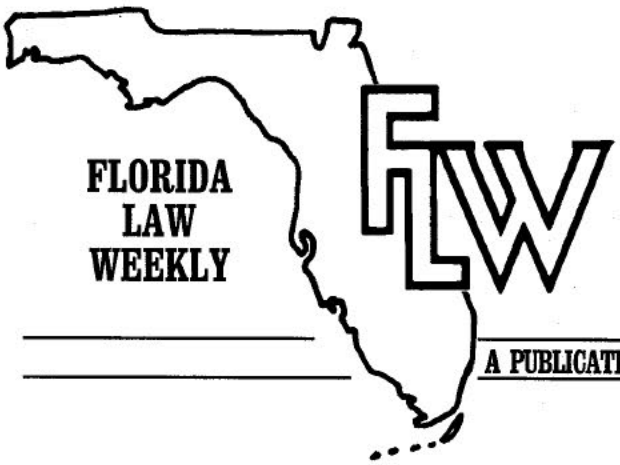
Volume 28, Number 1, May 29, 2020




# SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 1-93

**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.*

- **INSURANCE PERSONAL INJURY PROTECTION COVERAGE MEDICAL EXPENSES NURSE PRACTITIONERS. A county court held that a PIP insurer is not entitled to rely upon Medicare's 15% reduction to calculate the amount of PIP benefits payable for non-hospital non-emergency health care services provided by a nurse practitioner. The court found that the 2012 amendment to the statute did not in any way alter or amend the substantive requirements of the first and second sentences of section 627.736(5)(a)(3). The question whether a PIP insurer is authorized to rely upon Medicare's "Nurse Practitioner (NP) and Clinical Nurse Specialist (CNS) Services Payment Methodology" to calculate the amount of PIP benefits payable for health care services provided by a nurse practitioner to a PIP insured have statewide application was certified as one of great public importance.** *CRESPO & ASSOCIATES, P.A. v. USAA SERVICES AUTOMOBILE ASSOCIATION. County Court, Thirteenth Judicial Circuit in and for Hillsborough County, General Civil Division. Filed May 1, 2020. Full Text at County Courts section, page 82a.*

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

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**TORTS (continued)**

Slip and fall Jury trial Waiver Lease Tenant asserting defendant's breach of duty owed to her as invitee to maintain premises in reasonably safe condition 4CIR 33b

**ZONING**

Non conforming use Continuation of formerly permitted use **11CIR 20a**

Non conforming use Sunsetting of code provision for vacant land being used as nonconforming use Applicability Property being used as automobile towing and storage operation **11CIR 20a**

* * *

**TABLE OF CASES REPORTED**



**TABLE OF CASES (continued)**



* * *

**TABLE OF STATUTES CONSTRUED**

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

FLORIDA STATUTES

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**TABLE OF STATUTES CONSTRUED (continued)**



* * *

**TABLE OF CASES TREATED**
*Case Treated / In Opinion At*



**TABLE OF CASES TREATED (continued)**



* * *

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

Halifax Chiropractic and Injury Clinic, Inc. v. Century National Insurance Company. County Court, Ninth Judicial Circuit, Orange County, Case No. 2016 CC 007170 O. County Court Order at 27 Fla. L. Weekly Supp. 392a (August 30, 2019). Affirmed **9CIR 30a**

Southern Owners Insurance Company v. Hendrickson. Circuit Court, Seventh Judicial Circuit (Appellate), Volusia County, Case No. 2018 10008 APCC. Circuit Court Opinion at 27 Fla. L. Weekly Supp. 574a (November 29 2019). Reversed at 45 Fla. L. Weekly D1165b

* * *

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# CIRCUIT COURTS—APPELLATE

**Licensing Driver's license Driving record Petition for writ of mandamus ordering Department of Highway Safety and Motor Vehicles to remove four citations and suspension from driving record is denied where citations are not civil citations to which statute regarding removal applies, but criminal citations not addressed in statute**

BENJAMIN WHITFIELD, JR, Petitioner, v. STATE OF FLORIDA, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondents. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2019 CA 001023. February 19, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

## ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(CHARLES W. DODSON, J.) THIS CAUSE came before the Court upon Petitioner Whitfield's "Petition for Writ of Mandamus," filed April 23, 2019. After reviewing the Petition, the Response, the Reply, the Amended Reply, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

Petitioner Whitfield asserts that the Respondent Department of Highway Safety and Motor Vehicles ("Department") has improperly refused to remove four citations (5148FJL, 0174GFK, 1190RIS, and 3059SCF) from his driving record, and has improperly suspended his driver's license as a result. As relief Petitioner Whitfield requests this Court to issue a Writ of Mandamus compelling the department to remove the citations and suspension from his driving records. (Pet. at 2).

In order "to show entitlement to a writ of mandamus, the petitioner must demonstrate a clear legal right to the performance of the act requested, an indisputable legal duty on the part of the respondent, and that no other adequate remedy exists." *Turner v. Singletary,* 623 So. 2d 537, 538 (Fla. 1st DCA 1993).

Here, Petitioner Whitfield asserts that § 318.15(1) Fla. Stat. entitles him to removal of the citations from his driving record, he is mistaken. As the Respondent shows, and as can be seen from Petitioner's Reply App. A at 1, the four citations complained of are not civil citations to which § 318.15(1) Fla. Stat. applies, but rather criminal citations which are not addressed in that statute. Therefore, Petitioner Whitfield has failed to assert a clear legal right to the performance of the act requested or an indisputable legal duty on the part of the respondent, and so has not shown an entitlement to the requested relief.

Accordingly, it is **ORDERED** and **ADJUDGED** that mandamus relief is hereby **DENIED**.

* * *

**Licensing Driver's license Revocation Driving record Correction Mandamus Where licensee has neither exhausted administrative remedies for correction of driving record to remove out-of-state convictions nor sought proper review of license revocation through petition for writ of certiorari, there is no legal duty that Department of Highway Safety and Motor Vehicles failed to perform Further, department correctly included licensee's out-of-state convictions in his Florida driving record Petition for writ of mandamus is dismissed**

DORSEY W. SUTTON, JR., DC # L01135, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent(s). Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2019 CA 001805. March 2, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

## ORDER DISMISSING PETITION FOR WRIT OF MANDAMUS

(RONALD W. FLURY, J.) **THIS CAUSE** comes before the Court on Petitioner's "Petition for Writ of Mandamus" filed on July 24, 2019. The Court, having considered the petition, the response, the reply, the file, and being otherwise fully advised in the premises, finds as follows:

Mandamus is an extraordinary common law remedy used to enforce an established legal right by compelling a person in an official capacity to perform a ministerial duty required by law. *Pace v. Singletary,* 633 So.2d 516 (Fla. 1st DCA 1994); *Soto v. Bd. of Cnty. Comm'rs of Hernando Cnty.,* 716 So. 2d 863, 864 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2064d]. In order to be entitled to mandamus relief, the Petitioner must establish that he has a clear legal right to the requested action, that the Respondent has a clear legal duty to perform the requested action, and that no other adequate legal remedy exists. *Turner v. Singletary,* 623 So. 2d 537, 538 (Fla. 1st DCA 1993). Mandamus is also unavailable to compel the performance of a discretionary act, unless the Petitioner can show an abuse of discretion. *Id.,* at 537. "A ministerial duty is one which is positively imposed by law to be performed at a time and in a manner or upon conditions which are specifically designated by the law itself absent any authorization of discretion to the agency." *Solomon v. Sanitarians' Registration Bd.,* 155 So. 2d 353, 356 (Fla. 1963).

In the instant case, Petitioner failed to avail himself of the proper remedy and there is no duty for Respondent to discharge; thus, the Petition for Writ of Mandamus shall be dismissed.

Petitioner failed to follow the proper procedure to challenge the entries on his Florida driver record which he alleges are incorrect (Respondent's Ex. A). Rule 15A-1.0195, Florida Administrative Code provides the following for drivers whose Florida driver licenses have been revoked:

> Any person whose driving privilege has been cancelled, suspended or revoked, may petition the Department for an administrative review to present evidence showing why their driving privilege should not have been cancelled, suspended or revoked. Application for such review shall be made by personal letter specifying the action for which the review is requested, and the documents in the possession of the Department which the licensee requests to review.

If the driver disagrees with the findings of the administrative review, resulting in the driver's continued revocation, the proper remedy is a petition for writ of certiorari within 30 days of the Department's findings. Section 322.31, Florida Statutes, states the following:

> The final orders and rulings of the department wherein any person is denied a license, or where such license has been canceled, suspended, or revoked, shall be reviewable in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such person shall reside, in the manner prescribed by the Florida Rules of Appellate Procedure, any provision in chapter 120 to the contrary notwithstanding.

*See also Department of Highway Safety and Motor Vehicles v. Spells,* 502 So. 2d 19, 21 (Fla. 2d DCA 1986) (finding that despite the Department's delay in notifying him of the revocation of his license for 10 years, pursuant to Section 322.27(5), Florida Statutes, the Petitioner still had the remedy of appearing before a departmental hearing officer to demonstrate why his license should not have been revoked).

Petitioner did not file a petition with the Department to challenge

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the basis of his revocation and did not submit a personal letter specifying the action which was the basis of his request for review and the documents in the Department's possession which he wished to review. Petitioner merely alleges that he called the Department "on a number of occasions" for a correction of his driver history. (Petition at 3). Petitioner further makes an allegation concerning what Department employees, whom he does not name, told him "in effect" concerning his supposed inquiries of the Department. (*Id*.). He then in his petition places in quotation marks his interpretation of what was allegedly stated concerning removal of the Virginia convictions from his record. Further, Petitioner failed to provide any documentation that he mailed copies the September 10, 2014, transcript of his driver history from Virginia. (Petitioner's Ex. B). Consequently, Petitioner has not exhausted his administrative remedies, nor sought the proper review of the Department's findings through a petition for writ of certiorari. As a result, Petitioner's Petition for Writ of Mandamus should be dismissed.

The Court notes that officials with the Commonwealth of Virginia did not assert in its May 10, 2019, correspondence to Petitioner that there were no violations for Petitioner, as he inaccurately quotes in his petition, but that "there were no violations **found**" for him in the State of Virginia. (emphasis added). (Petition at 3; Petitioner's Ex. C). Petitioner failed to note that the Deputy Clerk went on to state on her letter that the court purges documents after 10 years. Consequently, this letter does not provide proof that Petitioner did not commit the May 26, 1976, and December 21, 1987, violations listed on his Florida driver record.

Moreover, even if Petitioner had pursued the correct remedy for review of his revocation and driving record, the Department properly included Petitioner's Virginia convictions on his Florida driver record. Florida's duty to include Petitioner's Virginia convictions on his Florida driving record arises from the Driver License Compact, codified in Section 322.44, Florida Statutes. Article III of Section 322.44, in pertinent part, requires the following:

> The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. . . .

Section 322.44, Article IV, (1)(b), mandates the following:

> (1) The licensing authority in the home state, for the purposes of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to article III, as it would if such conduct had occurred in the home state, in the case of convictions for:
>
> (b) Driving a motor vehicle while under the influence of alcoholic beverages or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, as provided by s. 316.193;

Further, Section 316.193(6)(m), Florida Statutes, states, in pertinent part, as follows

> . . .For the purposes of this section, any conviction for a violation of s. 327.35; a previous conviction for the violation of former s. 316.1931, former s. 860.01, or former s. 316.028; **or a previous conviction outside this state for driving under the influence, driving while intoxicated, driving with an unlawful blood-alcohol level, driving with an unlawful breath-alcohol level, or any other similar alcohol-related or drug-related traffic offense**, is also considered a previous conviction for violation of this section.
>
> (Emphasis added)

Pursuant to the requirements of Section 322.44, the Department correctly included Petitioner's convictions on his Florida driver record. The Department received information from the Commonwealth of Virginia, Division of Motor Vehicles, an Order of Revocation and Suspension due to Petitioner's conviction on May 26, 1976, of Driving While Intoxicated. (Respondent's Ex. B). As required by Section 322.44, this conviction was included on Petitioner's Florida driver record. (Respondent's Ex. A).

The Department also received information from the Virginia Department of Motor Vehicles concerning a second conviction of Petitioner. On December 21, 1987, Petitioner was convicted of Driving While Intoxicated. (Respondent's Ex. C). As required by Section 322.44, this conviction was also included on Petitioner's Florida driver record. (Respondent's Ex. A).

Accordingly, there is no legal duty which the Department has failed to perform.

BASED ON THE FOREGOING, it is

**ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Mandamus is hereby **DISMISSED**. The Clerk is directed to **CLOSE** this file.

* * *

**Licensing Driver's license Suspension Lawfulness of stop Deputy who observed licensee driving significantly below speed limit, veering into curb, and stopping in middle of roadway for more than 30 seconds had reasonable suspicion for traffic stop Stop was also justified as welfare check Deputy's activation of his emergency lights did not transform welfare check into search and seizure where activation of lights was necessary to alert other drivers to vehicle stopped in middle of rural road at midnight Petition for writ of certiorari is denied**

MAUREEN ANN MARTIN, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16 2018 AP 64, Division AP A. March 2, 2020. Petition for Writ of Certiorari from the decision of the State Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins, Susan Z. Cohen, and John N. Kessenich, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) This cause is before this Court on Petitioner Maureen Ann Martin's Petition for Writ of Certiorari, filed on June 20, 2018. The Petition argues that: (1) Department's order failed to comply with the essential requirements of the law and failed to afford due process when the hearing officer determined there was competent, substantial evidence to justify Deputy Pritchard's initial stop of Petitioner; and (2) the Department failed to comply with the essential requirements of the law and failed to afford Petitioner her due process right to a hearing with the appearance of impartiality.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

(1)

On the night in question, Deputy Pritchard observed the Petitioner's vehicle travelling an estimated 10 miles per hour along a stretch where the speed limit was 30-35 miles per hour and, later, 45 miles per hour. The vehicle drifted, eventually striking the curb. Petitioner corrected her vehicle back into the travel lane but came to a complete stop in the middle of the roadway. Deputy Pritchard waited approximately 30 seconds to see if the vehicle would move. When it did not, he activated his lights and went to check on the Petitioner. This is competent, substantial evidence to justify Deputy Pritchard's initial stop of Petitioner.

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Petitioner argues that these facts are virtually identical to those in *Beahan v. State*, 41 So. 3d 1000 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1760b]. In *Beahan*, the driver was in an area known for drug transactions. The defendant "dr[ove] his car slowly down the street and stop[ed] in front of several of the housing units. . . . After proceeding down the street past several of the residences, the defendant turned around and headed in the other direction. He could have reversed course by making a three-point turn but instead he made a U-turn by driving his vehicle up over the curb on the opposite side of the street." *Id*. at 1001. The First District held that the officer did not have a reasonable suspicion that the defendant was impaired at the time of the stop. *Id*. at 1002.

Petitioner's driving pattern is distinguishable from *Beahan*. The driver in *Beahan* drove over the curb as part of making a U-turn. Any stops made by that vehicle were in front of housing units in a high drug traffic area. Here, Petitioner's vehicle was going significantly below the speed limit—but not stopping. Then she veered into the curb. After correcting the vehicle back into the roadway, she came to a complete stop in the lane of travel. The Deputy did not immediately activate his lights. Instead, he gave Petitioner approximately 30 seconds to move. Only when she remained immobile for that length of time, did he begin to investigate. We hold these facts provide reasonable suspicion for the Deputy to initiate a traffic stop. Even if this did not constitute reasonable suspicion, the interaction would be fully justified under another theory.

Under the community caretaking doctrine, a law enforcement officer may stop a vehicle "without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare." *Majors v. State*, 70 So. 3d 655, 661 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a]. The purpose of such a stop, or welfare check, is to determine whether the driver needs assistance due to illness, fatigue, or impairment. *Dep't of Highway Safety and Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). However, a welfare check "must be based on specific articulable facts showing that the stop was necessary for the protection of the public." *Majors*, 70 So. 3d at 661.

Welfare checks " 'are considered consensual encounters that do not involve constitutional implications' " because the driver may choose whether to comply with law enforcement's requests. *Dermio v. State*, 112 So. 3d 551, 555 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]. A consensual encounter with law enforcement transforms into a seizure when, based on the totality of the circumstances, a reasonable person would believe he or she is not free to leave. *Golphin v. State*, 945 So. 2d 1174, 1182 (Fla. 2006) [31 Fla. L. Weekly S845a] (citing *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980)).

Here, competent, substantial evidence also supports a finding that Deputy Pritchard initially stopped Petitioner to conduct a welfare check. Deputy Pritchard testified to stopping Petitioner because he was concerned that she had a medical emergency or problems with her vehicle. Petitioner's driving pattern was consistent with that of a driver who had a medical emergency or a mechanical issue with his or her vehicle. Petitioner drove slowly, approximately 20 miles per hour under the speed limit, and drifted to the curb. Petitioner's vehicle struck the curb, returned to the roadway, and stopped in the middle of the road for at least 30 seconds.

Further, Deputy Pritchard's activation of his emergency lights did not transform the welfare check into a search or seizure. The activation of lights during an encounter with law enforcement "is *one important factor* to be considered in a totality-based analysis as to whether a seizure has occurred." *G.M. v. State*, 19 So. 3d 973, 979 (Fla. 2009) [34 Fla. L. Weekly S568a]. Petitioner stopped her vehicle in the middle of a rural road at midnight. A reasonable person would have determined that given the time, area, and location of the vehicle, Deputy Pritchard activated his lights to alert other drivers that a vehicle had stopped in the middle of the road. Accordingly, Petitioner's claim is denied.

(2)

Petitioner's second argument regarding the right to a hearing with the appearance of impartiality has been repeatedly rejected by the Fourth Circuit. *See e.g., Meadows v. Dep't of Highway Safety and Motor Vehicles*, 26 Fla. L. Weekly Supp. 699a (Fla. 4th. Cir. Sept. 27, 2018); *Edward Baker Eman v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-AP-000056-XXXX, (Fla. 4th Cir. May 22, 2017); *Spear v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-CA-000579-XXXX (Fla. 4th Cir. June 15, 2017); *Spear v. Dep't of Highway Safety and Motor v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-CA-000579-XXXX (Fla. 4th June 15, 2017); *Bruschi v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-AP-000065-XXX (Fla. 4th Cir. Oct. 5, 2017). While not binding authority, this Court finds persuasive the reasoning in those opinions. Accordingly, Petitioner's claim is denied.

(3)

On July 30, 2019, Petitioner filed a "Motion for Oral Argument," requesting oral argument on the instant Petition. Since this Court finds Petitioner is not entitled to certiorari relief, Petitioner's request for oral argument is moot.

Based on the foregoing, the "Petition for Writ of Certiorari" is **DENIED**, and the "Motion for Oral Argument" is **DENIED** as **MOOT**. (SALVADOR, SOUD, AND ROBERSON, JJ., concur.)

* * *

**Criminal law Contracting without license Sentencing Restitution Disgorgement of entire amount paid, not amount of damages suffered, is proper restitution for offense of unlicensed contracting**

GABRIEL TALPA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Hernando County. Case No. 2018 AP 0001. L.T. Case No. 2016 MM 0608. March 12, 2020. Appeal from the County Court in and for Hernando County, Kurt Hitzemann, Judge. Counsel: Peyton B. Hyslop, Hyslop & Pila, P.A., Brooksville, for Appellant. Office of the State Attorney, Brooksville, for Appellee.

OPINION

(DAVIS, H., J.) Appellant Gabriel Talpa was ordered to pay $12,800 in restitution following his conviction for Contracting without a License based on disgorgement of the contract. Appellant argues that the trial court erred and that restitution should have instead reflected the amount of damage actually suffered by the victim. We affirm.

Mr. Talpa entered a contract with James Hurley to build a metal garage, for which he was paid a total of $12,800.[1] Hernando County issued a stop order, claiming Mr. Talpa was not licensed as contractor. Although the details are not entirely clear from the record, Hernando County, Mr. Talpa and Mr. Hurley arranged to allow a third party, TAS Designer Homes, to finish the work on the project. Following Mr. Talpa's conviction for Contracting without a License, the trial court held a hearing to determine restitution. At the hearing, the State argued the proper restitution amount was disgorgement, that is, the entire amount paid by Mr. Hurley to Mr. Talpa, while Mr. Talpa argued restitution was only available if the State could prove an actual deficiency.

This Court considered precisely this issue in *Ledy v. State,* No. 2008-AP-0034, 2009 WL 10656210 (Fla. 5th Cir. Ct. June 10, 2009). In *Ledy,* The Court found that disgorgement was the proper remedy because a contract with an unlicensed contractor is void and therefore unenforceable, citing *Cooper v. Paris*, 413 So. 2d 772 (Fla. 1st DCA 1982) and *Vista Designs, Inc. v. Silverman*, 774 So.2d 884 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D103b]. The Court also reasoned that restitution based on damages suffered by the victim would allow

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unlicensed contractors to financially benefit from their wrongdoing, and therefore frustrate public policy.

Appellant argues that *Ledy* was overruled by *Bianchini v. State,* 77 So. 3d 247 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D159a]. In *Bianchini*, which also involved restitution following a conviction for Contracting without a License, the Fourth District Court found that testimony on how the work was deficient and the amount needed to remedy the deficiency had been hearsay. It therefore determined there was no competent substantial evidence to support the restitution award and remanded back to the trial court for a new restitution hearing. We acknowledge that a Circuit Court is bound to apply precedent from another district where its own has not spoken on an issue, even while sitting in its appellate capacity, *see Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 722 (Fla. 2012) [37 Fla. L. Weekly S130a]. But we believe the *Bianchini* opinion turned on hearsay, and that the issue of whether restitution should depend on disgorgement or the damage suffered by the victim was not squarely before the appellate court and was not explicitly ruled on. Thus, we do not think that *Bianchini* overruled *Ledy.*

AFFIRMED. (FALVEY, C. and ROGERS, S., JJ., concur.)

---

[1]Although the trial transcript states the amount was $12,018, the order states $12,800 and Appellant's brief represents that this amount was correct.

* * *

**Liens Foreclosure Assessment lien Disbursement of surplus funds Appeals Standing Neither cross-appellant, whose interest in foreclosed property she bought at lien sale was extinguished by issuance of certificate of title to buyer of property at subsequent lender sale, nor appellant, who was assignee of record owner of property, has standing to appeal order on distribution of surplus funds from lien sale where trial court did not make determination that either party was allowed to intervene in homeowners association's action for disbursement of surplus funds**

SWEARINGEN & ASSOCIATES, INC. as Assignee of Sharon D. Carter, Appellant/Cross appellee, v. VALENTINE EVELYNN GE, Appellee/Cross appellant, v. THE OAKS OF SUMMIT LAKE HOMEOWNERS ASSOCIATION, INC., Cross appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2017 CV 000017 A O. L.T. Case No. 2014 CC 016136 O. November 26, 2019. Appeal from the County Court, for Orange County, Tina Caraballo, Judge. Counsel: Bruce H. Hornstein, for Appellant/Cross appellee. David N. Glassman, for Appellee/Cross appellant. John Di Masi, for Cross appellee.

(Before BLACKWELL, A., WHITEHEAD, R., and RODRIGUEZ, H., JJ.)

**FINAL ORDER DISMISSING APPEAL**

(PER CURIAM.) Appellant, SWEARINGEN & ASSOCIATES, INC., as Assignee of Sharon D. Carter (hereinafter "S&A"), timely appeals the county court's "Order on Distribution of Funds Held by Orange County Clerk of Court" entered on January 11, 2017. VALENTINE EVELYNN GE (hereinafter "Ge") timely responded and cross-appealed February 17, 2017. Cross-appellee, THE OAKS OF SUMMIT LAKE HOMEOWNERS ASSOCIATION, INC., (hereinafter "HOA") has not filed a cross-reply brief.

This Court has jurisdiction of appeals from county court orders. Fla. Stat. § 26.012(1) (2017); Fla. R. App. P. 9.030(c)(1)(A).[1]

***Facts and Procedural History***

On March 15, 2016, pursuant to a final judgment of foreclosure (hereinafter "Lien Judgment") Ge was high bidder at an online public sale conducted in accordance with Florida Statutes § 45.031 (hereinafter "HOA Sale").[2] The record shows Ge intentionally bid $60,000.00 on real property located at 312 Breezeway Dr., Apopka, Florida, (hereinafter "Breezeway"). For the purchase she tendered certified funds into the Orange County Court Registry, the Clerk disbursed funds sufficient to satisfy the Lien Judgment which was less than $5000.00, certificates of sale, title, and disbursement all issued, and $55,175.35 in surplus funds remained in the Registry.

Breezeway had been purchased by Mr. Rodolphus Jackson and his spouse Sharon Carter in 1995. In 2009 Ms. Carter quitclaimed her interest in Breezeway to Mr. Jackson "to remove wife's name and clear title to obtain financing." R. 135. There is no dispute that Mr. Jackson was sole record owner of Breezeway from 2009 until he died intestate. Ms. Carter became record owner as a function of law upon his death. *See* § 732.101(2), Fla. Stat. Prior to his death, however, Mr. Jackson stopped paying both his Lender and his HOA assessments which caused each to separately file suit to foreclose his interest in Breezeway. On November 20, 2014, the Lender was first to file an action in circuit court based on the Note and Mortgage.[3] (hereinafter "Lender Action"). About a month later, December 23, 2014, HOA filed suit in county court to foreclose Mr. Jackson's interest based upon its Claim of Lien duly recorded with Orange County on October 24, 2014 (hereinafter "Lien Action"). When HOA was informed that Mr. Jackson had died, it amended its complaint to include Ms. Carter as a defendant. Despite the amendment, the Lien Action proceeded more quickly in county court than the Lender Action in circuit court and Lien Judgment was entered on October 29, 2015.

For Ge's part, she was trying to get into the business of real estate investing during the early part of 2016 which led her to bid on Breezeway when it came up for public sale. Ge was under the belief that her $60,000.00 bid would purchase the property free of all encumbrances. A search of public records would have revealed that Mr. Jackson's interest in Breezeway was in the process of being foreclosed by both the HOA and the Lender. Shortly after Ge bought Breezeway two events occurred independently which ultimately bring us to this appeal: On March 16, 2015, the day after the HOA sale, S&A entered into an agreement with Ms. Carter to recover any surplus from the sale; and on April 8, 2015 the circuit court entered final judgment in the Lender Action in favor of the Lender (hereinafter "Lender Judgment"). Breezeway was again sold at auction (hereinafter "Lender Sale") but this time Ge did not place a bid. Ge learned of the Lender Sale on June 4, 2016 along with the unhappy fact, from her perspective, that her interest in Breezeway would be extinguished upon the issuance of certificate of title to the buyer at said sale. She was also surprised to learn that the bulk of her $60,000.00 bid was still on deposit in the Court Registry. At that time she obtained counsel, Appellee/Cross-appellate Counsel in the present case, to try to recoup the money she believed she had paid to buy the property free of encumbrances at the HOA sale. Accordingly, on June 20, 2016, Ge moved to 1) intervene, 2) to rescind the sale, and 3) to recover the entire $60,000.00 she had paid. In the meantime, on May 4, 2016, in accordance with Florida Statutes § 45.032, S&A moved, in county court, to intervene and disburse the $55,175.35 surplus to itself as assignee of Ms. Carter pursuant to the written agreement they entered into on March 16, 2016. On July 21, 2016, the HOA, noting "there remains sums available in the Court Registry," moved for disbursement of an additional $3,168.70 for interest, fees, and costs.

The trial court held an evidentiary hearing November 2, 2016, and announced a ruling which was thereafter reduced to writing and entered January 11, 2017. The "Order on Distribution of Funds Held by Orange County Clerk of Court" awarded $2,091.43 "for costs and reasonable attorney's fees" to the HOA, $5,517.35[4] to S&A without comment, and the "remaining Retained Funds"[5] to Ge without comment. Both S&A and Ge appealed the Order on Distribution, S&A in its entirety and Ge the portions that ordered funds disbursed to S&A and the HOA.

***Analysis***

There were three different movants in the matter below. S&A was

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moving to intervene and to have surplus monies disbursed to itself as assignee of Defendant Susan Carter. Ge was moving to intervene and have the trial court order the equitable remedy of rescission to undo the foreclosure sale and to return to her the entire $60,000.00 purchase money. HOA was already a party and was moving to have money from the surplus disbursed to itself, the legal basis of which is not clear from its Motion for Disbursement of Funds from Court Registry.

At no time, either orally or by written order, did the trial court make a determination, analyze, or rule that Ge or S&A were allowed to intervene. Consequently, neither Ge nor S&A are parties to the action below and have no standing either here or in the court below. Therefore, the Court dismisses this appeal *sua sponte. See Hidden Wealth, Inc. v. Royal Petroleum, Inc.,* 453 So. 2d 106 (Fla. 4th DCA 1984) (citing *Vogel v. Smith,* 371 So. 2d 719 (3rd DCA 1979)).[6]

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the present appeal is hereby **DISMISSED** because Appellant and Cross-appellant do not have standing before the Court. (WHITEHEAD, R. and RODRIGUEZ, H., JJ., concur.)

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[1]*Popescu v. Laguna Master Ass'n., Inc.* 126 So.3d 449, 450 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2361a] *citing Clearwater Federal Savings & Loan Ass'n. v. Sampson,* 336 So.2d 78, 79 (Fla. 1976) ("[A] postforeclosure judgment order which was dispositive of a separate issue, entitlement to money paid to a receiver, constituted a 'final decretal order,'. . .").

[2]Lien Judgment was entered October 29, 2015 in Case No.: 2014 CC 16136 O.

[3]2014 CA 012117 O

[4]This amount represents 10% of the $55,175.35 surplus as reflected by the Certificate of Disbursement issued March 29, 2016 and is stated as the "entitled to" amount in paragraph 4 of the Order on Distribution. R. 228. The Court notes that paragraph 5 of the Order on Distribution incorrectly orders $5524.84 remitted to S&A. *Id.*

[5]Paragraph 6 of the Order on Distribution uses this language. R. 229. Paragraph 7 of same names the amount as $47,632.08. *Id.* This amount is incorrect as $55,175.35 $2,091.43 $5,517.35 =$47,566.57.

[6]A trial court commits reversible error by authorizing the release of monies deposited in the court registry to one who was not a party to the action. *Vogel v. Smith,* 371 So. 2d 719 (3rd DCA 1979). The record shows that the trial court fashioned an equitable remedy distributing monies to non parties Ge and S&A. R. 297 298. As neither yet have standing to appeal, this Court does not reach whether the trial court properly fashioned its equitable remedy, and in any event, entry of an order distributing monies to non parties would be reversible error.

* * *

**Insurance Personal injury protection Coverage Medical expenses Reasonableness of charges Medical provider confesses that trial court erred in finding that insurer was not entitled to contest reasonableness of provider's bills after it initially erroneously used fee schedule not elected in policy to reduce and pay billed amounts**

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Kavell Willis, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018 CV 000026 A O. L.T. Case No. 2014 SC 011804 O. February 25, 2020. Appeal from the County Court, for Orange County, David P. Johnson, Judge. Counsel: Michael C. Clarke, Danielle M. Lutyk, and Betsy E. Gallagher, for Appellant. Robert J. Hauser, and Alexander Thomas Briggs, for Appellee.

(Before WILSON, CARSTEN, and WHITEHEAD, JJ.)

ON CONFESSION OF ERROR

(PER CURIAM.) The Court previously granted Appellee's motion to stay this appeal pending the resolution of Appellee's petition for writ of certiorari in 5D19-1372, filed in the Fifth District Court of Appeal. In 5D19-1372, Appellee was seeking certiorari review of this Court's opinion in *Progressive Select Insurance Company v. Florida Hospital Medical Center a/a/o Larry Hunt,* No. 2017-CV-000146-A-O (Fla. 9th Cir. Ct. Apr. 11, 2019) ("*Hunt*"), which according to Appellee "addressed a critical legal issue."[1]

Recently, the Fifth District denied certiorari in 5D19-1372. *Fla. Hosp. Med. Ctr. a/a/o Larry Hunt v. Progressive Select Ins. Co.,* No. 5D19-1372 (Fla. 5th DCA Oct. 22, 2019). Thus, this Court issued an order directing Appellee to show cause why the stay previously imposed in this appeal should not be lifted, and why the Court should not reverse and remand for further proceedings consistent with *Hunt.* In response to the Court's show cause order, Appellee has filed a confession of error, in light of this Court's opinion in *Hunt,* and states that the "appropriate procedure" is to set aside the summary judgment on appeal and remand "for further proceedings in accordance with *Hunt*." In view of Appellee's confession of error, the stay previously imposed in this appeal is now lifted. We REVERSE the summary judgment entered in this case and REMAND to the trial court for further proceedings consistent with *Hunt.*

Appellant's motion for provisional award of appellate attorney fees is GRANTED, contingent on a judgment of no liability or a judgment obtained by Appellee that is at least 25% less than the amount of Appellant's proposal for settlement, and on the trial court's determination that Appellant's proposal for settlement is otherwise enforceable under section 768.79, Florida Statutes (2018), and Florida Rule of Civil Procedure 1.442. The assessment of those fees is REMANDED to the trial court.

Appellee's motion for appellate attorney's fees is DENIED. (CARSTEN and WHITEHEAD, JJ., concur.)

---

[1]In *Hunt,* this Court determined that the trial court erred in failing to follow *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.,* 202 So. 3d 437 (Fla. 5th DCA 2016), and in finding that the insurer was not entitled to contest the reasonableness of the provider's bill.

* * *

**Insurance Personal injury protection Coverage Medical expenses Reasonableness of charges Cconfession of error Trial court erred in finding that insurer was not entitled to contest reasonableness of provider's bills after it initially erroneously used fee schedule not elected in policy to reduce and pay billed amounts**

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Christina Frommling, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018 CV 000007 A O. L.T. Case No. 2015 SC 000136 O. February 20, 2020. Appeal from the County Court, for Orange County, Faye L. Allen, County Judge. Counsel: Michael C. Clarke, Danielle M. Lutyk, and Betsy E. Gallagher, for Appellant. Robert J. Hauser, for Appellee.

(Before BLACKWELL, HARRIS, and MARQUES, JJ.)

ON CONFESSION OF ERROR

(PER CURIAM.) The Court previously granted Appellee's motion to stay this appeal pending the resolution of Appellee's petition for writ of certiorari in 5D19-1372, filed in the Fifth District Court of Appeal. In 5D19-1372, Appellee was seeking certiorari review of this Court's opinion in *Progressive Select Insurance Company v. Florida Hospital Medical Center a/a/o Larry Hunt,* No. 2017-CV-000146-A-O (Fla. 9th Cir. Ct. Apr. 11, 2019) ("*Hunt*"), which according to Appellee "addressed a critical legal issue."[1]

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*Hunt.*

Appellant's motion for provisional award of appellate attorney fees is GRANTED, contingent on a judgment of no liability or a judgment obtained by Appellee that is at least 25% less than the amount of Appellant's proposal for settlement, and on the trial court's determination that Appellant's proposal for settlement is otherwise enforceable under section 768.79, Florida Statutes (2018), and Florida Rule of Civil Procedure 1.442. The assessment of those fees is REMANDED to the trial court.

Appellee's motion for appellate attorney's fees is DENIED. (HARRIS and MARQUES, JJ., concur.)

[1]In *Hunt,* this Court determined that the trial court erred in failing to follow *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.,* 202 So. 3d 437 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a], and in finding that the insurer was not entitled to contest the reasonableness of the provider's bill.

* * *

**Insurance Automobile All-risk policy Coverage Mechanical failure Coverage for engine damage caused by contaminated diesel fuel was precluded by all-risk policy's exclusion for mechanical breakdown or failure**

TAMIAMI ELECTRICAL, INC., a Florida corporation, Appellant, v. INFINITY ASSURANCE INSURANCE COMPANY, Appellee, a Florida corporation. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 156 AP 01. L.T. Case No. 2018 25676 CC25. February 21, 2020. An Appeal from the County Court for Miami Dade County, Robert T. Watson, Judge. Counsel: Sergio R. Casiano, Jr., MKRS Law, P.L., for Appellant. Joshua D. Lerner, Rumberger, Kirk, & Caldwell, P.A., for Appellee.

(Before DARYL E. TRAWICK, LISA S. WALSH, THOMAS J. REBULL, JJ.)

(PER CURIAM.) We affirm based upon the binding precedent of *Little Judy, Indus., Inc., v. Fed. Ins., Co.,* 280 So.2d 14 (Fla. 3d DCA 1973). *See Pardo v. State,* 596 So.2d 665, 666 (Fla. 1992) (the circuit courts of this State are required to follow the holdings of District Courts of Appeal). However, we respectfully submit that for the reasons discussed below it may be time to revisit this forty-seven-year-old precedent.

In *Little Judy,* the court considered whether engine damage caused by negligent maintenance was covered by an all-risk insurance policy similar to the one at issue here.[1] The Court found that even though the damage to the engine was traceable to the improper repair, coverage was still precluded as a mechanical failure.[2] Similarly in this case, it is alleged that contaminated diesel fuel led to engine damage. The insurance policy excluded any loss "[r]esulting from or caused by any of the following, unless caused by other loss that is covered by this insurance policy: (e) Mechanical or electrical breakdown or failure." As the trial judge correctly pointed out in his opinion, the critical language *of Little Judy* could be modified to insert the external event at issue here: "the fact that the failure . . . was traceable to contaminated fuel did not make it other than a mechanical failure."

The Appellant asks this Court to reject the *Little Judy* rational, arguing that it was improperly decided. They ask us instead to adopt the reasoning in *Associated Aviation Underwriters, v. George Koch Sons, Inc.,* 712 N.E.2d 1071 (Ind. Ct. App. 1999) ("*AAU*") and other courts which have considered a similar issue in a number of jurisdictions. In *AAU,* aircraft engines were damaged due to the negligent installation of a "high turbine seal ring." The issue presented in that case was quite similar to the one here—whether damage caused by the negligence of a third-party during maintenance brought the claim within the scope of the insurance policy exclusion which precluded a claim for mechanical or electrical breakdown. The court used a proximate cause analysis, stating that "where an insured risk sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery." *Id.* at 1075. In other words, the negligence was the cause of the loss while the mechanical breakdown was the effect of the loss. Thus, the covered peril was the negligence of the mechanic. The court cited numerous jurisdictions in accord with this analysis, including *Rust Tractor Company v. Consolidated Constructors, Inc.,* 86 N.M. 658, 526 P.2d 800 (N.M. Ct. App. 1974); *Connie's Const. Co. Inc. v. Continental Western Ins. Co.,* 227 N.W. 2d 204 (Iowa 1975); *Villella v. Public Employees Mut. Ins. Co.,* 106 Wash.2d 806, 725 P.2d 957, 962 (1986); *Jussim v. Massachusetts Bay Ins., Co.,* 415 Mass. 24, 610 N.E.2d 954, 955 (1993) citing *Standard Elec. Supply Co. v. Norfolk & Dedham Mut. Fire Ins. Co.,* 1 Mass. App. Ct. 762, 307 N.E.2d 11 (1975); *Berry v. Commercial Union Ins. Co.* 87 F.3d 387, 389 (9th Cir. 1996)(applying California law); *Cavalier Group v. Strescon Industries, Inc.,* 782 F. Supp. 946 (D. Del. 1992)(interpreting and apply Delaware law). The *AAU* court also cited other legal authorities to support their position, including 5 Appleman, Insurance Law and Practice §3083 (1970) and 18 George J. Couch, Couch on Insurance §74:709-711 at 1018-22 (2d Rev. Ed. 1983).[3] *AAU* expressly rejected the reasoning of the *Little Judy* case, indicating that it represents the minority view on this issue. *AAU,* 712 N.E.2d at 1076 n. 3. As noted in *AAU,* to accept the *Little Judy* rational would result in the exclusion of many obvious losses that would otherwise be covered by the policy. *Id.* at 1076. The court also found that the mechanical breakdown exclusion, viewed in the context of the entire policy, was not meant to apply "regardless of any possible negligent antecedent occurrence which in turn causes the engine to sustain mechanical breakdown or abnormal wear and tear." The court found this interpretation to be consistent with the principal that exclusions from coverage should be strictly construed, and that if there are any ambiguities they should be resolved against the insurer and in favor of the insured. *Id.*

We believe the *AAU reasoning* is persuasive. We also agree that there is more than one reasonable interpretation of the policy at issue, and that any ambiguity should be construed in favor of the insured. However, the *Little Judy* precedent prevents us from applying any of the above described analysis to this case. Therefore, the decision of the trial court is AFFIRMED. (TRAWICK, WALSH and REBULL, JJ., concur.)

[1]The policy in *Little Judy* excluded "damage which is due and confined to wear and tear, deterioration, freezing, mechanical, structural or electrical breakdown or failure, unless such damage resulted from other damage covered by this policy."

[2]Appellee also cites the case of *Arawak Aviation, Inc. v. Indemnity Ins. Co. of North America,* 285 F.3d 954 (11th Cir. 1992) which adopted the rational of *Little Judy. Arawak* is not binding on this Court. However, while *Arawak* did apply *Little Judy,* the decisive exclusions both related to wear and tear rather than a mechanical breakdown exclusion. *Id.* at 956.

[3]Appellant cited to yet other legal authorities supporting this rational, including *Nat'l Investors Fire & Cas. Co. v. Preddy,* 451 S.W.2d 457 (Ark. 1970); *Standard Structural Steel Co. v. Bethlehem Steel Corp.,* 597 F. Supp. 164, 196 97 (D. Conn. 1984); *Caldwell v. Transp. Ins. Co.,* 364 S.E.2d 1, 3 (Va. 1988); Amber S. Finch, C. Dennis Hughes, *Exclusions from Coverage for Wear and Tear, Deterioration, Inherent Vice, Latent Defect, and Mechanical Breakdown,* 50 Tort Trial & Ins. Prac. L.J. 49, 77 78 (2014); and 11 Couch on Ins. §156.77: "An exception is commonly made of damage resulting from mechanical breakdown or failure. The fact that there is a mechanical breakdown as an incident to the occurrence of a covered peril does not exclude coverage, for the breakdown is in this situation not the cause of the harm but merely a consequence of the realization of the covered peril."

* * *

JEROEN LOGTENBERG, Appellant, v. KOENPACK USA, INC., a Florida for profit corporation, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 211 AP 01. L.T. Case No. 2018 25032 CC05. February 20, 2020. An Appeal from the County Court for Miami Dade County, Diana Gonzalez Whyte, Judge. Counsel: Phillip A. Duvalsaint, for Appellant. Patrick F. Martin and Jay A. Yagoda, Greenberg Traurig, P.A., for Appellee.

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(Before DARYL E. TRAWICK, LISA S. WALSH, THOMAS J. REBULL, JJ.)

(PER CURIAM.) Affirmed. We reach this decision as to the declaratory relief count, in part, due to the fact that the trial judge dismissed with prejudice with leave to refile a separate lawsuit, presumably when the case presents a "bona fide need for a declaration based on present, ascertainable facts." *Santa Rosa County v. Admin. Comm'n, Div. of Admin. Hearings,* 661 So.2d 1190, 1193 (Fla. 1995) [20 Fla. L. Weekly S333a]. As to the dismissal of the breach of contract count, *see Attorney's Title Ins. Fund, Inc. v. Landa-Posada,* 984 So.2d 641, 643 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1595a] (attorney's fees are awardable only when authorized by statute or contract.); *First Specialty Ins. Co. v. Caliber One Indem. Co.,* 988 So.2d 708, 714 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1996a] (attorney's fees are not damages). (TRAWICK, WALSH and REBULL, JJ., concur.)

* * *

**Criminal law Driving while license suspended with knowledge Search and seizure Vehicle stop License plate reader Officer who received notification from automatic license plate reader that person needed to be "addressed" and that registered owner of tag had suspended license had reasonable suspicion for vehicle stop Any error in failing to establish content of notification from license plate reader was invited by defense's erroneous hearsay objections to questions about that content No error in denying motion to suppress**

KERWIEN BAPTISTE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 000273 AC 01. L.T. Case No. AB8H0KE. March 16, 2020.An Appeal from the County Court in and for Miami Dade County, Robin Faber, Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and James Odell, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Kathryn Della Ferra, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) The issue presented in this case is whether a notification on a police officer's laptop from a license plate reader provides reasonable suspicion for the officer to conduct an investigatory stop of the motor vehicle triggering the notification. We hold that it does, and therefore affirm the judgement appealed and the trial court's denial of Mr. Baptiste's motion to suppress.

I.

On April 14, 2019, Miami Beach police officer Sofia Darias was conducting a license plate reader[1] detail at the intersection of 7th street and Washington Avenue in the City of Miami Beach. A camera fixed at that location randomly captures images of license plates and runs the license plate numbers through a database. On that date, the camera captured an image of the license plate on the motor vehicle Mr. Baptiste was driving.

After the running the license plate number through a database, the software on Officer Darias's laptop in her police cruiser then issued an alert or notification. Officer Darias testified that "electronically, a review of that license plate's number is made and, if it gets a hit, it tells you, "Hey, we need to address this person." The trial court, clarified, "So, you have a laptop. You're there and, all of a sudden, it alerts you to a particular car; is that it or a plate that is on car?" The witness replied, "Yes, Your Honor."

As a result, Officer Darias conducted a traffic stop of that motor vehicle. Mr. Baptiste, who was driving, was unable to produce his driver's license at Officer Darias's request. He told her that his driver's license was suspended. After confirming Mr. Baptiste's suspension in her database, Officer Darias issued him a traffic citation for driving while knowing his driver's license was suspended.

At the bench trial for this charge, Mr. Baptiste moved to suppress the evidence obtained as a result of the traffic stop, arguing that the stop was illegal. The trial judge denied the motion, and ultimately found Mr. Baptiste guilty of driving while knowing his driver's license was suspended. Mr. Baptiste appeals that judgment, and raises as his sole issue on appeal the trial court's denial of his motion to suppress.

II.

Mr. Baptiste's argues that the evidence elicited in the trial court did not establish the content of the notification that Officer Darias received from the software. In other words, the evidence does not reflect why the license plate reader registered a hit for the license plate of the vehicle that Mr. Baptiste was driving. Did the notification, for example, reflect that the registered owner of the motor vehicle with that license plate had a suspended driver's license? Absent that information, Mr. Baptiste argues that the evidence fails to demonstrate that Officer Darias had reasonable suspicion to stop Mr. Baptiste.

We reject this argument for several reasons. Preliminarily, we note that in "reviewing an order on a motion to suppress, the reviewing court is to consider the evidence presented at the suppression hearing in a light most favorable to sustaining the trial court's ruling." *See Sims v. State,* 805 So. 2d 44, 45 (Fla. 1st DCA 2001) [27 Fla. L. Weekly D26a]. Seen in that light, the evidence presented in this case was that the camera captured an image of the license plate on the car Mr. Baptiste was driving. The software in the system electronically reviewed the tag number in its database. That review led to a "hit," which then notified Officer Darias on her laptop, "Hey, we need to address this person." That alone provided Officer Darias with reasonable suspicion to conduct a traffic stop of Mr. Baptiste's vehicle.

In *State v. Laina,* 175 So. 3d 897 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2117d], a police officer ran his own check on the license plate of a vehicle he was following. The results of his search revealed that the registered owner of the vehicle had a suspended license. The *Laina* Court held that this information gave the officer reasonable suspicion to conduct a traffic stop of the vehicle.

> Police may make an investigatory stop if police have reasonable suspicion that a suspect has committed, is committing, or is about to commit a crime, based on the totality of the circumstances. . . . Reasonable suspicion is more than a mere hunch, but specific and articulable facts, together with the rational inferences from those facts, that reasonably warrant the investigatory stop.
>
> * * *
>
> [R]eviewing courts . . . must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing.
>
> * * *
>
> To justify temporary detention, only "founded suspicion" in the mind of the detaining officer is required. A "founded suspicion" is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge.

*State v. Laina,* 175 So. 3d 897, 898 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2117d].

Here, Officer Darias plainly had a "founded suspicion" to stop Mr. Baptiste. This was not a mere hunch. The basis for the stop was "particularized," in that it was a hit directed to the specific license plate number on the vehicle he was driving. And it was "objective," in that it did not depend on Officer Darias's subjective interpretation of what she was seeing, but instead on the computer software database generating a "hit" that the vehicle needed to be addressed. When interpreted in the light of Officer Darias's knowledge, she had a founded suspicion to pull over Mr. Baptiste. The trial judge properly denied the motion to suppress.[2]

III.

Additional testimony elicited from Officer Darias at the hearing,

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seen in the light most favorable to sustaining the trial judge's ruling, supports the basis for the stop. At trial, the prosecutor marked as an exhibit the traffic printout, or driving history, of Mr. Baptiste from the Florida Department of Highway Safety and Motor Vehicles.[3] The prosecutor then asked Officer Darias some questions and the following colloquy took place:

Q So, Officer, looking at this traffic history, on the date of the incident which was April 14, 2019, was Mr. Baptiste's license suspended?

A Yes.

Q And, how do you know that?

***A I received notification that it was suspended.***

MR. GARDINER: Objection. Hearsay.

THE COURT: You are so soft spoken. I can hardly hear you.

BY MS. DELLA FERA:

Q Using using the information

THE COURT: Just a second. I didn't hear the prior response.

MS. DELLA FERA: I'm sorry, Judge.

THE COURT: Can you repeat it, Officer. I'm sorry.

***THE WITNESS: I received notification that it was suspended, Your Honor.***

THE COURT: What now, the question was what the document says.

BY MS. DELLA FERA:

Q So, using the information in front of you, how did you know that the license was suspended?

And, you can flip through the whole document.

(Trial Tr. 33-34) (emphasis added).

This testimony reflects that the ***notification*** Officer Darias received on her laptop was that the registered owner linked to the tag number captured by the license plate reader had a suspended driver's license. The exchange in the transcript makes clear that Officer Darias misunderstood the question about the driving history printout, and instead testified to the contents of the notification she received on her laptop. This of course provides an independent reasonable suspicion for the stop of Mr. Baptiste. It places this case squarely within the holding of the *Laina,* which also involved a record check which revealed that the registered owner's license was suspended. *See also Ellis v. State,* 935 So. 2d 29 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1734a] (response from computer database query that tag had "no record found" gave police officer reasonable suspicion to stop vehicle for tag not assigned). The trial judge correctly denied the motion to suppress.

IV.

Lastly, to the extent that there was any error in failing to establish the content of the notification that Officer Darias received on her laptop, the defense invited that error.

"The [invited error] doctrine prevents a party from inviting error, then attempting to make that error an issue on appeal. *See Norton v. State,* 709 So.2d 87, 94 (Fla.1997) [23 Fla. L. Weekly S12a] (the invited error doctrine prevents a party from making or inviting error in a case and then taking advantage of that error on appeal) . . . ." *Mora v. State,* 964 So. 2d 881, 883 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2320a].

> Under the invited error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal. In the instant case, if any error was committed in honoring the defendant's demand for speedy trial, the defendant clearly invited the error. Therefore, the defendant cannot take advantage on appeal of the situation he created at trial.

*Anderson v. State,* 93 So. 3d 1201, 1206 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1891c].

Here, when the State attempted to elicit testimony from Officer Darias regarding the content of the notification she received on the vehicle Mr. Baptiste was driving, the defense objected on hearsay grounds.

Q How did you first come in contact with Mr. Baptiste?

A I was conducting a license reader detail on 7th and Washington Avenue. I received a notification that

MR. GARDINER: Objection. Hearsay.

This objection was erroneous. Probable cause may be based entirely on hearsay. "Unlike the burdens of proof in a criminal trial, the obligation to establish probable cause in an affidavit may be met by hearsay, by fleeting observations, or by tips received from unnamed reliable informants . . . ." *Johnson v. State,* 660 So. 2d 648, 654 (Fla. 1995) [20 Fla. L. Weekly S347a]. If probably cause may be based on hearsay, then certainly reasonable suspicion can too.

"Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v. White,* 496 U.S. 325, 330 (1990). As a result, Officer Darias should have been permitted to testify freely without objection regarding the content of the notification she received on her laptop from the license plate reader and the hit in the database. Counsel cannot object to that information coming into evidence, and then argue on appeal that it was error to fail to determine the content of the notification to which he objected.

**Conclusion**

For these reasons, we affirm the lower court's denial of the motion to suppress, and the judgment and sentence on appeal.

AFFIRMED. (TRAWICK AND WALSH, JJ., concur.)

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[1]"Ordinarily, automatic license plate reader ("ALPR") technology utilizes high speed computer controlled cameras mounted on fixed structures or on patrol cars. The camera automatically captures an image of the license plate of each vehicle that passes through its optical range. For each image, the ALPR system uses character recognition software and almost instantly checks the license plate number against a given database, containing a list of license plates belonging to sex offenders, crime suspects, fugitives, or amber alert subjects and/or missing persons, as well as stolen or unregistered vehicles." Kimberly J. Winbush, Annotation, *Use of License Plate Readers,* 32 A.L.R.7th Art. 8 (Originally published in 2017).

[2]The Supreme Courts of Ohio and Kentucky have each recently issued opinions holding that information obtained from license plate reader systems provided reasonable suspicion to justify a traffic stop of vehicles generating a hit. *See State v. Hawkins,* 2019 Ohio 4210, 158 Ohio St. 3d 94, *reconsideration denied,* 2019 Ohio 5327, 157 Ohio St. 3d 1524, 137 N.E.3d 109; *Traft v. Commonwealth,* 539 S.W.3d 647 (Ky. 2018).

[3]"This court, too, has held that the defendant's driving record as maintained by the DMV is sufficient to prove that his license was revoked due to his habitual traffic offender designation. *State v. Fields,* 809 So.2d 99 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D476b]. *See also Rodgers v. State,* 804 So.2d 480 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2886a] (holding that certified copy of computer printout of defendant's driving record maintained by DMV was sufficient to present prima facie case of driving while license revoked as habitual traffic offender, and that State was not required to prove each qualifying conviction for DWLS.)" *State v. Miller,* 830 So. 2d 214, 215 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2418b].

* * *

**Landlord-tenant Return of security deposit Default Vacation Service of process Trial court erred in denying motion to quash service without hearing where unrebutted allegations in motion and affidavit, asserting that landlord's husband on whom return of service states substitute service was effected was out of town on date of service, and service was instead made on guest at landlord's residence, would establish tenant's failure to effect valid service Trial court further erred in denying motion for reconsideration which was based on trial court's failure to hold evidentiary hearing**

MARIA HENRY, Appellant, v. ANTONIO CARAM, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2018 312 AP

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01. L.T. Case No. 2016 3669 SP 26. February 27, 2020. An Appeal from the County Court in and for Miami Dade County, Judge Lawrence D. King. Counsel: Joshua Entin and Ryan Soohoo, for Appellant. Johanna Castellon Vega and Michael Caballero, for Appellee.

(Before WALSH, REBULL, and DE LA O, JJ.)

(DE LA O, J.) We find the trial court erred both in denying Appellant's Motion to Quash Service and Set Aside Default Judgment, and in later denying Appellant's Motion for Reconsideration.

Tenant, Antonio Caram, sued his landlord, Maria Henry, to recover a security deposit. Mr. Caram's process server filed a verified return of service affidavit swearing that he had accomplished substitute service on Ms. Henry by serving a copy of the complaint upon Ms. Henry's husband, Michael Henry, at Ms. Henry's usual place of abode. When Ms. Henry failed to appear at the scheduled Pre-Trial Conference, the trial court entered a default final judgment against her.

Two weeks later, Ms. Henry filed a *pro se* Motion to Quash Service and Set Aside Default Judgment. She supported the motion with her own affidavit, and affidavits from her husband and Kevin Cottrell ("Cottrell"). The gist of these affidavits was that Michael Henry was out of town when service was effectuated, Cottrell was a guest at the Henry residence on the date of service, and it was Cottrell—not Michael Henry—that the process server served. *If* these claims are true, the process server served a person that did not reside at the Ms. Henry's usual place of abode, the substitute service was therefore improper, *see* § 48.031(1)(a), Fla. Stat. (2017), and the motion to quash should have been granted.

Whether the claims in the affidavits are true, however, is unknowable at this time because the trial court denied the motion to quash without a hearing,[1] much less an evidentiary hearing. This was clear error. *See Hernandez v. Nat'l Bank of Florida,* 423 So. 2d 920, 920 (Fla. 3d DCA 1982) ("trial court abused its discretion in denying, without an evidentiary hearing, the motion to vacate and set aside the final judgment entered after default"); *Linville v. Home Sav. of America, FSB,* 629 So. 2d 295, 296 (Fla. 4th DCA 1993) ("[N]either the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing. The unrebutted allegations contained in appellant's motion to quash service of process and the supporting affidavit, if proven by clear and convincing evidence, would establish appellee's failure to effect valid service of process as required by section 48.031, Florida Statutes (1991). Appellant is therefore entitled to an evidentiary hearing on her motion to quash service of process.") (citations omitted)

The trial court compounded the error when Ms. Henry, this time through counsel, filed a motion for reconsideration. This motion was based expressly on the trial court's failure to hold an evidentiary hearing on the motion to quash. Nevertheless, the trial court denied the motion for reconsideration—again without a hearing—erroneously asserting in its Order that the motion for reconsideration was based on the same grounds which had been previously raised, thus failing to acknowledge that Ms. Henry based the motion on the trial court's failure to hold an evidentiary hearing.

Mr. Caram's argument that the trial court properly denied the motion to quash because it merely denied service is unsupported by the record and by Florida law. As detailed above, Ms. Henry's affidavits were far from "***mere***" denials of service. In other words the motion didn't simply say, "I never got it," or "it wasn't me." The affidavits provided detailed sworn testimony from 3 separate individuals which, if true, would constitute a valid legal basis to challenge service.

It is entirely proper for a party to challenge substitute service if it can establish that service was made on a person that does not reside at the usual abode of the person being served. *See Williams v. Nuno,* 239 So. 3d 153, 155 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D301c] (trial court correctly denied motion to quash service after holding an evidentiary hearing where defendant alleged through affidavit that the person served did not reside at defendant's usual place of abode); *Robles-Martinez v. Diaz, Reus & Targ, LLP,* 88 So. 3d 177, 180 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1834a] (parties can challenge "invalid service of process (for example, a claim that the residence where service was effectuated was not the defendant's usual place of abode)"). In this exact situation, Florida courts have consistently found that a trial court must hold an evidentiary hearing to ascertain whether substitute service was properly effectuated. *See Fern, Ltd. v. Road Legends, Inc.,* 698 So. 2d 364, 365 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1979a] (court required to hold evidentiary hearing in light of allegations in affidavit of defendant, because if proven they would establish that person served was not qualified to accept service for defendant); *Monsour v. Balk,* 705 So. 2d 968, 969 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D366a] ("If the allegations in Dr. Monsour's and his son's affidavits are true, Balk did not obtain service on Dr. Monsour. Balk argues that he obtained substituted service by serving Dr. Monsour's son. Section 48.031(1)(a), Florida Statutes (1995), provides for service of process by delivery to the person at their regular abode with any person residing therein who is fifteen years or older. This does not apply because Dr. Monsour's regular place of abode is in Pennsylvania.").

Accordingly, the Order denying Appellant's Motion to Quash Service and Set Aside Default Judgment is **REVERSED.** This cause is **REMANDED** to the trial court with directions that it hold an evidentiary hearing on the merits of the motion, and for such further proceedings as may be necessary. (WALSH and REBULL, JJ., concur.)

[1]*See Patricia Russell Designs, Inc. v. Gans,* 277 So. 2d 801, 801 (Fla. 3d DCA 1973) ("The record reveals that appellant's motion [for relief from judgment] was timely filed and supported by an affidavit setting out facts relied upon for relief. The motion was denied without a hearing before the trial judge. We will not deal with the merits of appellant's contention at this time since we are of the opinion that the trial judge abused his discretion in not allowing appellant a hearing on his motion.").

* * *

**Criminal law Driving under influence Error to play back portion of arresting officer's direct testimony to jury without also playing back cross-examination of officer where officer was only witness who could testify that he saw defendant driving, and several inconsistencies between officer's trial testimony and his police reports and prior testimony were raised on cross-examination New trial required**

ISMAEL MAYEN, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2018 270 AC 01. L.T. Case No. 3144XEV. February 26, 2020. An Appeal from the County Court of the Eleventh Judicial Circuit for Miami Dade County. Counsel: Carlos J. Martinez, Office of the Public Defender and Susan S. Lerner, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Wesley W.E. Stafford, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(PER CURIAM.) The issue presented to this Court is whether the trial court erred in allowing a play-back to the jury of a witness' direct examination testimony without also playing back that witness' cross-examination testimony. We find that under the circumstances presented, limiting the play-back to solely a portion of the direct examination was reversible error. We must therefore reverse Appellant's judgment and conviction.

Appellant was charged with Driving Under the Influence. His defense to the charge was that he was not driving the car, and that he was arrested merely because he was intoxicated and seen standing near the car. At trial, the only witness to testify that he had observed Appellant driving was the arresting officer, Sergeant Villareal. On cross-examination, several inconsistencies were raised between

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Villareal's trial testimony, his police reports and prior testimony.

During deliberations, the jury asked to see a copy of Villareal's police reports which had not been admitted into evidence. The trial court quite properly declined to do so and instructed the jury to rely on the evidence presented during the trial. Subsequently, the jury presented the following question to the court: "Did the arresting officer remain behind the vehicle from the leaving of the bar to the car coming to a stop?" During a discussion of the question with counsel, the trial judge discussed the option of a play-back of Officer Villareal's testimony. Appellant's trial counsel objected, but told the court that if testimony was going to be played back, such a play-back should include both the direct and cross examination. The trial judge overruled the objection and told the jury: "You must rely on your recollection of the evidence presented at trial. However, if you would like to hear any portion of the officer's testimony played back, you may be brought into the court to hear it." The jury responded by saying "[W]e would like to hear it." After playing a portion of Villareal's direct testimony, the court stopped the recording and told the jury:

> So we've heard the first portion of the testimony. I can continue allowing the play back for you or, if you think you've heard what you were wanting to hear, I can send you back into the jury room to continue deliberating; whatever you would like to do.

Indicating that they were satisfied with what they had heard, the jury returned to the jury room to continue their deliberations. They subsequently found Appellant guilty of the charged offense.

Trial courts are afforded great discretion in decisions regarding the playback or read-back of testimony. *Rentas v. State,* 237 So.3d 368, 372 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D129b]; *Gormady v. State,* 185 So.3d 547, 550 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D218c] citing *Mullins v. State,* 78 So.3d 704, 705 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D284a]; *Avila v. State,* 781 So.2d 413, 415 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D248a]. However, a play-back of a portion of direct examination without including cross-examination may be error if such a play-back could be misleading or unduly emphasize one party's version of events. *Rentas,* 237 So.3d at 373, citing *Mullins* 78 So.3d at 705 and *Gormady,* 185 So.3d at 551. If particular testimony is specifically requested by the jury, the trial judge must determine whether limiting the testimony played back would be misleading or unfairly highlight the witness' testimony. *Garcia v. State,* 644 So.2d 59, 62 (Fla. 1994), citing *Haliburton v. State,* 561 So.2d 248, 250 (Fla. 1990).

The play-back of Officer Villareal's testimony was of particular importance here where he was the only witness that could testify that he saw Appellant driving. Both questions asked by the jury directly related to Villareal's testimony. The question prompting the play-back concerned whether Officer Villareal had followed Appellant from the time he left the bar until the time the vehicle was stopped. Thus, the jury was addressing the crucial issue in the case for both the State and the defense—whether Appellant was in fact driving the vehicle and whether Villareal had observed him. Given both of the jury's questions, the inconsistencies brought out in cross-examination were all the more important. In response to the jury's latter question, it was the trial judge rather than the jury who suggested a play-back, asking the jurors whether they would like to hear a "*portion*" of Villareal's testimony. After playing back a part of his direct examination, and without prompting by the jury, the court stopped the recording and asked if this was enough. Deliberations then continued without the benefit of again hearing reference to the inconsistencies raised in cross-examination.

While the court was certainly well within its discretion in permitting a play-back of Villareal's testimony in light of the jury's question, any play-back of his testimony should have included the complete direct and cross-examination. While a trial court is not required to "force feed" a jury unnecessary testimony in a playback, *see Rentas* 237 So.3 at 373, not including relevant cross-examination of a critical witness unfairly highlighted portions of his direct testimony and unduly prejudiced Appellant.[1]

For the reasons indicated herein, the judgment and conviction are hereby vacated and this matter remanded to the trial court for a new trial. (TRAWICK, WALSH and REBULL, JJ., concur.)

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(REBULL, J., concurring.) I concur with the majority opinion. I write separately only to highlight why, in this case, the failure to play back the cross examination of Sergeant Villareal was an abuse of discretion.

The central and singular theme of the defendant's closing argument was that Mr. Mayen was not driving at all. And the only evidence that he was, came from the testimony of Sergeant Villareal. "The State only had one witness, one lying witness." (R. 622).

By my count, during cross examination of Sergeant Villareal, the defense impeached him (or attempted to impeach him) in approximately eleven separate topic areas with prior inconsistent statements, negative impeachment, *see Varas v. State,* 815 So. 2d 637, 640 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2848c], and a failure to investigate (failing to seek security footage or speak to witness at the bar from where the vehicle emerged). In sum, the entire defense rested on the jury disbelieving the testimony of Sergeant Villareal.

It's important to note that the jury's question in this case did ***not*** ask to rehear a certain witness's testimony, or even a specific portion of a witness's testimony. Where that happens, it's generally not an abuse of discretion for the trial judge to give the jury exactly what they asked for, that is, testimony that is "directly related and responsive to the jury's interrogatory." *See Garcia v. State,* 644 So. 2d 59, 62 (Fla. 1994) (*citing Haliburton v. State,* 561 So. 2d 248, 250 (Fla. 1990)); *see also Cole v. State,* 701 So. 2d 845, 850 (Fla. 1997) [22 Fla. L. Weekly S587a].[2]

Instead, the jury's question read as follows: "Officer testimony clarification: Did the arresting officer remain behind the vehicle from the leaving of the bar to the car coming to a stop? Signed [presiding juror]."[3] As correctly recognized by the trial court, this question could obviously not be answered with a "yes" or "no." What's important about this question, however, is that at least one juror (maybe more) had some uncertainty regarding Sergeant Villareal's observations and testimony. Given that the entirety of the defendant's cross examination of Sergeant Villareal and his closing argument was devoted to the theory that the officer was lying and that none of his testimony was worthy of belief, it is clear that playing back his entire testimony was critical to avoiding a playback that placed "undue emphasis" on "a version of events favorable to the State and [which diminished] a version favorable to the defense." *See Mullins v. State*, 78 So. 3d 704, 706 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D284a].

In other words, after rehearing ***all*** of Sergeant Villareal's testimony, the jury may very well have answered their own question with a "no": the arresting officer did ***not*** remain behind the vehicle the entire time it left from the bar. At a minimum, one or more jurors may have had a reasonable doubt as to whether that happened.

For these reasons, I join in the conclusion that the trial court abused its "broad discretion" in matters of playback of testimony by limiting the playback to the arresting officer's direct testimony.

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[1]Appellant also raised an issue regarding expressions of personal opinion by the prosecutor during closing arguments. However, in light of the Court's decision here, we need not address this argument.

[2]See generally Fern L. Kletter, Annotation, Propriety of Audio or Video Playback of Testimony or Statement to Jury, 65 A.L.R.6th 537 (2020).

[3]I note that the written question itself is not a court exhibit that is in the record on appeal. This quote is taken from the trial judge reading the question aloud in the

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transcript of proceedings.

* * *

**Insurance Personal injury protection Application Material misrepresentations Error to enter summary judgment in favor of medical provider on material misrepresentation defense where insurer identified summary judgment evidence from which jury could have concluded that insured made material misrepresentation regarding garaging location of vehicle in order to procure policy No error in entering summary judgment on issues of reasonableness, relatedness, and necessity of treatment where provider established prima facie case on issues and insurer presented no countervailing evidence**

GEICO INDEMNITY COMPANY, Appellant, v. Y.D. MEDICAL & REHABILITATION CENTER, INC., a/a/o Rene D. Torres Escalona, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2018 000345 ap 01. LT. Case No. 2014 1212 CC 26. February 26, 2020. An Appeal from the County Court for Miami Dade County, Gloria Gonzalez Meyer, Judge. Counsel: Louis Schulman, Rebecca O'Dell Townsend and Scott W. Dutton, Dutton Law Group, P.A., for Appellant. Marcus Griggs and Tim Snedaker, Corredor, Husseini & Snedaker, P.A.;, and David B. Pakula, David B. Pakula, P.A., for Appellee.

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

(WALSH, J.) GEICO raises two issues in this appeal. First, GEICO argues the trial court erroneously granted summary judgment for the medical provider, Y.D. Medical & Rehabilitation Center ("the Provider") on its affirmative defense of material misrepresentation. Second, GEICO argues that the trial court incorrectly granted summary judgment on damages, finding that the medical services were reasonable, related to the accident and medically necessary. We reverse the trial judge's summary judgment on GEICO's affirmative defense but affirm on the trial judge's order on damages.

*Record Below on Summary Judgment*

The insured, Rene D. Torres Escalona ("Torres") procured an online Personal Injury Protection insurance policy with GEICO. According to Torres, the online transaction occurred in an unorthodox manner. Torres claimed in his recorded statement to GEICO that a man known simply as "Louis" or "Luis" obtained the policy for him over the phone. When told by GEICO that the policy was purchased online and not by phone, Torres said he searched online and found "Luis," provided his personal information and Luis conducted the online transaction. Torres did not know Luis' last name. He did not recall exactly how he found Luis. He had no contact information for Luis, nor any records from any computer.

GEICO introduced screen shots of the information submitted electronically by the applicant to procure the policy. GEICO did not retain the actual online application[1] containing the questions prompting the information captured in the screen shots. But GEICO's expert averred that the screen shots captured the verbatim keystrokes by the applicant. Under "Garage Location" the screen shots reflected that the car was kept at "14398 NE 14 Avenue, Okeechobee, FL 34972." The computer system bounced back a message to the applicant suggesting "14th" instead of "14," and the change to address was affirmatively accepted (by Torres or "Luis") as: "14398 NE *14*th Avenue" in Okeechobee, Florida. In fact, this address does not exist.

Once coverage was confirmed, the program automatically ran Torres' driving record with the department of motor vehicles (DMV). The applicant elected an option for UM coverage using Torres' electronic signature.

Torres testified in deposition that he lived at an address in Miami, Florida. While he claimed to have lived with his mother and sister at their Miami home address for the past seven years, the traffic crash report reflected three different Miami addresses for his mother, sister and himself. GEICO presented evidence that for any online Miami application, GEICO required a subsequent signed, written application. Because of rampant fraud, GEICO did not write electronic policies for vehicles garaged in Miami without later obtaining signed, written applications.

When asked how the policy was purchased, Torres told GEICO that he used his cousin's credit card over the phone to pay for the policy. However, an online (not telephonic) credit card payment was made to purchase the policy, after a five-hour period during which the payment function was opened and closed five times. On the recorded call, Torres spelled out his cousin's name as "R-E-I-N-I-E-R I-T-U-R-I-A-G-A." Later in deposition, Torres testified that his cousin's name is Reinier Rafael Escalona, and that he had no cousin named Reinier Ituriaga, even though he was the one who audibly spelled out his cousin's name to GEICO.

Torres also did not recognize the email address used in the online application, although this address remained on the account throughout the duration of Torres' policy and was never changed. Nor could he explain why the phone number of "Juan Jose Cortez," a name he did not recognize, was used throughout his policy.

After obtaining the policy, Torres called GEICO because he never received his written policy. He was told that the garaging address was in Okeechobee, Florida and claimed to have corrected the mistake. Torres testified in deposition that he always resided in Miami and that he gave GEICO his correct address. Yet even after this phone call, while Torres' mailing address was corrected to reflect where he received mail, the garaging address remained at the non-existent address in Okeechobee, Florida.

GEICO argued that had it known that the vehicle was kept in Miami, the premium for the policy would have been $941.80 greater than what was charged. Stated differently, GEICO would not have written a policy for the premium charged had GEICO known of the true vehicle location.

The trial court granted summary judgment to the Provider on the affirmative defense of material misrepresentation.

*Standard of Review*

The standard of review of an order granting summary judgment is de novo and requires this court to view the evidence in the light most favorable to GEICO, the non-moving party. *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a].

*Statutory Defense or Policy Defense of Material Misrepresentation*

As a preliminary issue, GEICO argues that it may base its affirmative defense of material misrepresentation upon the statutory defense set forth in section 627.409(1), Florida Statutes. This statute permits rescission for misrepresentation by "[a]ny statement or description made **by or on behalf of** an insured" (emphasis added). Under the statute, misrepresentations need not be purposeful or knowing to void the policy. Mr. Torres' claim that "Luis" made such misrepresentation might therefore fall within the proscribed statutory conduct.

However, the Provider argues that GEICO is bound by the terms of its policy. GEICO's policy provides for rescission only when a person "knowingly conceals or misrepresents" a material fact or circumstance. The Provider is correct, and the policy language controls over the statute on GEICO's defense. *See, e.g., Green v. Life & Health of America,* 704 So. 2d 1386 (Fla. 1998) [23 Fla. L. Weekly S42a] (parties to insurance contract are bound by "upon knowledge and belief" contractual policy language which created higher burden than statute for insurer to rescind for misrepresentation).[2]

*Summary Judgment on Material Misrepresentation*

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Co. v. Gonzalez,* 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley,* 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The party moving for summary

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judgment must present evidence supporting its claim and once it does, "the opposing party must come forward with counterevidence sufficient to reveal a genuine issue." *R. Plants, Inc. v. Dome Enters.,* 221 So. 3d 752, 753-54 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a], *citing Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979).

Turning to the arguments presented on summary judgment, GEICO argues that it is entitled to a jury trial on its defense of material misrepresentation. GEICO argues that Torres' story — that he procured insurance by calling "Luis" who provided GEICO a non-existent garaging address — is wholly incredible. GEICO argues that the garaging location of the vehicle was provided online to obtain a cheaper policy Torres never would have obtained had he disclosed his Miami garaging address.

GEICO also points out that its screen shot evidence proves every keystroke made to input the online application including the non-existent Okeechobee garaging address. Further, even after Torres' later phone call where he alleges that he corrected the address, the screen shots still contained the non-existent Okeechobee garaging address. This meant that when Torres called GEICO, he only corrected his mailing address, not the garaging address (which makes sense given his complaint that he had not received his policy in the mail). And had Torres truthfully corrected the garaging address, GEICO would have, based on its standard practice for Miami policies, required a written, signed paper application, which never occurred.

In response, the Provider argues that no jury could conclude that a misrepresentation made by "Luis"— even if deemed an agent of Torres—was "knowing." And that even if a misrepresentation occurred, GEICO had constructive notice of Torres' actual address because GEICO conducted a DMV records check, and Torres called GEICO to provide the correct address. Alternatively, GEICO waived its right to void the policy when it conducted a DMV search of Torres, which, along with Torres' phone call, corrected the address.

Both GEICO and the Provider make compelling arguments. Perhaps "Luis" was a fictional character. Or perhaps Torres was an innocent, high-school educated patsy of "Luis," who lied online without Torres' authorization. Perhaps Torres simply kept bad records and did everything he could to correct an inadvertent misunderstanding with GEICO. Or perhaps GEICO's evidence proves that Torres made false statements to procure a cheaper policy.

On summary judgment, a judge may not weigh evidence or resolve conflicting facts and fair inferences. The insurer identified summary judgment evidence from which a jury could have concluded that Torres made a material misrepresentation to procure his insurance policy and therefore the policy was properly rescinded. There was sufficient evidence in the record below which would enable a jury to support the defense of material misrepresentation, and accordingly, it was error to grant summary judgment. *See Leybovich v. SecureAlert, Inc.,* 237 So. 3d 1104 (Fla. 3d DCA 2017) [43 Fla. L. Weekly D65a].[3] Accordingly, we reverse the trial court's order granting summary judgment on the defense of material misrepresentation and remand for a jury trial on the defense.

*Summary Judgment on Reasonable, Related and Medically Necessary Services*

GEICO also argues that the trial court erred in granting summary judgment on the ground that the medical care rendered was reasonable in price, related to the accident and medically necessary. The Provider moved for summary judgment, relying on the affidavit of Kevin Wood, D.C. GEICO presented no countervailing evidence below to refute the Provider's summary judgment evidence which established a prima facie case. Accordingly, we affirm on the matter of the damages sustained by the claimant. Should the Provider prevail at trial on the sole issue of the affirmative defense of material misrepresentation, judgment shall be entered in the amount of undisputed damages, $12,909.99, plus interest, costs and fees.

Appellee's Motion to Tax Appellate Attorney's Fees is granted, conditioned upon prevailing in the trial court and only with respect to appellate fees incurred on the issue of whether the medical services were reasonable, related and medically necessary.

Appellant's Motion to Tax Appellate Attorney's Fees is granted, conditioned upon the trial court's determination that GEICO satisfied the requirements of section 768.79, Florida Statutes (2018) and Florida Rule of Civil Procedure 1.442. and only with respect to appellate fees incurred on the issue of the cross motions for summary judgment on Appellant's affirmative defense of material misrepresentation. (TRAWICK and REBULL, JJ., concur.)

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[1]Oddly, GEICO no longer has access to the online application in this case, but GEICO introduced evidence that Torres had and still has access to his online application containing the questions prompting the online responses. Torres has never provided the online application.

[2]We go no further than to hold that the contract between the parties controls the affirmative defense of material misrepresentation in this case. At oral argument, GEICO urged us to find that even under the policy, a misrepresentation need not be "knowing." However, GEICO failed to make this argument in its briefs, depriving the Appellee Provider of the opportunity to respond. Therefore, an analysis of the policy language is not properly before us.

[3]One judge has recently criticized decisions which quash summary judgment because a "merest possibility" of a genuine issue of material fact or "scintilla" of evidence exists. In this judge's opinion, the inquiry should be whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Asking whether there exists a "scintilla of evidence," "slightest doubt," or "merest possibility" does not advance that inquiry." *Mobley v. Homestead Hosp., Inc.,* 45 Fla. L. Weekly D2a (Fla. 3d DCA Dec. 26, 2019) (Logue, J. concurring). The case before us does not present a speculative dispute, however, but an objectively disputed defense.

* * *

**Criminal law Driving under influence Reckless driving Closing argument Burden-shifting Prosecutor improperly shifted burden of proof by asking jury during closing argument why someone would choose to have their license suspended instead of providing breath or doing road side exercises State failed to show that error was harmless New trial required**

URBANO ACOSTA, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2018 000020 AC 01. L.T. Case No. 9949XEX, Amended Opinion. February 26, 2020. An appeal from the County Court for Miami Dade County, Judge Edward Newman. Counsel: James Odell, Assistant Public Defender, for Carlos J. Martinez, Public Defender, Miami Dade County, for Appellant. Jason Scott Duey, Assistant State Attorney, for Katherine Fernandez Rundle, State Attorney, Miami Dade County, for Appellee.

(Before MIGNA SANCHEZ-LLORENS, ANGÉLICA D. ZAYAS, and IVONNE CUESTA, JJ.)

(SANCHEZ-LLORENS, J.) Following a jury trial, Urbano Acosta ("**Appellant**" or "**Acosta**") was convicted of one count of driving under the influence, § 316.196 (1), Fla. Stat. (2006), and one count of reckless driving, § 316.19(1)(a) Fla. Stat. (2006), and sentenced to serve a period of incarceration.

On appeal Acosta raised several issues, however, this Court reverses and remands the matter for the reasons stated below.

BACKGROUND

The Appellant was arrested for reckless driving. While handcuffed, the arresting officer noticed the smell of alcohol emanating from Acosta's breath when he spoke. The officer also observed other signs of impairment, including but not limited to: erratic driving, flushed face, bloodshot and water eyes, slurred speech, and a stumbling gait. The officer requested that Acosta perform field sobriety exercises, but he declined. Acosta was warned of the consequences for refusal. The officer searched Appellant's vehicle and found empty beer cans with an odor of alcohol coming off them, and an alcohol odor coming from

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Acosta.

Acosta was transported to the station, and the arresting officer read the Implied Consent Form to him. Subsequently, the officer recorded Appellant's refusal on a Breath Refusal Affidavit, memorializing Acosta's refusal to submit to an intoxilyzer examination. During the reading of the Implied Consent Form the officer informed Acosta of the consequences of refusing to provide a breath sample. The Appellant was charged with reckless driving, DUI, and several non-criminal traffic citations.

During closing statement, the Assistant State Attorney made the following statements:

> State Attorney: This chain reaction of the defendant's choices that he made, from the drinks he had before he got into the car, to the choice to drive, to the choice to run the red lights in front of Officer Leon Paige, get pulled over for reckless driving after he saw him how he was affecting choice, *to the choice to dispel the concerns of driving under the influence . . .*

(Trial Tr. 308:4-14, Jan. 17, 2018 (emphasis added).)

> State Attorney: The defendant also made the choice to drive. The defendant also made the choice to refuse road side exercises. The defendant also made the choice to refuse the breath sample. Ladies and gentlemen of the jury, ask yourselves a question, "*Why would some choose to have their license suspended instead of providing breath? Instead of doing road side exercises? . . .*"
>
> State Attorney: Members of the jury, I challenge you is that *this refusal occurred, was because he knew* that he was what *would be in that breath sample. He knew that those road side exercises would show. . .*

(Trial Tr. 328:22-329:24, Jan. 17, 2018 (emphasis added).)

## STANDARD OF REVIEW

"A trial court has discretion in controlling opening and closing statements, and its decisions will not be overturned absent an abuse of discretion." *Williams v. State,* 225 So. 3d 349, 353 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1722a] (quoting *Merck v. State,* 975 So. 2d 1054,1061 (Fla. 2007) [32 Fla. L. Weekly S789b]). "Where the comments were improper and the defense objected, but the trial court erroneously overruled defense counsel's objection," the harmless error standard of review applies, which places " 'the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " *Sweeting v. State,* 260 So. 3d 520, 524 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2756a] (quoting *Cardona v. State,* 185 So. 3d 514, 520 (Fla. 2016) [41 Fla. L. Weekly S45a]).

## LEGAL ANALYSIS

An axiomatic principle of constitutional law is that the burden to establish commission of a criminal offense beyond a reasonable doubt is, and remains, on the prosecuting entity throughout the trial. *Jackson v. State,* 575 So. 2d 181 (Fla. 1991). This requirement is " 'basic in our law and rightly one of the boasts of a free society.' " *In re Winship,* 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1979) (quoting *Leland v. Oregon,* 343 U.S. 790, 803, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (*Frankfurter, J.,* dissenting). "For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Brooks v. State,* 267 So. 3d 417, 421 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D776a] (quoting *Jackson v. State,* 575 So. 2d 181, 188 (Fla. 1991)). In the event improper burden-shifting occurs, the appellate court must examine the entire record, in context. *Rodriguez v. State,* 27 So. 3d 753, 755-57 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D355b].

The Fifth Amendment of the United States Constitution guarantees that a criminal defendant cannot be compelled to be a witness against himself. *State v. Socarras,* 272 So. 3d 488, 492 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D935a]. Furthermore, "courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the [defendant's] right of silence." *Morris v. State,* 988 So. 2d 120, 122 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1851a] (quoting *Smith v. State,* 681 So.2d 894, 895 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2290a]). The Fifth Amendment, however, generally, does not encompass instances where the accused is the source of physical evidence. *Id.* When a law enforcement officer has probable cause to believe that the accused was driving under the influence, the officer can compel the accused to perform field sobriety exercises and a breath test. *Id.* While a prosecutor may comment on a defendant's failure to submit to perform field sobriety exercises and a breath test as evidence of the person's consciousness of his or her guilt, a prosecutor improperly shifts the burden of proof by arguing that an innocent person would volunteer to take a breath test or perform field sobriety exercises to prove his or her innocence. *Id.* at 123.

Acosta contends that the State's closing argument contained improper burden-shifting arguments that require reversal. We agree. During closing argument, the following exchange occurred:

> State Attorney: This chain reaction of the defendant's choices that he made, from the drinks he had before he got into the car, to the choice to drive, to the choice to run the red lights in front of Officer Leon Paige, get pulled over for reckless driving after he saw him how he was affecting choice, *to the choice to dispel the concerns of driving under the influence . . .*
>
> Defense: Objection, burden shifting.
>
> Judge: Overruled.

(Trial Tr. 308:4-14, Jan. 17, 2018 (emphasis added).)

> State Attorney: The defendant also made the choice to drive. The defendant also made the choice to refuse road side exercises. The defendant also made the choice to refuse the breath sample. Ladies and gentlemen of the jury, ask yourselves a question, "*Why would some choose to have their license suspended instead of providing breath? Instead of doing road side exercises?*"
>
> Defense: Objection, judge, denigration, burden shifting, and scope.
>
> Judge: Overruled.
>
> State Attorney: Members of the jury, I challenge you is that *this refusal occurred, was because he knew* that he was what *would be in that breath sample. He knew that those road side exercises would show. . .*
>
> Defense: Objection.
>
> Judge: Sustained.

(Trial Tr. 328:22-329:24, Jan. 17, 2018 (emphasis added).)

Examining these statements in the context of the entire record, we conclude the State improperly shifted the burden of proof by asking the jury "[w]hy would someone choose to have their license suspended instead of providing breath? instead of doing road exercises?" Although the State argues that it offered Acosta's refusal as evidence of Acosta's consciousness of guilt, we disagree. The State's comments direct the jury to infer Acosta's guilt from the fact that he did not take an affirmative step to prove his innocence by doing road exercises or submitting to a breathalyzer test. The State further asserts, that its comments regarding Acosta's refusal was an invited response to Acosta's alibi defense, however, Mr. Acosta did not assert an alibi defense in this case. The Defense's objections to these impermissible comments should have been sustained. To establish that these errors were harmless, the State must prove beyond a reasonable doubt that the errors did not contribute to jury's verdict. *State v. DeGuilio*, 491 So. 2d 1129 (Fla. 1986). Such a conclusion cannot be reached in this case. As such, because the State has failed to prove beyond a reasonable doubt that the error did not contribute to the verdict, we reverse,

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the judgment on each charge shall be vacated and the matter remanded for a new trial. (ZAYAS, A., and CUESTA, I., JJ, concur. )

* * *

**Criminal law Probation Revocation Identity of defendant Mere name identity between defendant and person named in judgment of conviction for driving under influence and placed on probation was sufficient to meet state's burden to prove by preponderance of evidence that defendant was person placed on probation Moreover, evidence presented at probation revocation hearing included evidence that defendant had other characteristics, such as age, race, gender, driver's license number and area of residence, in common with person placed on probation**

JUAN FLORIAN, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 107 AC 01. L.T. Case No. 9077XGC. February 21, 2020. An Appeal from the County Court in and for Miami Dade County, Michael Barket, Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and James Odell, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Christine E. Zahralban, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) Juan Florian appeals an order revoking his probation and sentencing him to 30 days in jail. He argues on appeal that State failed to prove in an April 2019 probation revocation hearing that he is the same Juan Florian named in a May 2016 Judgment adjudicating him guilty of DUI and sentencing him to 12 months of probation. We affirm the revocation of his probation and his sentence.

I.

At the revocation hearing, the trial court took judicial notice without objection of the May 23, 2016 Judgment in the lower tribunal (Case Number 9077XCG). That Judgment finds and adjudges a "Juan Florian" guilty of DUI. The Judgment reflects that: **(1)** his address is 733 W 34th Street, ***Hialeah,*** Florida 33012; **(2)** his date of birth is 05/17/1953; **(3)** he's a white male; and **(4)** his Driver's License number is F465420531770. It further provides that the "defendant is placed on probation for a period of 12 months beginning 05/23/2016 under the supervision of the ADVOCATE PROGRAM."

The Judgment also revokes Mr. Florian's driver's license for 365 days, orders a vehicle impoundment, and an ignition interlock device. Mr. Florian's signature appears on the Judgment, below the following language: "I have read and understand the above terms and conditions and I hereby acknowledge receipt of a copy of this form."

The State presented the testimony of Officer Wilbur Gonzalez of the ***Hialeah*** Police Department. Officer Gonzalez testified regarding his arrest of Juan Florian on January 7, 2017 for driving while license suspended as a habitual traffic offender, and resisting an officer without violence. His pertinent testimony on direct examination included the following:

> A I came in contact with ***Mr. Florian,*** who was parked at a green light, facing northbound, on a southbound lane. I tried to get his attention, conduct a traffic stop. He wasn't responding. He finally got my attention. I told him to stop. He looked directly at me. He slowed down and then he decided to take off.
>
> I got behind him. I conducted a traffic stop. He continued a couple of streets down. ***He bailed out of his car while the car was running*** and took of southbound on ***West One Avenue*** and ***I was able to, later, take him into run after him and take him into custody***.
>
> * * *
>
> Q Oh, yeah, can you is the person that you arrested in this courtroom today?
>
> A Yes. He's he's standing behind Defense. I can't see. It's like a white and grey shirt. Sorry.
>
> Q Can you point to him, please.
>
> A Right over there.
>
> Q Okay.
>
> MR. BERGIDA: Yeah, Your Honor, let the record reflect that the officer has pointed to the Defendant, ***Mr. Juan Florian***.

(emphasis added). On cross examination, Officer Gonzalez additionally testified as follows:

> Q I believe you just testified that ***Mr. Florian*** pulled up next to you.
>
> A He pulled up towards me.
>
> * * *
>
> Q Okay. 12 So, it was your testimony today that ***Mr. Florian,*** pulled up to you; was driving. You saw him driving?
>
> A Yes.
>
> * * *
>
> And just let me know if I'm reading this correctly. Defendant was stopped at a red light at Palm Avenue.
>
> A Yes.
>
> Q That's what it states; correct?
>
> A Yeah.
>
> Q So, ***Mr. Florian*** was not driving; was he?
>
> A Of course, he was driving.
>
> Q You just read that he was stopped?
>
> A Behind the—behind the driver's—behind the wheel of the driver—driver's side. He was stopped. He saw me. He pulled up towards me and he continued to drive. He was the only person in the car.
>
> * * *
>
> Q In your arrest form, you read that he was 3 stopped at a red light; correct?
>
> A You asked me that, yes.
>
> Q Okay. And, when you saw ***Mr. Florian,*** you had not seen him before?
>
> A No.

(emphasis added). After hearing argument from the State and Defense, the trial court revoked Mr. Florian's probation and sentenced him to 30 days in the Dade County Jail. On appeal, the defendant argues that the State failed to "prove that the Juan Florian who was placed on probation was the same Juan Florian who was arrested by Officer Gonzalez."

II.

"The State has the burden of proving by the greater weight of the evidence that the defendant committed a willful and substantial violation of a term of probation. ***The trial court has broad discretion to determine whether . . . the State has met its burden of proof."*** *Grizzard v. State,* 881 So. 2d 673, 675 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1980b] (emphasis added) (internal citations omitted).[1] The trial court's findings "***will not be overturned on appeal*** unless there is ***no evidence*** to support the decision." *See Cunningham v. State,* 795 So. 2d 219, 220 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2338a] (emphasis added). "When a cause is tried without a jury, the ***trial judge's findings of fact are clothed with a presumption of correctness on appeal,*** and these findings will not be disturbed unless the appellant can demonstrate that they are ***clearly erroneous***." *Sunshine State Ins. Co. v. Davide,* 117 So. 3d 1142, 1144 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D391a].

Here, the trial judge found as a fact that the Juan Florian before him was the same Juan Florian named in the May 2016 Judgment. Giving that finding—as we must—a presumption of correctness, it plainly is supported by competent evidence. The May 2016 Judgment identified a white male named Juan Florian who was born in May of 1953, and

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would therefore be 65 years of age at the revocation hearing. That Juan Florian also had an address in ***Hialeah,*** Florida.

The cold transcript of the revocation hearing does not reflect how old the Juan Florian standing before the trial judge appeared to him. Nor does the transcript reflect whether he is white. If the presumption of correctness means anything, however, it should at least mean that we can defer to the trial judge and presume that the Juan Florian before the court was a white male[2] who appeared to be in the neighborhood of 65 years of age.

The evidence presented at the revocation hearing also proved that the Juan Florian before the court was driving and was arrested in Hialeah, the same municipality of the Juan Florian in the May 2016 Judgment. Moreover, the Juan Florian before the court bailed out of his car while it was still running and ran away from Officer Gonzalez.

In sum, the trial judge had before him a DUI Judgment from May of 2016 for a white male with a Hialeah address named Juan Florian who was 65 years of age, and whose driver's license was revoked. And, in light of the presumption of correctness, he had before him in court a white male named Juan Florian who (we presume) looked about 65 years old and who was arrested ***in Hialeah*** in January of 2017; and who fled from a police officer who tried to pull him over for a traffic infraction. Was it reasonable for the trial judge to infer from such flight[3] that ***maybe*** this Juan Florian fled because he knew his driver's license was revoked and he wasn't supposed to be driving while he was on probation for DUI?

If the presumption of correctness for findings of fact means anything, and the standards for appellate review of trial judge's decisions at probation revocation hearings mean anything, they surely must mean that the trial judge's finding in this case is supported by competent evidence, was not ***clearly,*** erroneous, and was not an abuse of discretion.[4]

> It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. ***It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it.*** The test . . . is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' ***it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court.***

*Shaw v. Shaw,* 334 So. 2d 13, 16 (Fla. 1976) (emphasis added) (internal citations omitted).

III.

The dissent relies on *Cox v. State,* 816 So. 2d 160 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D980a] in support of the proposition that the evidence presented at the revocation hearing was insufficient—as a matter of law—to prove that the Juan Florian before the trial judge was the same Juan Florian in the May 2016 DUI judgment and probation sentence. *Cox* is materially distinguishable from this case. Indeed, it's the reverse of this case.

In *Cox,* the probation officer was the only witness at the revocation hearing. The police officer who issued a citation for reckless driving to a "Jody Cox," did not testify. Thus, while there was no question as to the Jody Cox who was on probation and was before the Court for the revocation hearing, the evidentiary basis for the substantive probation violation was a Florida DHSMV printout of someone named "Jody Cox." In other words, the evidence that the Jody Cox on probation and before the court violated his probation by engaging in reckless driving was ***only*** a traffic printout reflecting someone named Jody Cox had a withhold of adjudication for a reckless driving charge.

The *Cox* Court held that the similarity of names and date of birth was legally insufficient to prove that the Jody Cox on probation was the same Jody Cox who engaged in reckless driving. In arriving at its decision, the Court in *Cox* block quoted from *Miller v. State,* 573 So. 2d 405 (Fla. 2d DCA 1991). The citation to *Miller* highlights why Cox is distinguishable from this case. *Miller* stands for the narrow proposition that in proving (beyond a reasonable doubt) the offense of possession of a firearm by a convicted felon, the State must present additional "affirmative evidence" ***beyond identity of names,*** to connect the person charged to the prior conviction. As recognized in *Cox* and *Miller,* there are two lines of authority on the "name identity" issue. The Fourth District Court of Appeal described the difference as follows:

> When the State must establish the existence of a prior conviction to prove an essential element of an offense, merely introducing a judgment, which shows identity between the name on the prior judgment and the name of the defendant, is insufficient. *Mason v. State,* 853 So.2d 544, 545 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2021a]. Instead, the State must present affirmative evidence that the defendant and the person named on the prior judgment are the same person. *Miller v. State,* 573 So.2d 405, 406 (Fla. 2d DCA 1991). This requirement is rooted in the requirement that the State prove the defendant guilty of every element of the offense beyond a reasonable doubt. *Gravatt v. United States,* 260 F.2d 498 (10th Cir. 1958). ***In contrast, a trial court can rely on nothing but certified copies and official court records at sentencing to determine, for example, whether a defendant qualifies for an enhanced sentence.*** *Moore v. State,* 944 So.2d 1063 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2173a]; *Slade v. State,* 898 So.2d 120 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D580c]. As due process does not require a prior conviction to be proven beyond a reasonable doubt when it is not an element of the offense, *see Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Roberts v. State,* 559 So.2d 289, 291 (Fla. 2d DCA 1990), ***only a preponderance of the evidence standard applies.*** This lesser burden of proof can be satisfied by ***merely showing name identity.*** *See Singh v. Holder,* 379 Fed.Appx. 578 (9th Cir. 2010) (name identity without rebuttal evidence is sufficient to meet clear and convincing evidence standard of deportation proceeding).

*Moncus v. State,* 69 So. 3d 341, 343 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1986a] (emphasis added).

This case is controlled by *Moncus*,[5] and not by *Cox.* Here, the State had to prove—by a preponderance of the evidence—that the Juan Florian before the court was the same Juan Florian named in the May 2016 judgment of conviction for DUI. Under *Moncus,* mere name identity was enough to prove that they were one and the same. Moreover, as we've pointed out in Section I., *supra,* the evidence presented at the revocation hearing in this case was more than "mere name identity" (and even more than name and date of birth identity).

For all of these reasons standing alone, the trial court's order of revocation and sentence must be affirmed.

IV.

Lest a reader of this opinion be alarmed that this is a case of "mistaken identity," and that the wrong 65 year old Juan Florian from Hialeah was found in violation of a DUI probation that was never his to begin with, we write further to point out the abundant information in the record that this is the same person.

The record on appeal contains numerous documents leading up to the May 2016 Judgment, which identify a "Juan Florian," "Juan Florian Escaveduque," or a "Juan Escaveduque." Not coincidentally—where applicable—all of those documents contain the same address, date of birth, driver's license number, and race and gender, as the Judgment.

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The Advocate Program filed an affidavit of violation of probation in case number 9077XCG, dated January 18, 2017. The affidavit alleges, among other things, that: "On or about 1/7/2017, in Miami-Dade County, FL., defendant allegedly committed offense(s): DWLS/HABITUAL and RESISTING OFFICER WITHOUT VIOLENCE, with case number F17-365, contrary to 322.34(5) and 843.02."

As a result, and again not coincidentally, the February 3, 2017 "VIOLATION OF PROBATION ARREST WARRANT" in the record has the same 4 items as the Judgment (Hialeah address, date of birth, DL number, race, and gender). There is a "COMPLAINT/ARREST AFFIDAVIT" in the record reflecting that the police arrested Mr. Florian in Hialeah on the probation warrant on October 12, 2018 at 6:23pm. That October 12, 2018 arrest affidavit reflects that the person the police arrested was named "Juan Florian Escaveduque." Once again, the arrest affidavit has the same 4 data points as the Judgment, the arrest warrant, and every other document in the record containing Juan Florian's identifying information.

Lastly, the trial court's April 11, 2019 Commitment Order and Supplemental Court Order in the record (which sentenced Mr. Florian to 30 days in jail), both contain the same date of birth, address, race, gender, and driver's license number, as ***all*** of the other documents in the record on appeal.

The transcript of the proceedings before the trial judge—before the actual probation revocation hearing began—should put to rest any remaining "mistaken identity" concerns a reader may have. Mr. Florian's lawyer told the trial judge as follows:

> However, would the court would the court like to get involved in plea negotiations. Our client is willing to plead guilty to the probation violation in return for this court unsuccessfully terminating his probation. He has completed all conditions of probation. The only issue is the withhold and one day that he took to a felony case back in 2017.
>
> * * *
>
> I believe the Advocate will say everything but the AA. However, we do have proof of the AA classes. But he did his DUI school. He did his victim impact. He did his
>
> * * *
>
> I spoke with Advocate on Friday and he agreed that it was waived. All that he had left was to bring in the proof of the AA meetings.
>
> ***Mr. Florian told me*** that he completed it. He does not have proof since this is from 2017. However, he would be willing to, if Your Honor wanted to have him go back and complete more AA meetings, ***I spoke with him.*** He would be willing to do that to satisfy this court.
>
> * * *
>
> THE COURT: I mean, the court's not really inclined to get involved into it. I mean, have you guys discussed it; has the State and (emphasis added)

While it is debatable whether defense counsel's statements would be admissible as admissions against her client[6], the trial court can hardly be faulted for not engaging in the legal fiction being asserted now—that there was any debate whether the Juan Florian before him was the same person placed on probation.

Further, the Juan Florian before the trial judge did not coincidentally show up in court on the day when another Juan Florian was supposed to appear for revocation hearing—he was summoned to court following his arrest on a warrant, a process that requires confirmation of a person's identity, not merely the similarity of name. And though not introduced in evidence, as we already noted the arrest affidavit for the violation of probation—which was made part of the court file below and part of the record on appeal—reflects that the Defendant arrested bore the identical date of birth and home address as the Defendant reflected on the face of the judgment. Mr. Florian is, indisputably, the right man.

By further analogy, a defendant who disputes a prior offense on a sentencing scoresheet must do more than debate the sufficiency or competency of the State's evidence—he must dispute its truth. *Jennings v. State,* 595 So. 2d 251 (Fla. 1st DCA 1992). *See also Banks v. State,* 610 So. 2d 514, 517 (Fla. 1st DCA 1992) (an objection to prior record predicated solely on hearsay does not require corroboration by the State) (citation omitted); *Telfort v. State,* 616 So. 2d 1222 (Fla. 3d DCA 1993) (same); *Rodriguez v. State,* 650 So. 2d 1111, 1112 (Fla. 2d DCA 1995)[20 Fla. L. Weekly D517b] (same). The truth here—which the Defendant does not dispute—is that he is the person who was placed on probation in this case.

V.

As we detailed above, the evidence presented at the probation hearing—by ***itself***—was enough to prove the case by the preponderance of the evidence. And it is based on that evidence alone that we affirm.

Interestingly, the dissent completely ignores the actual evidence presented at the hearing: a 65 year old white male before the trial judge named Juan Florian, who was arrested in Hialeah by a Hialeah police officer. And, who fled from the police when that officer attempted to pull him over for a traffic infraction.

And a DUI judgment of probation identifying a white male named Juan Florian who was 65 years of age with a Hialeah address whose driver's license was revoked and who wasn't supposed to be driving. The dissent disregards all of that evidence, and certainly with no deference to the trial judge's finding of fact that they were one and the same.

It's very revealing that the dissent uses the analogy of a "mountain," to describe the State's burden. Certainly doesn't sound like the "preponderance of the evidence" burden of proof, which is the law in probation violation hearings. "A preponderance of the evidence is evidence that more likely than not tends to prove a proposition." *See Hernandez v. Guerra,* 230 So. 3d 514, 518 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2168a].[7]

Did the evidence presented to the trial judge in this case show that it was more likely than not that the Juan Florian before him was the same Juan Florian named in the DUI judgment? Did it tend to prove that they were the same person? Those questions are not for us to answer as an appellate court. But it is beyond question that there was competent evidence to support the trial judge's finding of fact answering those questions in the affirmative.

**Conclusion**

For all of these reasons, we affirm the trial court's decision to find Mr. Florian in violation of his probation, revoke his probation, and sentence him to 30 days in jail.

AFFIRMED. (WALSH, J., concurs. TRAWICK, J., dissents, with an opinion.)

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(TRAWICK, J., dissenting.) It is axiomatic that the State is required to prove that a defendant charged with a probation violation is the same person that was placed on probation in the underlying criminal case. *Cox v. State,* 816 So.2d 160 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D980a]. *See also Morgan v. State,* 353 So.2d 161, 162 (Fla. 2d DCA 1977) (State has burden of proving identity in any case where identity is in issue). The State attempted to meet this burden through the testimony of Officer Wilbur Gonzalez, the officer who arrested Appellant for the new offenses. Officer Gonzalez stated that he attempted to conduct a traffic stop of a car driven by Appellant. Appellant jumped out of his car while the car was running, after which he was apprehended by Gonzalez. After running the Appellant's driver's license, Gonzalez determined that Appellant was driving with

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a suspended license and was a habitual traffic offender.[8] He then placed Appellant under arrest. However, while he was able to identify Appellant as the person he arrested, he had never seen Appellant prior to this arrest and he had no personal knowledge of the Appellant being placed on probation in the underlying case.

In the course of the hearing, the State asked the trial court to take judicial notice of the final judgment and sentencing order which placed Appellant on probation, as well as the probation violation affidavit charging the new offenses. The court did so.[9] However, the State produced no testimony that the person named in the final judgment and sentencing order was Appellant.[10] Instead, they argued that the signature of Juan Florian on that order established Appellant was the same person who committed the new substantive offenses and who was named in the probation violation affidavit. There was no evidence produced to support this argument.[11]

It is not the responsibility of a court to save the State from a deficiency in their case. *See Morges v. State,* 33 So.3d 115 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D935a] ("Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction."), citing *Cox v. State,* 555 So.2d 352, 353 (Fla. 1989). The burden is on the State to establish that the Juan Florian named in the final judgment and the Juan Florian who allegedly violated his probation and who was named in the probation violation affidavit are one in the same. *Cox v. State,* 816 So.2d at 616.[12] They failed to meet this burden.

It would have been quite easy for the State to have called the Appellant himself to the witness stand to establish this link. *See E.P. v. State,* 901 So.2d 193 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D812b]; *Perry v. State,* 778 So.2d 1072 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D644a] (Probationer has no Fifth Amendment privilege to refuse to answer questions that would disclose a violation if called by the State as a witness in a probation violation hearing). *See also Howell v. McDonough,* 2008 WL 1931321 (M.D. Fla. 2008). Further, there may have been other documents, as referenced by the majority, which may have linked the Juan Florian in the Judgment to the Juan Florian in the probation violation affidavit if those documents had been offered and admitted into evidence. Unfortunately for the State, they did none of this.

While the majority discusses in elaborate detail supposedly "abundant evidence in the record . . . that this is the same person" and a "copious basis in the record to support the lower tribunal's order", there is no indication in the record that the trial judge considered any of the information referenced by the majority other than the Judgment and the probation violation affidavit itself. The trial court took judicial notice of both documents. However, there is nothing in the record to show that the trial judge had any document before him with the "4 data points" mentioned by the majority (address, date of birth, driver's license number, race and gender) and contained in the Judgment which linked Florian to the probation violation affidavit. The affidavit itself contains **none** of these "data points". Further, such a linkage was never argued by the State below or in this appeal.

The majority also references statements made by Appellant's counsel in concluding that Appellant conceded he was on probation, stating that these statements "should put to rest any remaining 'mistaken identity' concerns a reader may have." However, they seem to recognize a weakness in their conclusion, indicating that it is "debatable" as to whether these statements were admissible against the Appellant. It is not debatable. Such statements are not evidence and cannot be attributed to the Appellant. *Schroeder v. MTGLQ Investors, L.P.,* 2020 WL 698271 (Fla. 4th DCA Feb. 12, 2020) [45 Fla. L. Weekly D339a] ("[U]nder Florida law, absent a stipulation, statements of counsel not made under oath are not evidence."), quoting *Parkerson v. Nanton,* 876 So.2d 1228, 1230 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1415c].

It is disappointing that the majority has chosen to lessen the bar for the State. Prosecutors have a duty to prove their case with evidence, not with supposition. I would liken what the majority has done here with a mountain climber scaling a majestic peak. There are various stages that the climber must attain before reaching the top. However, upon reaching the final stage before the summit, the climber discovers that she has forgotten equipment necessary for the final leg of her climb. Being unprepared to go any further, she claims victory and stakes her claim that she has successfully climbed the mountain. Another climber, aware of her story, complains to the organization who recognizes each successful climb. The organization, rather than become embroiled in controversy, fails to take any action, leaving her non-meritorious climb in their record book.

Here, the State of Florida is that climber. They were close to proving their case but fell short, yet claiming victory. Our court has unfortunately recognized the State's achievement, despite being made aware by the Appellant and the record that the State did not prove their case. The majority has instead said that the State's proof was "the truth" and dismissed the concerns raised in this dissent as "legal fiction." In other words, the evidence was close enough to affirm the decision below. Close may be good enough in horseshoes, but not in mountain climbing and certainly not in an American courtroom. Decisions such as this chip away at the bedrock that is our justice system. This may be a small chip, but chiseling away one chip after another and yet another will eventually erode and weaken our institution's foundation. The institution itself will be left tottering and unsteady until eventually confidence in its stability will be weakened beyond repair.

I dissent.

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[1]"The trial court has broad discretion to determine whether there has been a willful and substantial violation of a term of probation and whether such a violation has been demonstrated by the greater weight of the evidence." *State v. Carter,* 835 So.2d 259, 262 (Fla. 2002) [27 Fla. L. Weekly S1004a]; *see also Mata v. State,* 31 So.3d 257, 259 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D651b] (the State must prove by a preponder ance of the evidence the probationer willfully and substantially violated the terms of probation).

" 'When a decision in a non jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence' because 'the trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses.' " *Oertel v. State,* 82 So.3d 152, 156 57 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D516a] (*quoting Acoustic Innovations, Inc. v. Schafer,* 976 So.2d 1139, 1143 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D544a]).

*Harrington v. State,* 238 So. 3d 294, 297 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D434a].

[2]Plainly, all parties referred to the Juan Florian in court as "Mr.," indicating that he was a male.

[3]*Looney v. State,* 803 So. 2d 656, 667 68 (Fla. 2001) [26 Fla. L. Weekly S733a] (Evidence that on the day of the murder the defendant attempted to hit police officer and knock him down with his truck, and the ***subsequent pursuit and arrest was relevant to infer defendant's consciousness of guilt.*** Decision discusses this issue in terms of collateral crimes evidence.); *Hertz v. State,* 803 So. 2d 629, 644 45 (Fla. 2001) [26 Fla. L. Weekly S725a] (In murder prosecution, no abuse of discretion to admit ***evidence of the defendant's flight and resistance to a lawful arrest*** on the day of the murders which were ***relevant to the defendant's consciousness of guilt***.)"

Charles W. Ehrhardt, Other uses, 1 Fla. Prac., Evidence § 404.19 n.2 (2019 ed.).

[4]*See generally Williams v. State,* 602 So. 2d 643, 644 (Fla. 2d DCA 1992) (finding that evidence presented at 1991 probation revocation hearing was sufficient to prove that defendant was same person placed on probation in 1978).

[5]In *Moncus,* the Court held that the Richard Moncus before the trial court could be impeached at trial by the introduction of copies of judgments of conviction for a "Richard Moncus." "When Moncus declined to introduce any evidence to disprove identity, the trial court was entitled to rely on the ***strong inference*** created by ***the similarities between Moncus's name and the names on the prior judgments and hold that the State met its burden to demonstrate name identity without introducing additional evidence***." *Moncus v. State,* 69 So. 3d 341, 344 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1986a] (emphasis added).

[6]According to Professor Ehrhardt, "a statement made by an attorney to the court may be admissible as an admission against his or her client if it is shown that the

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attorney had the authority to make the statement.4

FN 4. When statements by an attorney are admissible against the client is unclear. Rule of Judicial Administration 2.505(h) provides: "In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client . . . ." ***It would appear that written or oral statements by a lawyer in the court concerning a lawsuit, would be admissible against the client as admissions under section 90.803(18)(c) or 90.803(18)(d).*** *See Payton Health Care Facilities, Inc. v. Estate of Campbell,* 497 So. 2d 1233, 1238 (Fla. 2d DCA 1986) (Complaint filed by defendant Payton against defendant Southeast shortly before trial was admissible during the trial against Payton as an admission: "We conclude that the complaint was properly admitted by the trial court as an admission against interest."); *St. Paul Fire and Marine Ins. Co. v. Welsh,* 501 So. 2d 54, 57 (Fla. 4th DCA 1987) (Letter written by St. Paul's consulting attorney to St. Paul was admissible under 90.803(18).). *See Jensen v. Sierra Grill, Inc.*, 876 So. 2d 1264 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1585a] (discussing presumption that attorney is authorized to act on behalf of client); *U.S. v. McKeon,* 738 F.2d 26, 30 33 (2d Cir. 1984) (Attorney's opening statement may be admissible against client in subsequent case.); *Frank v. Bloom,* 634 F.2d 1245, 1266 (10th Cir. 1980) (factual matter in a pleading); *Contractor Utility Sales Co., Inc. v. Certain teed Products Corp.,* 638 F.2d 1061, 1084, 74 (7th Cir. 1981) (amended or withdrawn pleading). However, other Florida cases found, without discussing whether the pleadings were admissions, that "neither a complaint nor counterclaim is admissible in evidence to prove or disprove a fact." *Adams v. Merrill Lynch, Pierce, Fenner & Smith,* 392 So. 2d 4, 5 (Fla. 4th DCA 1980); *Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, P.A.,* 496 So. 2d 163, 163 (Fla. 4th DCA 1986) (Appellate brief written by party's counsel in unrelated appeal is not "an admission against interest by the individual appellant . . . ."); *Tierra Builders, Inc. v. Schwimmer,* 511 So. 2d 638 (Fla. 4th DCA 1987) (dissent) (Pleadings are not admissible against party unless it is shown that party against whom they are offered supplied the information contained in them.); *Douglass v. Rigg,* 525 So. 2d 494, 495 96 (Fla. 4th DCA 1988) (Attorney's statement during opening statement was not sufficient evidence to support finding that client could pay increased child support.). *See also State Farm Fire and Casualty Co. v. Higgins,* 788 So. 2d 992, 1007 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D111a], decision approved on other grounds, 894 So. 2d 5 (Fla. 2004) (en banc) (Noting that while pleading may not be admissible under section 90.803(18)(c), it may be admissible under section 90.803.18(b).).

However, statements of fact by attorneys during a trial are not usually binding judicial admissions. *Parkerson v. Nanton,* 876 So. 2d 1228, 1230 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1415c] (Statements made by counsel during opening statements or final argument are not binding judicial admissions on a party.).

Charles W. Ehrhadt, Admissions Authorized, 1 Fla. Prac., Evidence § 803.18c (2019 ed.)

[7]Indeed, a frequently used analogy for the preponderance of the evidence burden of proof is "tipping the scales of justice ***one little bit*** in our favor." *See Blossom v. CSX Transp., Inc.,* 13 F.3d 1477, 1479 (11th Cir. 1994) (emphasis added) (agreeing that this was a proper illustration of the preponderance burden of proof). "A bare preponderance is sufficient, though the scales drop but ***a feather's weight***." *In re M.L.,* 2010 VT 5, ¶ 25, 187 Vt. 291, 301, 993 A.2d 400, 407 (2010) (emphasis added).

[8]After a defense hearsay objection, the Court refused to admit the testimony of Officer Gonzalez regarding his verification through the "DAVID" database of Appellant's license status and history. This was error. Hearsay is admissible in a probation violation hearing to prove the alleged violation, provided that such evidence is not the sole basis for the revocation of probation. *Russell v. State,* 982 So.2d 642, 646 (Fla. 2008) [33 Fla. L. Weekly S302a]; *Bell v. State,* 179 So.3d 349 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2281a]; *Thompson v. State,* 994 So.2d 468, 471 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2596a].

[9]The majority references documents that would support the conclusion that the same Juan Florian named in the Judgment in the underlying case is the same Juan Florian named in the probation violation affidavit, including the complaint/arrest affidavit. The court record does not indicate that these documents were ever admitted into evidence and they cannot be used to support the decision of the trial court.

[10]The individual monitoring the progress of the Juan Florian named in the probation violation affidavit was no longer employed by the Advocate Program, the program which administered the conditions which were required as part of Florian's probation. The State failed to call any other witnesses involved in supervising Florian.

[11]Further complicating the issue for the State is that by failing to call any witnesses who supervised Appellant's probation, they were unable to establish that Appellant was advised that as a condition of his probation he could not commit any new criminal offenses.

[12]The majority's efforts to distinguish this case from *Cox* and to instead rely on *Moncus v. State,* 69 So.3d 341 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1986a] are unavailing. While the *Cox* court indicated that the trial court could rely on certified copies and official court records for a **sentencing**, there were no such records admitted into evidence in the procedurally and substantively different **probation violation hearing** at issue here. In *Moncus,* the court stated "the State must prove by **affirmative evidence** that the defendant and the person named on the prior judgment are the same person" (*emphasis added*). I could not agree more.

* * *

**Criminal law Driving while license suspended with knowledge Search and seizure Vehicle stop Reasonable suspicion Officer who observed defendant driving vehicle with tag that was registered to a trailer had reasonable suspicion that defendant was violating section 320.261, justifying traffic stop**

PATRICIA GATES, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 000067 AC 01. L.T. Case No. A91Q8GE. March 6, 2020. An Appeal from the County Court in and for Miami Dade County, Hon. Joseph Mansfield, Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and Susan S. Lerner, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Joshua Olin, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) Ms. Gates appeals a judgment finding her guilty of driving a motor vehicle while knowing that her driver's license was suspended. She argues on appeal that the trial court erred in denying her motion to suppress. She contends that the police officer who pulled her over lacked reasonable suspicion to conduct a traffic stop. We disagree, and affirm the judgment.

The officer testified that he was doing "random tag checks" of vehicles traveling northbound on South Dixie Highway. He observed Ms. Gates driving a blue Dodge Dakota pickup truck. The "tag results came back to a trailer[1]", and not a Dodge Dakota pickup truck. As a result, the officer conducted a traffic stop of Ms. Gates based on a possible violation of section 320.261, which provides in pertinent part that:

> Any person who knowingly attaches to any motor vehicle . . . any registration license plate . . . which plate . . . was not issued and assigned or lawfully transferred to such vehicle, is guilty of a misde meanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 320.261, Fla. Stat. (2019). After stopping Ms. Gates, the officer determined that she was driving with a suspended driver's license.

Ms. Gates maintains that the officer had to personally observe her attaching the license plate to the Dakota "before there can be a reasonable basis for believing the defendant committed the misdemeanor offense." (Initial Br. at 2). Ms. Gates cites *Phillips v. State,* 531 So. 2d 1044, 1045 (Fla. 4th DCA 1988) in support of this proposition. This citation is off target.

*Phillips* stands for the proposition that a police officer may only make a ***warrantless arrest*** of a person for a violation of section 320.261 if the officer personally observed the person committing the offense in the presence of the officer.

> Since violation of statutory section 320.261 is only a misdemeanor, a police officer may arrest without a warrant only if the person has committed the offense in the presence of the officer. § 901.15(1), Fla.Stat. (1985). *See, Phillips v. State,* 314 So.2d 619 (Fla. 4th DCA 1975). There is nothing in the record to indicate that the police officer personally observed appellant attaching a registration license plate or a validation sticker which was not lawfully transferred to the subject vehicle. In the absence of such personal observation by the police officer herein, probable cause to make the warrantless arrest did not exist.

*Phillips v. State,* 531 So. 2d 1044, 1045 (Fla. 4th DCA 1988). Because the officer's arrest of Phillips was unlawful, his search of Phillips incident to such arrest (revealing 13 tin foil packets of cocaine) was also unlawful. As a result, the *Phillips* court held that the trial court should have granted the motion to suppress the evidence obtained from Phillips resulting from an unlawful arrest and search.

This case does not involve the warrantless arrest of a person for committing a misdemeanor. Nor does it involve law enforcement action that would require probable cause. The question in this case is whether the officer had a "reasonable suspicion," or a "founded

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suspicion," that Ms. Gates was involved in criminal activity. He clearly did.[2]

In *Ellis v. State,* 935 So. 2d 29 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1734a], Officer Wilson—as she did "all day long, every day of the week"—"ran the tag" on the car Ellis was driving. The computer in her patrol car came back with the response of "no record found." Officer Wilson therefore pulled Ellis over and ended up arresting him for driving without a license.

As articulated by the *Ellis* Court, the issue it had to "decide is whether the officer who stopped Ellis had at least a reasonable, articulable suspicion that the car Ellis was driving was not properly registered." *Id. at 32.* The Court held that she did.

> We conclude that given her experience and the facts known to her at the time, it was reasonable for Officer Wilson to infer that the car was not properly registered. Accordingly, she was justified in stopping the car to investigate further.

*Id.*

Likewise, in this case the officer's observations that Ms. Gates was driving a Dodge Dakota pickup truck that had a license plate that was registered to a trailer, provided the officer with a reasonable, articulable basis to infer that there was a violation of section 320.261 of the Florida Statutes. At a minimum, the officer "was justified in stopping [Ms. Gates] to investigate further." Under *Ellis,* the trial judge properly denied Ms. Gates's motion to suppress.

While not binding on us, we also find persuasive the analysis of the United States Court of Appeals for the Eleventh Circuit analyzing the very same factual scenario and argument made in this case. In *United States v. Garrette,* 745 Fed. Appx. 124, 125 (11th Cir. 2018), the Court reviewed the trial judge's denial of Garrette's motion to suppress.

> The district court concluded the totality of the circumstances known to Deputy Smith when he initially pulled Garrette over provided a particularized and objective basis for believing Garrette was violating § 320.261, Florida Statutes, which makes it a second degree misde meanor to knowingly attach a license plate to a vehicle to which that plate is not lawfully assigned. Garrette was driving a Ford Explorer with an orange transporter license plate.

*See id.* In concluding that the deputy's initial stop of Garrette was lawful, the Court wrote:

> Garrette asserts Deputy Smith could not have had reasonable suspi cion to suspect a violation of § 320.261 because Deputy Smith did not see Garrette attach the transporter license plate to the vehicle. The case Garrette cites for this proposition is, however, inapplicable. In *Weaver v. State,* 233 So.3d 501 (Fla. 2d DCA 2017) [43 Fla. L. Weekly D13a], a Florida appellate court invalidated a warrantless arrest for a misde meanor tag violation because the officer did not observe the defendant committing the offense. But this case concerns reasonable suspicion, not probable cause. *See Arvizu,* 534 U.S. at 274, 122 S.Ct. 744 (noting that, for purposes of a reasonable suspicion analysis, "the likelihood of criminal activity need not rise to the level required for probable cause.").

*United States v. Garrette,* 745 Fed. Appx. 124, 126 n.3 (11th Cir. 2018).[3]

Similarly, this case involves a "reasonable suspicion analysis," as opposed to consideration under a probable cause standard. Here, the officer's suspicion that Ms. Gates was involved in criminal activity was reasonable. His observations that Ms. Gates was driving a motor vehicle with a license plate registered to a trailer "provided a particularized and objective basis for believing" Ms. Gates was violating section 320.261 of the Florida Statutes.[4] The officer did not have to personally observe Ms. Gates attach the plate to the Dakota for his suspicion to be reasonable.

Lastly, we note then-Chief Judge Lawson's observations in *State v. Laina*, 175 So. 3d 897 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2117d] (quoting earlier cases) that:

> To justify temporary detention, only "founded suspicion" in the mind of the detaining officer is required. . . . A "founded suspicion" is a suspicion which has ***some factual foundation in the circumstances observed by the officer***, when those circumstances are interpreted in the light of the officer's knowledge. . . . Significant to this analysis, "[r]easonable suspicion . . . [is] ***based on probabilities, not absolute certainty***.

*State v. Laina*, 175 So. 3d 897, 899 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2117d] (emphasis added) (internal quotations and citations omitted).[5]

For all of these reasons, we affirm the trial court's denial of the motion to suppress and the judgment. The trial judge correctly rejected the argument that the police officer had to "actually see Ms. Gates transfer it or attach it" in order to have a basis to pull her over.

AFFIRMED. (TRAWICK and WALSH, JJ., concur.)

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[1]"'Trailer' means any vehicle without motive power designed to be coupled to or drawn by a motor vehicle and constructed so that no part of its weight or that of its load rests upon the towing vehicle." § 320.01(4), Fla. Stat. (2019).

[2]We note that while the officer could not arrest Ms. Gates unless he personally observed her committing the misdemeanor in his presence, nothing precluded the officer from pulling her over to issue her a notice to appear in court for the violation of section 320.261. "If a person is arrested for an offense declared to be a misdemeanor of the first or second degree . . . notice to appear may be issued by the arresting officer . . . ." Fla. R. Crim. P. 3.125(b). Moreover, "a law enforcement officer is clearly entitled to stop a vehicle for a traffic violation." *See Cresswell v. State,* 564 So. 2d 480, 481 (Fla. 1990). All of this, of course, would've resulted in the same discovery that Ms. Gates was driving with a suspended license.

[3]"Reliance on a hunch cannot justify a stop; however, 'the likelihood of criminal activity ***need not rise to the level required for probable cause***, and it falls ***considerably short of satisfying a preponderance of the evidence standard***.' " *United States v. Garrette,* 745 Fed. Appx. 124, 125 (11th Cir. 2018) (emphasis added) (quoting from and citing *United States v. Arvizu,* 534 U.S. 266 (2002) [15 Fla. L. Weekly Fed. S81a]).

[4]Leaving aside a possible violation of section 320.261, it is eminently reasonable to suspect that the switching of license plates is evidence of the possibility that a crime was committed, is being committed, or was about to committed. *See generally United States v. Hunley,* 07 CR 168A, 2010 WL 2510901, at *5 (W.D.N.Y. Feb. 26, 2010), report and recommendation adopted, 07 CR 168, 2010 WL 2510900 (W.D.N.Y. June 17, 2010) (inconsistent license plate sufficient to create reasonable suspicion for an investigatory stop). Especially where, as here, the discrepancy is between a Dodge Dakota pickup truck, and a license plate for a trailer.

[5]*See generally State v. Pena,* 247 So. 3d 61 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1030a] (reversing order granting motion to suppress where stop was lawfully based on license plate frame which obscured the word "Florida" on the plate in violation of statute).

* * *

**Civil procedure Dismissal Failure to prosecute Trial court erred in denying motion to set aside dismissal for lack of prosecution as untimely filed more than one year after order of dismissal where motion alleges that order of dismissal was void because plaintiff never received notice of hearing on lack of prosecution Reversed and remanded with directions to conduct evidentiary hearing on issue of whether plaintiff was served with notice of hearing**

FIA CARD SERVICES, N.A., Appellant, v. ANA RODRIGUEZ, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 2019 173 AP 01. L.T. Case No. 2012 27189 CC 05. March 19, 2020. An Appeal from Miami Dade County Court, William Altfield, Judge. Counsel: Law Offices of Andreau, Palma & Andreu, P.L., and Carlos Cruanes, for Appellant. John J. Boyle, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

**OPINION**

(WALSH, J.) Plaintiff, FIA Card Services, N.A., filed an action to collect a debt. The trial court dismissed the case for lack of prosecution. Plaintiff filed a motion to set aside the dismissal under Rule 1.540(b), Florida Rules of Civil Procedure, 12 months and 10 days after the dismissal was entered. In support of the motion, Plaintiff offered sworn proof that it never received the trial court's notice of

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lack of prosecution hearing nor the order dismissing the case. The trial court denied the motion as untimely filed more than one year after the dismissal. On appeal, Plaintiff argues that because the order of dismissal was void, its motion to set aside the dismissal was not untimely under the rule. We agree and reverse.

We review an order denying motion to set aside dismissal for abuse of discretion. *Shields v. Flinn,* 528 So. 2d 967, 968 (Fla. 3d DCA 1988). Under Rule 1.540(b), a party must file a motion to set aside a judgment or dismissal within a reasonable time not to exceed one year. However, the one-year time limitation does not apply if the underlying judgment or decree is void.

An order entered without notice to the parties deprives the parties of procedural due process and is therefore void. *State, Dept. of Revenue ex rel. Johnson v. Haughton,* 188 So. 3d 32 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D616a]; *Lamoise Group, LLC v. Edgewater S. Beach Condo. Ass'n, Inc.,* 278 So. 3d 796, 799 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2092a]. An order dismissing an action for lack of prosecution rendered without service to the Plaintiff is likewise void. *Courtney v. Catalina, Ltd.,* 130 So. 3d 739 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D208a]. Plaintiff offered sworn proof and argued that it never received notice of the hearing on lack of prosecution. Because it was unaware of the hearing, Plaintiff claims that it could not avail itself of the 60-day safe harbor period in which to act. *Id.* at 739.

Had Plaintiff merely claimed that it received notice of the hearing but never received the final order of dismissal, the order of dismissal would not be void and would be subject to the one-year limitation. *See Renovaship, Inc. v. Quatremain,* 208 So. 3d 280 (Fla. 3d DCA 2016) [42 Fla. L. Weekly D21a] (order of dismissal subject to one-year limitation on motion to set aside dismissal where plaintiff served with notice of lack of prosecution hearing but never received the order). Because Plaintiff here never received notice of the hearing, the order of dismissal was void. It was therefore an abuse of discretion to deny the motion to set it aside and we therefore reverse.,

Plaintiff argues that its proof of lack of service was undisputed. However, it appears the order denying relief was based solely upon the time-bar and not on whether the notice of hearing was, in fact, served by the Clerk. There was no evidentiary hearing below to resolve the lack of service issue. But it appears from the record that counsel for the Plaintiff moved offices at some point between the hearing for lack of prosecution and the filing of the motion to set aside the dismissal.

The record reflects that the clerk mailed the FWOP notice on March 29, 2017 to Plaintiff's counsel at: Yulexy Solis Garcia at 1000 NW 57th Court, Suite 400, Miami, Florida 33126-3292. This is the same address set forth in Plaintiff's May 4, 2015 first amended complaint signed by Ms. Solis Garcia. Yet in her June 11, 2018 motion to set aside the dismissal, Ms. Solis Garcia's address is 815 NW 57th Avenue, Suite 401, Miami, Florida 33126. There is no indication in the docket that Plaintiff's counsel updated the clerk of court with a change of address, before the clerk mailed the FWOP notice.[1]

On remand, the trial court should conduct a "limited evidentiary hearing" to determine whether plaintiff received notice. "[W]hen the facts concerning the receipt of the notice of the opportunity to be heard are disputed, the determination of whether an order is void can be resolved only after an evidentiary hearing." *Purdue v. R.J. Reynolds Tobacco Co.,* 259 So. 3d 918, 922 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2542b].

We therefore reverse and remand with directions to conduct a limited evidentiary hearing to determine whether the Plaintiff was served with notice of the lack of prosecution hearing. If Plaintiff was not served, the dismissal should be set aside and the case allowed to proceed. (REBULL and TRAWICK, JJ., CONCUR)

[1] Finally, we reject Purdue's assertions in this appeal that she is entitled to have this court simply vacate the order of dismissal because her evidence of nonreceipt is unrefuted. Here, there is a docket entry that states that the clerk of court mailed the notice of the lack of prosecution to "all parties," and the clerk is presumed to have properly discharged his duties. *See Wells v. Thomas,* 78 So.2d 378, 384 (Fla. 1954) ("We must presume that the Clerk performed his statutory duty, which was to mail the notice and certify thereto, or else certify that he had no addresses of record of the persons entitled to notice; and we think it is just as reasonable to infer that the notice to the appellee Hyslop was, in fact, mailed to him (as in the case of the other tax deed holder, Savage) and that the record thereof became misplaced, as it is to infer that the Clerk completely ignored his statutory duty. To do otherwise under the particular circumstances here present would amount to an imputation of fraud against the Clerk and this we will not do in the absence of more compelling evidence."); *Long v. Sphaler,* 89 Fla. 499, 105 So. 101, 104 (1925) (same). Therefore, Purdue must present evidence to rebut the presumption that the clerk properly discharged his duties as documented in the docket.

*Purdue v. R.I. Reynolds Tobacco Co.,* 259 So. 3d 918, 923 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2542b]

* * *

**Municipal corporations Zoning Non-conforming use City did not err in determining that automobile towing and storage operation fell within permitted use of "automobile and truck storage" in property's former zoning designation and, thus, could continue to operate as legal nonconforming use under current zoning No merit to argument that towing and storage operation was unapproved conditional use whose continued nonconforming use is illegal City code's sunsetting provision for vacant land being used as nonconforming use is inapplicable to property that is not being used as vacant land, but as towing and storage operation**

SUNSET LAND ASSOCIATES, LLC, and SH OWNER, LLC, Petitioners, v. THE CITY OF MIAMI BEACH, and BEACH TOWING SERVICES, INC., Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami Dade County. Case No. 19 117 AP 01. Board of Adjustment File No. ZBA18 0079. February 26, 2020. On a Petition for Writ of Certiorari seeking to quash an Order of the City of Miami Beach's Board of Adjustment (File Number: ZBA18 0079). Counsel: Jeffrey S. Bass, Kathrine R. Maxwell, Mark E. Grafton and Allannah L. Shubrick, Shubin & Bass, P.A., for Sunset Land Associates, LLC, and SH Owner, LLC., Petitioners. Raul J. Aguila, Steven H. Rothstein and Nicholas E. Kallergis, City Attorney's Office, The City of Miami Beach, Respondent. Kent Harrison Robbins, The Law Offices of Kent Harrison Robbins, P.A., for Beach Towing, Respondent. Rafael E. Andrade, The Law Offices of Rafael E. Andrade, P.A., for Beach Towing Services, Inc., Respondent.

(Before WALSH, TRAWICK and REBULL, JJ.)

(WALSH, J.) Petitioners, Sunset Land Associates, LLC ("Sunset") and SH Owner, LLC ("SH") (collectively the "Petitioners"), seek to quash a March 20, 2019 Order of the Board of Adjustment (the "Board") of the City of Miami Beach (the "City").[1] The Board affirmed the City Planning Director's determination that Beach Towing Services, Inc. ("Beach Towing") may continue to use the real property located at 1349 Dade Boulevard, Miami Beach, Florida (the "Subject Property"), for its automobile storage and towing service operation, as a legal non-conforming use (the "Administrative Determination").

*Standard of Review*

Certiorari review by the circuit court requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and, (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). We find in this instance that the lower tribunal accorded procedural due process, observed the essential requirements of the law, and the Administrative Decision, with accompanying Order, is supported by competent substantial evidence and deny this Petition.

*Facts*

For more than 33 years, since at least 1986, Beach Towing has been operating an automobile storage and towing company at the Subject Property. When Beach Towing was first established, the Subject Property was zoned C-6 ("Intensive Commercial District").

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On October 1, 1989, C-6 was rendered obsolete when the City adopted City Ordinance 89-2665, rezoning the property CD-2 ("Commercial Medium Intensity"). From 1989 until the present, Beach Towing has had yearly certificates of occupancy and use approved as legally nonconforming uses and has continued to operate without interruption.

Since the zoning changes eliminating the C-6 designation, the character of the neighborhood has changed. Medium density residential development and mixed-use development have flourished. The City very recently approved the Petitioner's five-story mixed-use project containing both residential and commercial uses. The Petitioners' Subject Property is located several hundred feet away and across the street from Beach Towing's automobile storage and towing service operation.

*Argument*

The gist of this Petition for Writ of Certiorari is that Beach Towing's automobile storage and towing company was never legal under the City's then-existing code, and therefore, its continued nonconforming use is illegal. According to Petitioners, Beach Towing did not operate as a permitted, nonconforming use, but rather as a conditional use. The Petitioners claim that because Beach Towing's automobile storage and towing service operation was never approved as a conditional use under the Former Code, it was not legally established prior to the adoption of the Present Code.

The Petitioners contend that the City violated the essential requirements of the law when it concluded that Beach Towing's automobile storage and towing service operation constituted a legal use. The Petitioners further contend that after reaching this conclusion, the City violated the essential requirements of law in failing to sunset Beach Towing's use, even if it was originally established as a legal nonconforming use under the Present Code.

Beach Towing responds that it never operated as a conditional use, but rather, as a legally nonconforming use, originally permitted within Districts C-6 and, by reference, C-5. And since Beach Towing does not occupy "vacant land," Miami Beach's sunsetting provisions do not apply to it.

*Analysis*

To address these issues, we must examine the plain language and interplay between Miami Beach's then-existing and current city code.

Present Code section 114-1 (Definitions) defines a nonconforming use as:

> a use which exists lawfully prior to the effective date of these land development regulations and is maintained at the time of and after the effective date of these land development regulations, although it does not conform to the use restrictions of these land development regula tions.

Present Code section 118-390(b) defines the term "nonconformity" as "a use, building, or lot that does not comply with the regulations of this article. Only ***legally established*** nonconformities shall have rights under this section." (emphasis added). Present Code section 118-390(d)(3) defines "legally established" to include, [a]n existing use which conformed to the code at the time it was established." Thus, the legal question presented in this Petition—whether Beach Towing was and is operating as a legally nonconforming use—depends on whether Beach Towing's use of the Subject Property existed lawfully from its inception under the prior C-6 and C-5 zoning districts.

Pre-1989 zoning code district C-6 (Intensive Commercial District), the zoning district within which Beach Towing operated, was enacted to address the following purpose:

> A. DISTRICT PURPOSE. This is a utilitarian district characterized by sales, storage, repair, processing, wholesaling and trucking activities and shall not include any residential uses. Former Code section 6 13 A.

The C-6 designation set forth a list of permitted uses, including:

> B. USES PERMITTED
>
> 1. ***Any non-residential use permitted in C-5 District*** except those uses listed as conditional uses. (emphasis added). Former Code section 6-13 B.1.

Thus, a non-residential use permitted in the C-5 (General Business District) was permitted in the C-6 district. Turning to the purpose of the C-5 district, the code states:

> A. DISTRICT PURPOSE. This is a mixed use district which permits high density residential, retail, and light and heavy service commercial development. Former Code section 6 12 A.

Included within the C-5 permitted uses was:

> 20. Storage garages, automobile and truck storage within an area enclosed by an opaque masonry wall or structural wood fence not less than 6 feet in height. Such wall or fence shall totally screen garage and work area from public view. Former Code section 6 12 B.20.

The City permitted Beach Towing to operate within district C-6, which included its permitted use for "automobile and truck storage" within district C-5.

By the plain language of section 6-12 C-5(B)(20), Beach Towing's storage facility fits within the defined permitted use. The Subject Property land is being used to store cars and trucks. The Subject Property is a walled (by a 6-foot masonry wall), paved lot and buildings used for the storage of trucks and automobiles, which is precisely how Former Code section C-5(B)(20) defined its permitted use: "Storage garages, automobile and truck storage within an area enclosed by an opaque masonry wall . . . ." Cars and trucks are towed to the Subject Property where they are stored until their retrieval or demise. The record further reflects that the Subject Property holds a contract with the Miami Beach Police Department for the storage of vehicles seized incident to criminal activity or illegal parking.

Despite operating within the plain language of the provision, the Petitioners rely upon the exception contained in the second part of Former Code section 6-13 C-6 (B)(1), which provided that one of the listed permitted uses in the C-6 district was "[a]ny non-residential use permitted in C-5 district ***except those uses listed as Conditional Uses***." (emphasis added). A subsequent section of C-6, upon which Petitioners rely heavily, addresses conditional uses:

> Former Code section 6 13 C 6(B) provides that:
>
> 20. The following uses may be permitted as ***conditional uses***:
>
> i. Uses not listed above which are ***similar in character*** to one or more permitted uses, and which would not be inappropriate in the district. (emphasis added).

Petitioners argue that Beach Towing's use is not the same as, but rather, "similar in character" to an "automobile and truck storage" facility, and therefore, required a ***conditional use*** permit prior to 1989. Petitioners have seized upon language contained in the current opinions of the Planning Director that towing uses are "consistent with" and "related to" the truck and automobile storage land use permitted by then-existing C-5 district. Relying upon Former Code section 6-13 C-6 B(20)(i), above, Petitioners argue that a towing and storage company is "***similar in character***" to a storage garage, and therefore, Beach Towing was illegally continuing to operate as a conditional use, rather than a legally nonconforming use. We disagree.

First, as pointed out above, Beach Towing's land use falls within the plain language of Former Code section 6-12 C-5 (B)(20). Second, Petitioners urge strict construction to deprive the property owner of its use, while binding authority compels us to apply the converse

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principle.

"Zoning laws are in derogation of the common law and, as a general rule, are subject to ***strict construction in favor of the right of a property owner to the unrestricted use of his property***." *Mandelstam v. City Comm'n of City of S. Miami,* 539 So. 2d 1139, 1140 (Fla. 3d DCA 1983) (emphasis added).

> Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their ***broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner***.

*Rinker Materials Corp. v. City of North Miami,* 286 So. 2d 552, 553 (Fla.1973) (emphasis added). Under this broad interpretation favoring property owners, "storage garages" ***must*** be construed in favor of Beach Towing, and thus no conditional use permit was required under the Former Code, because automobile storage and towing service operations were a permitted use in both the C-5 or C-6 districts.

Further, although the word "towing" is not contained in districts C-5 or C-6, this does not prohibit a towing ***company*** from operating its ***car storage*** on the land zoned within C-5/C-6. "Towing" occurs offsite, while automobile and truck storage occurs on the land. Moreover, 6-12 C-5(B)(20), defining car and truck storage use, concludes with the following statement: "Such wall or fence **shall totally screen garage and work area** from public view." Former Code section 6-12 C-5(B)(20) does not address what work might occur in an "automobile and truck storage," but language addressing a "garage and work area" means that the City well understood that storage or work would be done, so long as the storage or work area was shielded from public view. We find no error in the City's determination that Beach Towing's automobile storage and towing service operation fell within Former Code section 6-12 C-5(B)(20), "automobile and truck storage," permitted within C-6(B)1.

The City and Beach Towing presented competent substantial evidence to support the conclusions below. Both the present and former City Planning Directors have consistently interpreted the City Code for more than 30 years to permit multiple storage and towing companies within districts C-5 and C-6 of the earlier Code. Our determination that this interpretation was correct is further supported by a City decision made in a 1987 case involving another Miami Beach towing company, Magnum Towing, in which the City affirmed that automobile storage and towing service operations were a permitted use in the C-5 zoning district.

In addition, the 1987 Planning Director Kurlancheek (who now, after purportedly being hired by the Petitioners as a planning expert, gives a different interpretation), then opined that towing services were related to storage of automobiles, permitted within C-5 and C-6 zoning designations. Accordingly, automobile storage and towing service operations were permitted in the C-6 district, because they were a permitted use in the C-5 district.

We further find that Beach Towing's automobile storage and towing service operation did not sunset under the Present Code. Present Code section 118-391 states in part that:

> In any district where ***vacant land*** is being used as a nonconforming use, and such use is the main use and not accessory to the main use conducted in a building, such use shall be discontinued not later than two years from the effective date of these land development regula tions. (emphasis added).

The record contains substantial competent evidence establishing that the Subject Property is not being used as "vacant land." We fail to see how storage of cars and trucks on paved land surrounded by a six-foot wall can fairly be characterized as "vacant land." Accordingly, Beach Towing's use of its property for an automobile storage and towing service operation does not sunset under the Present Code.

Based upon the above analysis, the Petition for Writ of Certiorari is hereby DENIED. (TRAWICK and REBULL, JJ. concur.)

---

[1]The Board re executed the Order on March 25, 2018.

* * *

**Taxation Ad valorem Exemptions Complaint for writ of mandamus filed by county aviation authority challenging property appraiser's denial of governmental exemption from ad valorem taxation for certain properties owned by authority and leased to private for-profit tenants, arguing that value adjustment board rather than property appraiser was required to make initial determination as to exemption Petition denied, as authority does not have clear legal right to relief sought If leasehold interest in properties is at issue, that interest is held by tenants, not by authority, and it is tenants' interests that have been harmed If fee interest in properties is at issue, law requires property appraiser to make initial determination as to entitlement to governmental exemption for leased property for which rent payments are due Moreover, authority has adequate legal remedy available by filing case in circuit court challenging denial of exemption**

HILLSBOROUGH COUNTY AVIATION AUTHORITY, an independent special district of the State of Florida, Plaintiff, v. VALUE ADJUSTMENT BOARD OF HILLSBOROUGH COUNTY, an administrative body, and BOB HENRIQUEZ, as Property Appraiser, Defendant. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 20 CA 000570, Division D. February 20, 2020. Counsel: Robert E. V. Kelley, Jr., Hill, Ward & Henderson, P.A., Tampa, for Plaintiff. Rinky S. Parwani, Parwani Law, P.A. Tampa, for Defendant Value Adjustment Board of Hillsborough County. William D. Shepherd, Property Appraiser's Office, Tampa, for Defendant Bob Henriquez, as Hillsborough County Property Appraiser.

FINAL JUDGMENT DENYING COMPLAINT FOR WRIT OF MANDAMUS AND ORDER DISCHARGING ALTERNATIVE WRIT

(EMILY A. PEACOCK, J.) THIS MATTER came before the court on February 14, 2020. The court has reviewed the record, applicable law, and heard the arguments of counsel and has determined that plaintiff's complaint for writ of mandamus should be DENIED.

**Parties and Procedural History**

Plaintiff Hillsborough County Aviation Authority ("Aviation Authority") is an independent special district of the State of Florida created by the Florida Legislature owning certain properties throughout the county primarily used in conjunction with Tampa International Airport and other regional airports within Hillsborough County.

Defendant Value Adjustment Board of Hillsborough County ("VAB") is an administrative body organized pursuant to § 194.015, Florida Statutes.

Defendant Hillsborough County Property Appraiser ("Property Appraiser") is a constitutional office created by Article VIII, Section 1(d) of the Florida Constitution.

Intervenors Pemco World Air Services, Inc. and LGSTX Services, Inc. ("Tenants") are tenants leasing property from the Hillsborough County Aviation Authority who were permitted to intervene for the purpose of filing a memorandum of law in support of Hillsborough County Aviation Authority's Complaint for Writ of Mandamus and otherwise participating as intervenors in this proceeding.

The genesis of the Aviation Authority's Complaint is the denial of an exemption from ad valorem real property taxation for certain properties owned by the Aviation Authority and, for the most part, leased to certain private for-profit tenants.[1] The Property Appraiser denied exemptions for these properties for the 2019 tax year. The Aviation Authority alleges entitlement to these exemptions under §§ 196.199 and 196.012(6), Florida Statutes, commonly referred to as a governmental exemption. As a result, the Aviation Authority filed

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petitions with the VAB, which were heard by a special magistrate appointed by the VAB. The special magistrate recommended upholding the Property Appraiser's denial of the exemptions. Prior to review of the recommended decision by the full VAB, the Aviation Authority filed this action.

The statutory subsection at issue in this case is § 196.199(5), Florida Statutes, which states in full:

> *Leasehold interests* in governmental property shall not be exempt pursuant to this subsection unless an application for exemption has been filed on or before March 1 with the property appraiser. The property appraiser shall review the application and make findings of fact which shall be presented to the value adjustment board at its convening, whereupon the board shall take appropriate action regarding the application. If the exemption in whole or part is granted, *or established by judicial proceeding*, it shall remain valid for the duration of the lease unless the lessee changes its use, in which case the lessee shall again submit an application for exemption. The requirements set forth in s. 196.194 shall apply to all applications made under this subsection.

§ 196.199(5), Fla. Stat. (emphasis added).

Aviation Authority asserts that the procedure set forth in § 196.199(5) was not followed and that, as opposed to the VAB making the initial decision on the exempt status of the properties, the Property Appraiser made the initial decision to deny the exemptions.[2]

Questions posed by this case are: (1) Whether the procedure outlined in §196.199(5) was followed; (2) Whether the procedure outlined in § 196.199(5) is applicable to the instant case; and (3) Whether the Aviation Authority has established that a writ of mandamus is appropriate.

**Taxation of Leasehold Interests in Florida**

The history of the taxation of leasehold interests in Florida is long and varied, from the absence of taxation (*See Park-N-Shop, Inc. v. Sparkman*, 99 So. 2d 571 (Fla. 1957)), to taxation as real property (*Williams v. Jones*, 326 So. 2d 425 (Fla. 1975)), to taxation as an intangible interest (*Chapter 80-368, Laws of Fla. 1980*; *Miller v. Higgs*, 468 So. 2d 371 (Fla. 1st DCA 1985); *review denied*, 479 So. 2d 117 (Fla. 1985); *disapproved of on other grounds*, 613 So. 2d 448 (Fla. 1993); *Capital City Country Club v. Tucker*, 613 So. 2d 448 (Fla. 1993)).

Section 196.199(2)(a)-(b), Florida Statutes, sets forth the tax treatment of leasehold interests in governmental property and states in full:

> (2) Property owned by the following governmental units but used by nongovernmental lessees shall only be exempt from taxation under the following conditions:
>
> (a) *Leasehold interests in property of* the United States, of the state or any of its several political subdivisions, or of municipalities, agencies, *authorities*, and other public bodies corporate of the state *shall be exempt from ad valorem taxation and the intangible tax* pursuant to paragraph (b) *only when the lessee serves or performs a governmental, municipal, or public purpose or function,* as defined in s. 196.012(6). *In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation.* However, a leasehold interest in property of the state may not be exempted from ad valorem taxation when a nongovernmental lessee uses such property for the operation of a multipurpose hazardous waste treat ment facility.
>
> (b) Except as provided in paragraph (c), the exemption provided by this subsection shall not apply to those portions of a leasehold or other interest defined by s. 199.023(1)(d), subject to the provisions of subsection (7). *Such leasehold or other interest shall be taxed only as intangible personal property pursuant to chapter 199, Florida Statutes 2005, if rental payments are due in consideration of such leasehold or other interest.* All applicable collection, administration, and enforcement provisions of chapter 199, Florida Statutes 2005, shall apply to taxation of such leaseholds. *If no rental payments are due pursuant to the agreement creating such leasehold or other interest, the leasehold or other interest shall be taxed as real property*. Nothing in this paragraph shall be deemed to exempt personal property, buildings, or other real property improvements owned by the lessee from ad valorem taxation.

§ 196.199(2)(a)-(b), Fla. Stat. (emphasis added).

For purposes of this case, subsection (2)(b) is of primary importance. This subsection notes that leasehold interests shall be taxed as intangible personal property if rental payments are due under the lease and as real property if no rental payments are due under the lease.[3] Florida Administrative Code rules hold the same. *See* Fla. Admin. Code R. 12D-3.002, 12D-3.003, 12D-13.046. In this case, there is no dispute between the parties that the Aviation Authority's tenants pay rent under the leases at issue.

**Section 196.199(5), Florida Statutes**

Section 196.199(5), Florida Statutes, by its plain language applies only to *leasehold interests* in governmental property. Thus, of paramount importance in this case is whether the interest denied a governmental exemption by the Property Appraiser is a leasehold interest.

The Property Appraiser provided an affidavit stating that the interest assessed here is the fee interest and the methodology used results in a value of the fee interest, as opposed to the leasehold interest. That affidavit was uncontested. Two appellate decisions in particular support the conclusion that the Property Appraiser's duty is to assess the fee interest and not the leasehold interest.

In *Page v. City of Fernandina Beach*, 714 So. 2d 1070 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D1477a], the county property appraiser, like here, denied an exemption to property leased by the City of Fernandina Beach to various private tenants, some of which was located at a local airport. *Id.* at 1072. The tenants argued the applicability of § 196.199(5) to the assessments. *Id.* at 1077. The First District Court of Appeal rejected that argument, noting, "[b]y its terms, this statute applies only to leasehold interests in governmental property, not to the fee interest in controversy here." *Id.* As in *Page*, this case involves the denial of an exemption to property leased from a governmental agency to a private entity.

In *Capital City Country Club v. Tucker*, 613 So. 2d 448 (Fla. 1993), the issue was again the denial of a governmental exemption to property leased from a government entity to a private tenant—this time from the City of Tallahassee to a private country club. *Id.* at 450. In *Tucker*, the tenant argued that because it was paying intangible taxes to the state on the leasehold interest, the assessment of the fee interest of the real estate by the county property appraiser resulted in double-taxation. *Id.* The Florida Supreme Court rejected that premise, stating,

> [w]e reject the club's contention that the imposition of real estate taxes on the fair market value of the land and the imposition of intangible taxes on the leasehold interest constitutes double taxation of the property. Intangible personal property is property which is not itself intrinsically valuable, but which derives its chief value from that which it represents. §§ 199.021(1), 192.001(11)(b), Fla. Stat. (1991). The intangible tax is being imposed on the rights afforded to the club under the lease. The real estate taxes, on the other hand, are being imposed on the land itself. In Florida, real estate taxes are collected by the county, while the intangible tax on leasehold interest is collected by the state. In this case, the club, as the holder of a leasehold interest, is legally responsible for the intangible tax. . . . It is clear that that the club's leasehold and the city's real property are completely separate interests.

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*Id* at 452. *See also 1108 Ariola, LLC v. Jones*, 71 So. 3d 892, 894 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1537a] ("In 1980, section 196.199(2)(b), Florida Statutes, which essentially reads the same today, was enacted making private leaseholds of government owned property exempt from ad valorem taxation and subject only to intangible personal property taxes when rental payments are due as consideration for the leaseholds.").

It is clear that the interest denied the exemption in this matter is the fee interest in the property and § 196.199(5) is not applicable.[4]

**Writ of Mandamus**

The prerequisites for the issuance of a writ of mandamus require the moving party to demonstrate that:

1. Petitioner has a clear legal right to the requested relief;
2. Respondent has a clear, legal, ministerial duty to perform; and
3. Petitioner has no other adequate legal remedy available.

*Tucker v. Ruvin*, 748 So. 2d 376, 377 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D202b].

Under § 196.199(5), Florida Statutes, and Florida case law, the Aviation Authority does not have a clear legal right to the relief sought here. If, as the Aviation Authority argues, it is the leasehold interest that is at issue, that interest is held by the tenants, not the Aviation Authority, and it is the tenant's interest, not that of the Aviation Authority, that has been harmed.

Second, under the statutory framework and case law, it is clear that the Property Appraiser, not the VAB, must make the initial determination as to entitlement of a government exemption, except in the instance where no rent payments are due under a lease of governmental property—only when no rent payments are due under the lease is the leasehold interest treated as real property by a county property appraiser.

Even if § 196.199(5) were applicable, it is not clear that the statute was violated or that the Aviation Authority was deprived of any right to a hearing. All applications made under §196.199 (5) are subject to the requirements of §196.194, Florida Statutes. Section 196.194, Florida Statutes, requires the VAB to hear disputed or appealed applications for exemptions, and to grant such exemptions in accordance with the criteria set forth in Chapter 196. § 196.194, Fla. Stat. Furthermore, under § 194.035(1), Florida Statutes, in counties having a population of more than 75,000, the VAB shall appoint special magistrates for the purpose of taking testimony and making recommendations the VAB may act upon without further hearing. Although the special magistrate's role is not specified in § 196.199 (5), special magistrates are specially trained to hear matters related to exemptions. § 194.035(1), Fla. Stat. Hearings before a special magistrate occur under the auspices of the VAB. At the hearing before the special magistrate the Aviation Authority and the Property Appraiser presented facts and legal argument, upon which the special magistrate made findings of fact and conclusions of law. Upon determining the special magistrate's decision met certain legal requirements, the VAB would then have considered and likely adopted the recommended findings of fact and conclusions of law, had this action not delayed that process. *See* Fla. Admin. Code R. 12D-9.031(3) ("If the board determines that a recommended decision meets the requirements of subsection (1), the board shall adopt the recommended decision."). Accordingly, this court finds that nothing about the conduct or contemplated conduct of proceedings violates the requirement for VAB review under § 196.199(5), which requires only that appropriate action be taken; it does not mandate specific action or procedure. Moreover, pursuant to § 194.036(2), Florida Statutes, the Aviation Authority has the option to file an action in circuit court challenging the denial of the exemption. Indeed, under § 194.171, Florida Statutes, the Aviation Authority can bypass the VAB altogether and file a case in circuit court. Thus, the Aviation Authority has an adequate legal remedy.

IT IS THEREFORE ORDERED that the Complaint for Mandamus against the Value Adjustment Board and the Hillsborough County Property Appraiser is DENIED. The alternative writ issued January 22, 2020 is hereby DISCHARGED.

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[1]It is important to note here that some properties at issue were not leased, but were vacant and held out for lease to prospective tenants, thus no leasehold interest existed at all, whether as an intangible contract right or as a real property interest. (*See* Decision of Value Adjustment Board, Findings of Fact, Compl. Ex. A, at 2.)

[2]Aviation Authority also makes the claim that under the latter part of § 196.199(5) the properties at issue are entitled to an exemption because the use of the property has not changed since a prior granting of the exemption to the same tenant. However, this proceeding is not the appropriate venue to decide the ultimate question as to whether the properties are entitled to a governmental exemption.

[3]Whether taxed as an intangible interest by the state or as real property by the county, the tax is an *ad valorem tax* a tax based upon value. *Miller v. Higgs*, 468 So. 2d 371, 376 (Fla. 1st DCA 1985), *review denied*, 479 So. 2d 117 (Fla. 1985), *disapproved of on other grounds*, 613 So. 2d 448 (Fla. 1993) ("The particular category of taxes at issue here is the 'ad valorem' (according to value) tax, which can be further divided into real property taxes (from which government property is exempt), tangible personal property taxes, and taxes on intangible personal property (defined by section 199.023(1), Florida Statutes)."). *See also Just Valuation & Taxation League, Inc. v. Simpson*, 209 So. 2d 229 (Fla. 1968) (describing the intangible tax as an 'ad valorem' tax).

[4]Several cases emphasize that the county property appraiser is specifically prohibited from including an intangible interest in assessing the real property. *GTE, Fla., Inc. v. Todora*, 854 So. 2d 731, 733 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1957a] ("Under the Florida Constitution, only the State may levy ad valorem taxes on intangible personal property. Art. VII, §§ 1(a), 2, 9(a), Fla. Const. Therefore GTE argues, the Sarasota County Property Appraiser's valuation based on the income approach was unconstitutional. We agree."); *Appleby v. Nolte*, 682 So. 2d 1140 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2164a].

* * *

**Licensing Driver's license Suspension Refusal to submit to breath test Where licensee was misinformed about consequences of refusing to perform field sobriety exercises, which he refused to perform, but was correctly advised of consequences of refusing to submit to breath test, which he also refused, misrepresentation about exercises was harmless and does not invalidate breath test refusal Petition for writ of certiorari is denied**

DEVIN LEONARD MONROE, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 19 CA 8867, Division J. March 5, 2020. Counsel: Stephen K. Miller, Law Offices of Stephen K. Miller, P.A., Gainesville, for Petitioner. Christie S. Utt, General Counsel, and Sam Frazer, DHSMV, Jacksonville, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(REX M. BARBAS, J.) THIS MATTER is before the court on Petitioner's amended petition for writ of certiorari filed October 9, 2019. A response was filed November 14, 2019, and Petitioner replied on December 16, 2019. In such proceedings the hearing officer is to determine whether three elements have been established by a preponderance of the evidence: 1) whether law enforcement had probable cause to believe that the person whose license was suspended was in actual physical control of a motor vehicle in this state while under the influence of drugs or alcohol; 2) 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 3) 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

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So. 2d 624 (Fla. 1982). Having reviewed the briefs, appendices, and applicable law, the court finds that although there is no doubt Petitioner was misinformed as to the consequences of refusing to perform field sobriety exercises, he was properly advised as to the consequences of refusing the breath test. For this reason, and because the misrepresentation about field sobriety tests was harmless in this case, the petition must be denied.

On May 11, 2019, at about 1:30 a.m. Petitioner was operating a mini-bike on a private roadway inside a private campground known as "Ginnie Springs Outdoors." Petitioner and his friends had paid to camp overnight at the site.

During his stay, because Petitioner was alleged to be driving the mini-bike in a reckless manner, private security personnel employed by Ginnie Springs Outdoors attempted to stop him. Because Petitioner disregarded security's request that he stop and posed a danger to other patrons, the private security personnel detained Petitioner until Trooper Ganus with the Florida Highway Patrol arrived. On arrival Trooper Ganus read Petitioner his Miranda rights. During his investigation, Trooper Ganus improperly advised Petitioner repeatedly that if Petitioner refused to participate in field sobriety exercises his license would be suspended. No one disputes that this was incorrect. Because of this, Petitioner contends his subsequent refusal to submit to a breath test was invalid as "fruit of the poisonous tree,"[1] and, therefore, the administrative suspension should be set aside.

The "fruit of the poisonous tree" doctrine is a type of exclusionary rule that forbids the use of evidence if it is the product of a search or seizure or interrogation carried out in violation of constitutional rights." *Craig v. State,* 510 So. 2d 857, 862 (Fla. 1987)(internal citations omitted). An officer cannot misinform an individual about his rights but likewise has no duty to inform him that field sobriety exercises are voluntary or that he has a right to refuse to submit to them. *State v. Whelan,* 728 So. 2d 807, 811 (Fla. 3d DCA 2002) [24 Fla. L. Weekly D640b]. Had Petitioner performed the field sobriety exercises under these circumstances, the results may well have been suppressed, because it would have been reasonable to conclude that Petitioner's performance was coerced by the misinformation. Because Petitioner did not perform the field sobriety exercises, however, there was nothing to suppress.

It is undisputed that law enforcement's request that Petitioner submit to the breath test was properly given. As he had done with the field sobriety exercises, Petitioner refused to submit to the breath test. Since Petitioner refused to perform the field sobriety exercises, the lawful request that Petitioner submit to a breath test was unrelated to Petitioner's refusal to perform any FSTs.[2] Because Petitioner refused to submit to the breath test, his license suspension is valid. § 322.2615(1)(b)1.a., Fla. Stat.

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

---

[1]*Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 441 (1963).

[2]Petitioner does not assert that, in the absence of evidence of his performance on field sobriety exercises there was insufficient cause to arrest him, and the court makes no determination thereon.

* * *

**Licensing Driver's license Permanent revocation Fourth DUI conviction Where licensee does not dispute that fourth DUI occurred, permanent revocation of his driver's license was required notwithstanding fact that adjudication was withheld for that offense in violation of section 316.656(1) Petition for writ of certiorari is denied**

CODY MARTIN, Petitioner, v. 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 10863, Division K. March 6, 2020. Counsel: Sam Frazer, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CAROLINE TESCHE ARKIN, J.) Cody Martin filed a petition for writ of certiorari to review the September 26, 2019, final administrative decision of the Department of Highway Safety and Motor Vehicles permanently revoking his driving privilege for four convictions of driving under the influence (DUI). The October 23, 2019, petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; § 322.31, Fla. Stat. This court reviews the administrative decision to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

The Court has reviewed the petition, appendix, response, and reply and finds that the revocation of Petitioner's driver's license should be affirmed. Petitioner concedes that the withheld adjudication violates the proscription in § 316.656(1), Florida Statutes, against withholding adjudication for driving under the influence. In addition, the court finds that the revocation is consistent with clear legislative intent to promote public safety, and to deny the privilege of driving to persons who have shown their indifference to the safety of others, as well as their demonstrated disregard for the laws of this state.

Before the offense leading to the revocation of his driving privilege, Petitioner had been convicted of DUI three times: June 9, 1997; December 11, 2000; and April 17, 2002. Adjudication was withheld on his fourth offense on October 9, 2014. State law requires the revocation of a person's driving privileges upon four DUI *convictions*. § 322.28(2)(d), Fla. Stat. Because adjudication was withheld as to the fourth offense, however, Petitioner contends he was not convicted, and the Department lacked the authority to permanently revoke his license. He contends the revocation departs from the essential requirements of law.

Petitioner concedes that § 316.656 prohibits courts from withholding adjudication of guilt for certain violations involving the operation of a motor vehicle, including any violation of § 316.193.[1] He contends, however, that because the state did not appeal or otherwise challenge the sentence, he does not have the necessary fourth conviction allowing the Department to revoke his license. The court disagrees with Petitioner that this requires it to quash the revocation.

Petitioner is correct that in some situations withheld adjudications do not count as convictions.[2] In *Raulerson v. State,* 763 So. 2d 285, 293 (Fla. 2000) [25 Fla. L. Weekly S542a], which analyzed the term "conviction" in the context of driving with a suspended license, the court said "[t]he focus of the definition [of 'conviction'] is whether an offense was *committed* and not on the judicial decision of whether to impose or withhold adjudication." *Id*. (Emphasis added.) Here, Petitioner does not dispute that the fourth offense was committed.[3]

The state contends, and the court agrees, that the challenge to the revocation of Petitioner's license under the circumstances presented here is at odds with the clear legislative intent expressed in § 322.263, Florida Statutes. It says:

> 322.263 Legislative intent. It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or other wise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demon strated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased and added deprivation of the

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privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

Petitioner's argument requires the court to overlook both the legislature's intent and that he seeks to take advantage of an adjudication withheld in violation of § 316.656(1). In denying the petition, the court's emphasis is on the fact that the fourth offense was committed, not on the form of the adjudication.

It is therefore ORDERED that the petition is DENIED on the date imprinted with the judge's signature.

---

[1]Section 316.656(1), Florida Statutes states in pertinent part: "[n]otwithstanding the provisions of s.948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of s. 316.193. . ."

[2]*See e.g.* § 322.34(11)(a b), Fla. Stat.

[3]To the extent the withheld adjudication constitutes an illegal sentence, the state is not foreclosed from further review. An illegal sentence may be corrected at any time. Fla.R.Crim.P. 3.800(a).

* * *

**Civil procedure Default Vacation Appeals Non-final order vacating default judgment meets irreparable harm prong for certiorari review where passage of seventeen years since judgment was entered has removed plaintiff's ability to make claim Service of process There was no competent substantial evidence to support invalidation of service on defendant where return of service was facially valid, and defendant's denial of service was insufficient to impeach summons Trial court's questioning of defendant about other cases defendant may have been involved in deprived plaintiff of neutral tribunal where defendant's answers factored into decision to invalidate service**

F. A. MANAGEMENT SOLUTIONS, INC., Petitioner, v. VICTORIA ANN LUNSFORD, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19 CA 5997, Division T. L.T. Case No. 00 CC 23459. February 13, 2020. Counsel: Hugh Shafritz and Aaron Miller, Shafritz and Associates, P.A., Delray Beach, for Petitioner. James S. Giardina, The Consumer Rights Law Group, PLLC, Tampa, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(ROBIN FUSON, J.) This case is before the court to review a nonfinal order setting aside a final judgment previously entered against Respondent Victoria Ann Lunsford (n/k/a Victoria McCracken) in 2001. Having reviewed the petition, response, reply, and appendices, the court determines that Respondent did not make the necessary evidentiary showing to invalidate service. Accordingly, the writ is granted.

Petitioner F. A. Management filed suit against Respondent Victoria Ann Lunsford, now known as Victoria McCracken in December, 2000. The return of service showed she was served January 11, 2001, at 7:35 p.m. by Frank St. Clair, at 14816 Oak Vine Drive, in Lutz, Florida. Respondent Lunsford made no appearance in the case. Shortly thereafter, a default judgment was entered against her and recorded.

On or about September 11, 2018, F.A. Management, the judgment creditor and Petitioner herein, began proceedings to enforce the judgment. As part of that process, it sent a number of discovery requests and legal correspondence by regular U.S. Mail to Respondent's current address in Longwood, Florida, starting on September 11, 2018. When she did not respond to the discovery requests sent in September, or the courtesy letter that followed on October 24, 2018, Petitioner filed a motion to compel responses on November 6, 2018, again mailing a copy to Respondent's Longwood address. She still did not respond. Only when Respondent's account was garnished in late February, 2019, to enforce the judgment did she appear in the case. Respondent moved to set aside the judgment under Florida Rule of Civil Procedure 1.540(b)(4), claiming the 2001 judgment was void for want of valid service. After an evidentiary hearing, the court granted Respondent's motion and set aside the judgment. Because an order setting aside a final judgment is a nonfinal order[1] that is not subject to review by *appeal* in circuit court under Rule 9.130, Florida Rule of Appellate Procedure, Petitioner filed a petition for writ of certiorari.[2]

For a court to exercise its discretionary certiorari jurisdiction over a nonfinal order such as the one presented here, a petitioner must typically show that the trial court departed from the essential requirements of law resulting in prejudice that cannot be remedied on plenary appeal. *Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC,* 99 So. 3d 450, 454-55 (Fla. 2012) [37 Fla. L. Weekly S589a]; *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1634a]. The showing of irreparable harm is jurisdictional. *Id.*

This court concludes that Petitioner meets the irreparable harm prong for certiorari review in this case because of the significant passage of time since the judgment was entered. The court is mindful that the mere necessity of having to try a case does not form the basis to find that a litigant will suffer irreparable harm, as instructed by *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 214 (Fla. 1998) [23 Fla. L. Weekly S551a]. This court is also aware that the passage of time does not make a void judgment valid. *Johnson v. State, Dept. of Revenue, ex rel. Lamontagne,* 973 So. 2d 1236, 1238 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D328a].That's why judgments entered without notice may be challenged at any time. *Id.* Authority Respondent relies on, including *Jaye* (demand for jury trial stricken), and *Whiteside v. Johnson*,[3] (denial of motion to dismiss), are distinguishable. On the other hand, the removal of a litigant's ability to make a claim demonstrates irreparable harm that cannot be remedied on appeal. *Cf. In re Estate of Bunda,* 268 So. 3d 255, 257 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D992a]. In this case, Petitioner had already fully invoked the legal process and obtained a judgment. The reasonable time for record retention has passed. Indeed, the county court case file has been destroyed in accordance with records retention rules. Although the expense and inconvenience of a trial do not form the basis for certiorari relief, the removal of a party's ability to make a claim does. *Id.* The court therefore finds that Petitioner meets the jurisdictional prong for certiorari review.

The court now turns its attention to Petitioner's claim that the order under review departs from the essential requirements of law. Public policy recognizes that the passage of time and the number of summonses served would naturally dim a process server's recollection of serving a given summons. *Slomovitz v. Walker,* 429 So. 2d 797, 799 (Fla. 4th DCA 1983). To permit a defendant to impeach a summons simply by denying service would create chaos in the judicial system. *Id.* Therefore, clear and convincing evidence must be presented to corroborate the defendant's denial of service. *Id.* "Clear and convincing" evidence has been defined as evidence making the truth of the facts asserted "highly probable." *Id.* (*Internal citations omitted*.)

Here, the return of service is facially valid. The date, time, location, the person served, and the person effecting service were all clearly identified. Because service is facially valid, the burden was on Respondent to prove her claim that service was invalid. *Matthews v. U.S. Bank N.A.,* 197 So. 3d 1140, 1143 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1525a], quoting *Slomovitz,* at 799. A defendant cannot impeach a summons by simply denying service was made. *Matthews,* at 1143. At the evidentiary hearing held March 25, 2019, more than 18 years after the return of service, Respondent admitted residing at the address where service was made and to being home at the time service was made. She simply denied she was served.[4] She testified that she first learned about the case in March, 2019, when her accounts were frozen.[5] Respondent added significant detail regarding her feelings and general approach to legal matters, but this is not relevant evidence. The substance of her testimony with regard to the instant

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lawsuit was no more than a blanket denial of service. Her only recollection of the events of January 11, 2001, was that "no one showed up at my door with a summons for me to appear." At least one court has said a person seeking to quash service must demonstrate that the place of service was not at her usual place of abode. *Preudhomme v. Matthews,* 194 So. 3d 1057, 1058 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1423a]. *Cf. Johnson v. Christiana Tr.,* 166 So. 3d 940, 944 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1406a] (defendant presented "clear and convincing evidence" that substituted service on her boyfriend in Arizona was improper by submitting "two affidavits in which she and [her boyfriend] asserted that she was not living at the Arizona address" and attaching copies of her Florida driver's license, property appraiser records, and property tax bill). Respondent did not do so.

Petitioner also challenges the propriety of the trial court's questioning of Respondent at the hearing. Although neither her attorney nor Petitioner's attorney inquired as to Respondent's other litigation history, the trial court elicited testimony on that subject. A trial judge may ask questions, but it is not an invitation to supply essential elements in a litigant's case. *Amason v. State,* 76 So. 3d 374, 377 (Fla. 2d DCA 2011) [37 Fla. L. Weekly D25b]. In this instance, Respondent's answers to the trial judge's questions about other cases Respondent may have been involved in were irrelevant in determining whether service was valid in this case. That alone would not pose a problem, of course, but her answers became a factor in forming the basis for setting aside the judgment.[6] Although unintentional, this deprived Petitioner of a neutral tribunal.

In the absence of competent, substantial evidence to invalidate service, it is ORDERED that the petition for writ of certiorari is GRANTED and the order setting aside the final judgment is QUASHED. The case is remanded to the county court for further proceedings.

---

[1]*Lee v. Chung,* 528 So. 2d 1313, 1314 (Fla. 2d DCA 1988).

[2]*See Blore v. Fierro*, 636 So.2d 1329 (Fla. 1994).

[3]351 So. 2d 759 (Fla. 2d DCA 1977)

[4]Her husband's testimony was similar.

[5]The court notes record exhibits showing that multiple documents in aid of execution were mailed to her Longwood, Florida address, confirmed as her then current address, more than six months before the hearing to quash service. In addition, courtesy correspondence, was mailed in October, 2018, followed by a motion to compel in November, 2018, each several months before the February 25, 2019, writ of garnish ment impacted her account.

[6]The conclusion that Respondent would be on "high alert" as to service in this case based on the existence of a pending family law case is speculative, not supported by evidence of record, and, accordingly, not competent evidence that Respondent was not served.

* * *

**Criminal law Battery Sentencing Trial court erred in considering nolle prossed charge when sentencing defendant without affording her an opportunity to explain Error is moot where it did not affect legality of conviction and defendant has already served sentence**

MARIE CANDACE BREILING, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 502018AP000068AXXXMB. L.T. Case No. 502017MM007077AXXXSB. March 17, 2020. Appeal from the County Court in and for Palm Beach County, Leonard Hanser, Judge. Counsel: David John McPherrin, Office of the Public Defender, West Palm Beach, for Appellant. Samantha Bowen, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, Candace Marie Breiling, appeals her conviction for Battery. We deny Appellant's first three claims without further comment. On Appellant's fourth claim, we agree with Appellant that the trial court erred by considering a nolle prossed charge during sentencing without providing Appellant an opportunity to explain. *See Jansson v. State,* 399 So. 2d 1061, 1064 (Fla. 4th DCA 1981) (holding trial court may consider defendant's prior arrests not leading to convictions as long as the court recognizes these arrests are not convictions *and* the defendant has an opportunity to explain); *see also, e.g., Peters v. State,* 128 So. 3d 832, 844-46 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2417a] (affirming sentence were trial court considered nolle prossed charge because trial court acknowledged charge was not a conviction *and* the defendant was given opportunity to explain); *Dowling v. State,* 829 So. 2d 368, 371 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2400a] (same).

Nevertheless, we find the error moot because Appellant has served her sentence and the error does not affect the legality of her conviction. *See Casiano v. State,* 280 So. 3d 105, 106-07 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2354a]; *Williams v. State,* 591 So. 2d 295, 296 (Fla. 4th DCA 1991) (holding matter moot and not requiring reversal where sentencing error exists but defendant served his term of imprisonment). *Cf. Hagan v. State,* 853 So. 2d 595, 596 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2095a] (holding appeal not moot where defendant challenges the legality of his conviction).

Accordingly, we deny Appellant's first three claims and, although we find error in Appellant's fourth claim, we find the error moot.

AFFIRMED. (KROLL, SHEPHERD, and SCHER JJ., concur.)

* * *

**Attorney's fees Insurance Personal injury protection Discovery Appeals Certiorari Medical provider has not satisfied jurisdictional prerequisite for certiorari relief from order compelling production of unredacted portion of employment agreement between attorney and provider's parent company where it was within trial court's discretion to determine that agreement was relevant, and disclosure of limited information is insufficient to establish irreparable harm Further, certiorari relief cannot be granted based on order to disclose privileged document where provider did not assert attorney-client privilege below**

CHIRO MEDICAL ASSOCIATES OF HOLLYWOOD, INC. a/a/o Deshandria Williams, Petitioner, v. GEICO INDEMNITY CO., Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 502019AP000034CAXXMB. Marach 17, 2020. Petition for Writ of Certiorari from the Honorable Marni Bryson, Palm Beach County Court. Counsel: Robert A. Trilling, Boca Raton, for Petitioner. Michael A. Rosenberg, Plantation, for Respondent.

(PER CURIAM.) Chiro-Medical Associates of Hollywood, Inc. ("Petitioner") files a Petition for Writ of Certiorari seeking review of the trial court's order granting GEICO Indemnity Company's ("Respondent") Motion to Compel Production of Unredacted Employment Agreement. The Petition for Writ of Certiorari is **DENIED** for the reasons set forth below.

Petitioner sued Respondent for its alleged failure to pay the full amount of benefits under a Personal Injury Protection ("PIP") insurance claim due for its medical treatment of Respondent's insured. After Respondent agreed to pay the benefits at issue, Petitioner filed its motion for attorney's fees and costs. Because Respondent did not challenge the motion, the limited issue remaining for the trial court's consideration was the amount of attorney's fees and costs due to Petitioner.

Petitioner's attorney is an employee of Petitioner's parent company. Respondent served discovery on Petitioner, which included a request to produce "[a]ny documents reflecting the fee arrangement between Plaintiff and its counsel as it relates to this case." Petitioner did not object and in response, produced a heavily redacted employment agreement between Petitioner's attorney and Petitioner's parent company ("Agreement"). Respondent filed a motion to compel the production of an unredacted Agreement. At the hearing on Respondent's motion, Petitioner argued that the Agreement was irrelevant to the determination of reasonable attorney's fees. Petitioner raised no other objections. The trial court concluded that portions of the redacted Agreement were relevant and ordered[1] Petitioner to produce

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the portion of the Agreement reflecting the percentage of legal fees Petitioner agreed to pay its attorney.

A non-final order for which no appeal is provided in Florida Rule of Appellate Procedure 9.130 is reviewable by certiorari in limited circumstances. *Palm Beach Cnty. Sch. Bd. v. Morrison,* 621 So. 2d 464, 468 (Fla. 4th DCA 1993). To obtain certiorari review, Petitioner must establish that the order departs from the essential requirements of the law, results in material injury to Petitioner for the remainder of the case, and leaves Petitioner with no adequate remedy on appeal. *See id.* Petitioner argues that the trial court's order departs from the essential requirements of law by requiring discovery of irrelevant materials, which will result in material injury for which Petitioner would have no adequate remedy by requiring the discovery of confidential and privileged materials.

We first hold that Petitioner has not established that the court's order departed from the essential elements of law by requiring the discovery of irrelevant materials. Discovery must be relevant to the subject matter of the case and admissible or reasonably calculated to lead to admissible evidence. *Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 94 (Fla. 1995) [20 Fla. L. Weekly S217a]. When fees are contested, the scope of relevant discovery falls within the discretion of the trial court. *Paton v. GEICO General Ins. Co.,* 190 So. 3d 1047, 1050 (Fla. 2016) [41 Fla. L. Weekly S115a]. For example, in *Paton,* the Florida Supreme Court held that the billing records of opposing counsel were relevant to the issue of reasonableness of time expended in a claim for attorney's fees. *Id.*; *see also Anderson Columbia v. Brown,* 902 So. 2d 838, 841 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D949a] (holding that "discovery of an opposing party's legal costs is a matter best left to the sound discretion of the trial court"). Accordingly, because fees were at issue, it was within the trial court's discretion to determine that the Agreement was relevant.

Second, even if the discovery was irrelevant, irrelevant discovery alone is not a basis for granting certiorari because discovery of irrelevant materials does not necessarily cause irreparable harm. *See Langston,* 655 So. 2d at 94-95. Here, the trial court's order compelled Petitioner to unredact a discreet portion of the Agreement pertaining to attorney's fees while maintaining the confidentiality of the rest of the Agreement. We hold that the disclosure of this limited information is insufficient to establish irreparable harm.

Finally, certiorari relief cannot be granted based on the court ordered disclosure of privileged documents during discovery when privilege was not raised below. *See Leonhardt v. Masters,* 679 So. 2d 73, 74 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2022c] (denying petition for writ of certiorari from order compelling allegedly privileged documents because petitioner first raised the privilege in his petition). Petitioner waived its assertion of attorney-client privilege by raising it for the first time in its Petition. In response to Respondent's discovery request, Petitioner did not assert that its fee agreement was protected by the attorney-client privilege. During the hearing, Petitioner also did not raise privilege, but only objected as to the relevance of its Agreement. Petitioner cannot now seek to assert privilege for the first time.

We therefore hold that Petitioner has not met the jurisdictional prerequisites for this Court to grant certiorari relief. *See Paton,* 109 So. 3d at 1052 ("Certiorari review of interlocutory orders is an extraordinary remedy that should only be granted in very limited circumstances."). Accordingly,

We **DENY** the Petition for Writ of Certiorari. Further, we **DENY** Petitioner's motion for appellate attorney's fees as to this Writ. (KERNER, ROWE, and NUTT, JJ., concur.)

[1]The trial court entered two identical orders dated January 29, 2019 and February 6, 2019.

* * *

**Contracts Attorney's fees Prevailing party Trial court erred in awarding prevailing party attorney's fees to contractor that was sued for failing to pay subcontractor because court's finding that subcontractor had substantially performed on contract is tantamount to finding that contractor was in breach of contract**

SUPERIOR FENCE & RAIL OF SOUTH FLORIDA, INC., Appellant, v. MAR CELLA ELLBERGER & SEABREEZE CONSTRUCTION CORP., Appellees. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17 005215 (AP). L.T. Case No. COCE12 026580. February 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Peter B. Skolnik, Judge. Counsel: Christopher L. Johnson, Superior Fence & Rail of South Florida, Inc., Oviedo, for Appellant. Joseph W. Lawrence, II, Vezina, Lawrence & Piscitelli, P.A., Fort Lauderdale, for Appellees.

**OPINION**

(PER CURIAM.) Appellant, Superior Fence & Rail of South Florida, Inc. ("Superior Fence") appeals an award of prevailing party attorney's fees in favor of Appellee, Seabreeze Construction Corp., ("Seabreeze Construction") Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the award of attorney's fees in favor of Seabreeze Construction is hereby **REVERSED** as set forth below:

On May 29, 2012, Seabreeze Construction hired Superior Fence to construct a fence and gate on the property of Marcella Ellberger ("Ellberger") which was completed on or about July 16, 2012. Upon completion of the work, Seabreeze Construction failed to remit payment. Thereafter, on or about October 2, 2012, Superior Fence filed an amended complaint. In its answer and affirmative defenses Seabreeze Construction specifically denied owing Superior Fence any balance and alleged its own breach of contract against Superior Fence. As such, at trial, the sole issue was which party breached the contract.

At the conclusion of a three-day, non-jury trial, the county court entered final judgment in favor of Superior Fence. On June 29, 2015 and July 2, 2015, respectively, Seabreeze Construction and Superior Fence filed competing motions for attorney's fees, each claiming that they were the prevailing party. After a hearing, held on May 16, 2016, the county court entered an order on May 31, 2016 which determined: 1) that Superior Fence had substantially performed on the contract; but 2) that Seebreeze Construction was the prevailing party and entitled to reasonable attorney's fees. Thereafter, on December 29, 2016, the county court entered an order awarding Seabreeze Construction attorney's fees, reiterating the county court's finding that Seabreeze Construction was the prevailing party. (R. 1376-1378).

As to the provision of attorney's fees to the prevailing party in a breach of contract action, the law is well settled. "The party who prevails 'on the significant issues in the litigation is the . . . prevailing party for attorney's fees." *Khodam v. Escondido Homeowner's Ass'n, Inc.,* 87 So. 3d 65 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D928a] (quoting *Moritz v. Hoyt Enters., Inc.,* 604 So. 2d. 807, 810 (Fla. 1992)). "[T]he fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Moritz,* 604 So. 2d at 810.

The county court's finding that Superior Fence had substantially performed on the contract is legally inconsistent with the county court's order determining that Seabreeze Construction was entitled to attorney's fees. In other words, a determination that Superior Fence had substantially performed on the contract is tantamount to a finding that Seabreeze Construction was in breach of the contract. As such, Seabreeze Construction could not have been the prevailing party and was not entitled to attorney's fees. *See Legacy Place Apartment Homes, LLC v. PGA Gateway, LTD.,* 65 So. 3d 644 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1605a] (explaining that the doctrine of substantial performance is generally unavailable where a party has

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materially breached the terms of the agreement). Indeed, the breach of contract cases that have applied the doctrine of substantial performance stand for the proposition that upon substantial completion of the contract terms, that party is entitled to enforce the contract. *See e.g. Viking Cmty. Corp. v. Peeler Const. Co.,* 367 So. 2d 737 (Fla. 4th DCA 1979); *J.M. Beeson Co. v. Sartori,* 553 So. 2d 180 (Fla. 4th DCA 1989).

Once the county court determined that substantial performance had taken place it should have found that Seabreeze Construction was in breach of the contract. *See Moritz,* 604 So. 2d at 810 (explaining that on the primary issue of who breached the contract, it was apparent from the record that the trial judge concluded that appellee had prevailed on the significant issues because it did not breach the contract). Applying the analysis from *Moritz* to the instant matter, since the county court, in essence, determined that Seabreeze Construction had breached the contract, it should have simultaneously determined that Superior Fence was the prevailing party.

Pursuant to the foregoing, this Court finds that: 1) the determination that Superior Fence substantially performed on the contract was tantamount to a finding that Seabreeze Construction breached the contract and 2) a determination that Seabreeze Construction breached the contract requires a finding that Superior Fence is the prevailing party, entitled to attorney's fees. Accordingly, the award of attorney's fees in favor of Seabreeze Construction is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Superior Fence's Motion for Award of Appellate Attorney's Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Additionally, Seabreeze Construction's Motion for Appellate Attorney's Fees is hereby **DENIED**. (BOWMAN, LOPANE, FAHNESTOCK and, JJ., concur.)

* * *

SERVIO ESPAILLAT ALVAREZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18 52AC10A. L.T. Case No. 17 10251MM10A. February 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kathleen McHugh, Judge. Counsel: Lisa Lawlor, Office of the Public Defender, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

**OPINION**

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find no abuse of discretion by the trial court in finding that Appellant violated the terms of his probation. (FEIN, MURPHY III, and SIEGEL, JJ., concur.)

* * *

JOHN DOLNE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18 000045AC10A. L.T. Case No. 07 12711MM10A. February 28, 2020. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Kal Le Var Evans, Judge. Counsel: Martin L. Roth, The Law Office of Martin L. Roth, P.A., Fort Lauderdale, for Appellant. Nicole Bloom, State Attorney's Office, Fort Lauderdale, for Appellee.

**OPINION**

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, we hereby AFFIRM the county court's denial of Appellant's motion to vacate plea. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. SHERA RODRIGUEZ, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19 12AC10A. L.T. Case No. 18 007529MU10A. February 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kal Evans, Judge. Counsel: Nneka Utti, for Appellant. Richard Corey, for Appellee.

**OPINION**

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, and the applicable law, we hereby **AFFIRM** the trial court's granting of Appellee's motion to suppress. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

**Insurance Personal injury protection Coverage Medical expenses Reasonableness of charges Medical provider confesses that trial court erred in finding that insurer was not entitled to contest reasonableness of provider's bills after it initially erroneously used fee schedule not elected in policy to reduce and pay billed amounts**

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Margarita Torres, Appellee. PROGRESSIVE SELECT INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Elizabeth Flanagan, Appellee. PROGRESSIVE EXPRESS INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Tatiana Bayona, Appellee. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Zoe Gainous, Appellee. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Annmarie Selvin, Appellee. PROGRESSIVE AMERICAN INSURANCE COM PANY, Appellant, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Dulce Corrales, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case Nos. 2017 CV 9 A O, 2017 CV 10 A O, 2017 CV 11 A O, 2017 CV 12 A O, 2017 CV 13 A O, 2017 CV 24 A O. L.T. Case Nos. 2014 SC 8438 O, 2013 SC 7534 O, 2014 SC 11844 O, 2013 SC 5856 O, 2013 SC 8322 O 2014, SC 11826 O. February 12, 2020. Appeals from the County Court, for Orange County, Florida, Steve Jewett, County Judge, and Tina Caraballo, County Judge. Counsel: Michael C. Clarke, and Andrew T. Lynn, for Appellant. Robert J. Hauser, for Appellee.

(Before THORPE, MYERS, and O'KANE, JJ.)

ON CONFESSIONS OF ERROR

(PER CURIAM.) In these consolidated appeals, the Court previously granted Appellee's motions to stay pending the resolution of Appellee's petition for writ of certiorari in 5D19-1372, filed in the Fifth District Court of Appeal. In 5D19-1372, Appellee was seeking certiorari review of this Court's opinion in *Progressive Select Insurance Company v. Florida Hospital Medical Center a/a/o Larry Hunt,* No. 2017-CV-000146-A-O (Fla. 9th Cir. Ct. Apr. 11, 2019) ("*Hunt*"), which according to Appellee "addressed a critical legal issue."[1] Appellee was directed to give this Court prompt written notice once the decision of the Fifth District in 5D19-1372 became final.

Recently, the Fifth District denied certiorari in 5D19-1372. *Fla. Hosp. Med. Ctr. a/a/o Larry Hunt v. Progressive Select Ins. Co.,* No. 5D19-1372 (Fla. 5th DCA Oct. 22, 2019). On January 10, 2020, Appellee filed confessions of error, in which Appellee confessed error in light of this Court's opinion in *Hunt,* and stated that the "appropriate procedure" is to set aside the summary judgments on appeal and to remand "for further proceedings in accordance with *Hunt*." In view of Appellee's confessions of error, the stays previously imposed in these appeals are now lifted. We reverse the summary judgments entered in these cases and remand to the trial court for further proceedings consistent with *Hunt.*

Appellant's motions for provisional award of appellate attorney fees, filed in 2017-CV-9-A-O, 2017-CV-10-A-O, 2017-CV-11-A-O, 2017-CV-12-A-O, 2017-CV-13-A-O, and 2017-CV-24-A-O, are granted, contingent on a judgment of no liability or a judgment obtained by Appellee that is at least 25% less than the amount of Appellant's proposal for settlement, and on the trial court's determination that Appellant's proposal for settlement is otherwise enforceable under section 768.79, Florida Statutes (2018), and Florida Rule of Civil Procedure 1.442. The assessment of those fees is remanded to the trial court.

Appellee's motions for appellate attorney's fees, filed in 2017-CV-9-A-O, 2017- CV-10-A-O, 2017-CV-11-A-O, 2017-CV-12-A-O,

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2017-CV-13-A-O, and 2017-CV-24-A-O, are denied. (MYERS, C.J., and O'KANE, JJ., concur.)

[1]In *Hunt,* this Court determined that the trial court erred in failing to follow *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.,* 202 So. 3d 437 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a], and in finding that the insurer was not entitled to contest the reasonableness of the provider's bill.

* * *

**Insurance Personal injury protection Application Misrepresentations PIP insurer waived right to rescind policy for alleged material misrepresentation in application where insurer did not rescind policy upon learning that rescission right existed but, rather, continued to recognize the continued existence of policy by sending explanations of benefits and notice letters and breached policy by failing to pay or deny claim within thirty days or ask for more time to investigate claim under section 637.736(4)(i)**

CENTURY NATIONAL INSURANCE COMPANY, Defendant/Appellant, v. HALIFAX CHIROPRACTIC AND INJURY CLINIC, INC. as assignee of Rantanen Bloodworth, Plaintiff/Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018 CV 000019 A O. L.T. Case No. 2016 CC 007170 O. January 22, 2020. Appeal from the County Court, for Orange County, Florida, David P. Johnson, County Judge. Counsel: William J. McFarlane, III, for Appellant. Chad A. Barr, for Appellee.

(Before DOHERTY, CRANER, and BLECHMAN, JJ.)

**ORDER AFFIRMING FINAL SUMMARY JUDGMENT**

(PER CURIAM.) Appellant, CENTURY-NATIONAL INSURANCE COMPANY (hereinafter "C-N"), timely appeals the county court's "Amended Order on Plaintiff's Motion for Final Summary Judgment" entered on January 16, 2018. HALIFAX CHIROPRACTIC AND INJURY CLINIC, INC. as assignee of Rantanen Bloodworth (hereinafter "Halifax") timely responded November 19, 2018.

This Court has jurisdiction of appeals from county court orders. § 26.012(1), Fla. Stat. (2017); Fla. R. App. P. 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320. We affirm.

***Facts and Procedural Background***

Halifax provided medical services to Rantanen Bloodworth (hereinafter "Bloodworth") after injuries she sustained November 1, 2015 as a passenger in car crash. Bloodworth purchased an insurance policy from C-N[1] on or about October 22, 2015 which provided PIP[2] coverage. No later than December 8, 2015, Halifax sent to C-N invoice(s) for Bloodworth's treatment and C-N obtained, on January 5, 2016, a recorded statement of Bloodworth as part of its investigation of the claim. According to C-N, during the course of the recorded statement Bloodworth said that she was, and had been at the time of the issuance of the PIP policy, living with her parents and sister and that there were other automobiles garaged at her residence. Bloodworth's Application for Automobile Insurance did not contain this information. Ultimately, C-N took the position that the missing information was an omission and a material misrepresentation which, under terms of the policy and Florida Statutes § 627.409, allowed it to rescind the policy as if it had never been entered into.

More than sixty days after the January 5, 2016 recorded statement, C-N submitted a report of rescinded policy, dated March 15, 2016, to the Florida Office of Insurance Regulation and sent letters dated March 21, 2016 to Bloodworth and Halifax saying it "has completed its investigation" of the November 1, 2015 car crash and it was "declaring [the policy] to be void from its inception for material misrepresentation . . ." and returned Bloodworth's premium in its entirety. (R. 148, 151.) After Halifax received C-N's rescission notice it sued for payment of PIP benefits as Bloodworth's Assignee in Orange County Court on June 21, 2016. C-N answered on August 30, 2016 and asserted the affirmative defenses of "Rescission of Policy-void ab initio" and "Lack of Standing." (R. 36.)

The Parties filed competing motions for summary judgement, which were heard together on October 30, 2017. Halifax moved for summary judgment, *inter alia,* on grounds of waiver, arguing that the PIP statute is clear: An insurer upon being "furnished written notice of the fact of a covered loss and the amount of same" must either pay the claim within 30 days, deny the claim within 30 days, or itself give notice that it opts for 60 more days to investigate a suspected fraud; but in any event an insurer must either pay or deny a claim within 90 days. *See* § 627.736, Fla. Stat. Halifax completed its argument by asserting that since C-N did not pay, deny, or send notice within the statutorily mandated 30/60/90 day timeframe it was in breach of the policy and PIP statute, and consequently could not assert a fourth option: rescission. (R. 598.)

C-N moved for summary judgment on grounds that it had a unilateral right of rescission and it properly rescinded the contract, therefore it was as if the insurance contract never existed, *ipso facto* there never were any PIP benefits to recover. (R. 97.) For this proposition C-N relied heavily upon *United Auto. Ins. Co. v. Salgado,* 22 So. 3d 594 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a], which holds that failure to disclose other drivers in a household is a material misrepresentation and could be used to rescind a PIP policy.[3]

The trial court held a hearing on October 30, 2017 and issued an amended order on January 16, 2018 finding C-N in breach of the policy and PIP statute saying, "Once [C-N] failed to pay or deny the claim within 30 days after receiving bills for services provided by [Halifax], they were in breach of the policy, Fla. Stat.§ 627.736 and the stated purpose for enacting the personal injury protection (PIP) statute in the first place which is swift and automatic payment of claims." (R. 912.) In making its ruling the trial court cited to *Central Fla. Chiropractic Care v. GEICO Indemnity Co.,* 24 Fla. L. Weekly Supp. 152a (Orange Cty. Ct. April 22, 2016), *aff'd,* 26 Fla. L. Weekly Supp. 613a (Fla. 9th Cir. Ct. May 11, 2016), as Ninth Judicial Circuit precedent "that a prior breach prohibits an insurer from denying a claim for a breach on the part of the insured." (*Id*.) Concluding, "Because [C-N] violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. § 627.736(4)(i) they waived the ability to investigate or deny the claim for material misrepresentation." (R. 913.)

***Arguments on Appeal***

C-N's pertinent arguments on appeal are that the trial court erred in finding it waived its right to rescind, because, in fact, it properly exercised the rescission-right by giving notice of the rescission and returning the entirety of the premium within a reasonable time of discovery of the misrepresentation. Additionally, it argues, the trial court's ruling was improper because C-N rescinded by reason of material misrepresentation under § 627.409 and not for a fraudulent insurance act under § 627.736(4)(i). C-N contends the trial court "improperly relied on irrelevant provision of the Florida PIP statute," namely § 627.736(4)(i), in making its ruling. Appellant Int. Br. 47.

***Standard of Review***

The standard of review for an order granting a motion for judgment as a matter of law is *de novo. Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

***Discussion***

This is a PIP case, consequently C-N is subject to all of the PIP statute's strictures. C-N has consistently argued, in essence, here and in the court below, that this is not a PIP case because it chose to rescind the contract by reason of material misrepresentation rather than pursuing cancellation of the policy alleging a fraudulent insurance act. C-N invites the Court to view in isolation each reason the insurer might have had to avoid payment of this claim, agree with the

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insurer's selection, and deem the PIP statute inapplicable. This argument is belied by C-N's own conduct. C-N engaged the PIP statute prior to its attempted exercise of its unilateral right of rescission or failed to properly exercise its rescission-right timely. In either event, a hard deadline was in effect under the PIP statute which C-N failed to meet, putting it in breach of the statute.

The PIP statute is of a special nature, the intent of which is to guarantee swift payment of PIP benefits. *Crooks v. State Farm Mut. Auto. Ins. Co.* 659 So. 2d 1266, 1268 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1984a]. PIP payments which are not made within 30 days after the insurer is furnished written notice of claim are overdue. § 627.736 (4)(b), Fla. Stat. An insurer is under this statutory time constraint even after raising a coverage issue. *January v. State Farm Mutual Ins. Co.,* 838 So. 2d. 604, 607 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a]. An insurer is not free to assert a coverage issue, ignore the thirty-day deadline *to pay a claim,* and investigate further with no consequences. *Id.* Simply put, the deadline to verify, and pay, a claim is not tolled. *Superior Ins. Co. v. Libert,* 776 So. 2d 360, 363 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D381a] (*citing Fortune Ins. Co. v. Pacheco,* 695 So. 2d 394, 395 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1076a] (internal citations in *Pacheco* omitted)). Furthermore, the failure of an insurer to adhere to the statutorily mandated timeframe is itself a breach of contract. *Amador v. United Auto. Ins. Co.,* 748 So. 2d 307, 309 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a].

C-N argues for a ruling that would allow an insurer to discover a colorable right of rescission during the investigation of a PIP claim, unilaterally ignore the time limitations found in § 627.736(4)(b) and § 627.736(4)(i), engage in other conduct pursuant to the PIP statute, and then, within a reasonable time, declare an entire contract of insurance void *ab initio.* C-N is correct that an insurer has a unilateral right to rescind a policy of insurance. *See Gonzalez v. Eagle Ins. Co.,* 948 So. 2d. 1, 2 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2287a] (*citing Towers v. Clarendon Nat'l Ins. Co.,* 927 So. 2d 913 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D131e]). C-N is also correct that, the special nature of the PIP Statue notwithstanding, a unilateral right of rescission also applies to PIP policies. *United Auto. Ins. Co. v. Salgado,* 22 So. 3d 594, 604 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a]. However, the unilateral right of rescission can be waived. *Echo v. MGA Ins. Co., Inc.* 157 So. 3d 507, 511 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D442a]. Furthermore, C-N is incorrect that an insurance policy contract is automatically rendered void *ab initio* upon the discovery of an extant right of rescission. *See id.*

In the present case the record shows that C-N had notice of claim from December 8, 2015, but waited until January 5, 2016 to take Bloodworth's statement. According to C-N, during the course of Bloodworth's statement she admitted to material misrepresentations in her Application for Insurance which revealed the existence of a right of rescission. Since 30 days had not passed from the Notice of Claim, C-N could have exercised the rescission-right prior to the expiration of the 30 day deadline mandated by § 627.736(4)(b). This they failed to do. Attached to C-N's Motion for Summary Judgment filed December 15, 2016 is the affidavit of its custodian of records, Melissa Andrade. Ms. Andrade swears that the rescission of Bloodworth's policy occurred on or about March 15, 2020.[4] (R. 120.) As the trial court correctly stated, "the statute under which the rescission took place is irrelevant" the threshold question was whether the invocation of the rescission-right was proper. It is indisputable that thirty days past December 8, 2015 C-N had not rescinded the policy, had not paid, not denied, and had not asked for more time to investigate the claim under § 627.736(4)(i). Rather, C-N continued to send out Explanation of Benefits and notice letters, pursuant to the PIP statute, at the same time it was aware that a rescission-right existed. These overt acts, while in breach of the PIP statute, waived its right of rescission. "[I]t is equally well settled in insurance law that, when an insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any unequivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof." *Johnson v. Life Ins. Co. of Ga.,* 52 So. 2d 813 (Fla. 1951).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED:**

1. The county court's "Amended Order on Plaintiff's Motion for Final Summary Judgment," entered on January 16, 2018, is **AFFIRMED.** (BLECHMAN and CRANER, JJ., concur.)

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[1]Some documents in the Record are under the heading of Pro General Insurance Solution, Inc. which is the claims administrator for Century National Insurance Company.

[2]PIP is an acronym for "personal injury protection." *See* § 627.736(1)(a), (b), (c), Fla. Stat. (2015).

[3]*Salgado* was decided prior to the 2013 amendments to the PIP statute which added the portions of § 627 which strengthened the 30/60/90 deadlines to include the "in no event more than 90 days" language, and is silent as to the facts regarding United's investigation of Oscar Salgado's claim.

[4]C N points out in its Initial Brief that the trial court may have incorrectly interpreted the regulatory import of its March 15, 2016 Notice of Rescission sent to the State of Florida, however, this error, if it in fact exists, is *de minimis*.

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. FLORIDA EMERGENCY PHYSICIANS KANG & ASSOCIATES, M.D., P A., a/a/o Jonathan Sias, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2016 CV 000024 A O. February 24, 2020.

FINAL ORDER DISMISSING APPEAL

(DIANA M. TENNIS, J.) THIS MATTER came before the Court for consideration of the Stipulation for Dismissal, filed on February 21, 2020, in which the parties "notify the Court that the parties have settled this dispute and, as a result, they stipulate to the dismissal of this appeal, with each party to bear its own fees and costs, except to the extent set forth in the parties' settlement agreement." Based on the parties' Joint Stipulation for Dismissal, this matter is DISMISSED.

Accordingly, it is ORDERED AND ADJUDGED that this matter is DISMISSED WITH PREJUDICE. The Clerk of the Court shall CLOSE this case forthwith.

* * *

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# CIRCUIT COURTS—ORIGINAL

**Jurisdiction Non-residents Recording of one phone call into Florida is not enough to establish long-arm jurisdiction Moreover, parties' contract contains Colorado venue and jurisdiction provision Motion to dismiss granted**

ROBERT POLLAK, Plaintiff, v. DUSTIN WALZ, Defendant. Circuit Court, 1st Judicial Circuit in and for Escambia County. Case No. 2019 CA 001524, Division E. February 21, 2020. Jan Shackelford, Judge. Counsel: Mark A. Bednar, Mark A. Bednar, P.A., Pensacola, for Plaintiff. Allison S. Lovelady, Shullman Fugate PLLC, West Palm Beach, for Defendant.

## FINAL ORDER OF DISMISSAL WITH PREDJUDICE

This cause having come to be heard on January 21, 2020 on Defendant Dustin Walz's Motion to Dismiss for Lack of Personal Jurisdiction, and the Court, after review of the pleadings, affidavits, applicable case law, and hearing the arguments of counsel, and otherwise being fully advised in the premises,

Finds as follows:

1. The recording of one phone call into the State of Florida is not enough to establish long-arm jurisdiction under Florida's Long-Arm Statute. *See, Kountze v. Kountze,* 996 So.2d 246 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2830b].

2. As a secondary basis, the Court finds that this matter is governed by the parties' Asset Purchase Agreement, which includes a Colorado venue and jurisdiction provision. The Asset Purchase Agreement states:

> 10.8 *Governing Law*: This Agreement shall be governed by and construed under the laws of the State of Colorado without recourse to the principles of conflicts of laws, and any suit to enforce any of the terms hereof shall be brought in the District Court, Denver County, State of Colorado, and for this purpose, each party hereby expressly and irrevocably consents to the jurisdiction of said Court.

Accordingly, it is ORDERED AND ADJUDGED as follows:

The Defendant's Motion to Dismiss is **Granted.** Since the Court has determined that it does not have personal jurisdiction over the Defendant, and the Asset Purchase Agreement mandates Colorado jurisdiction, this case is **Dismissed with Prejudice**. Plaintiff shall take nothing by this action and go hence without day.

DONE AND ORDERED.

* * *

**Torts Premises liability Slip and fall at apartment complex Jury trial Waiver Lease Provision of lease between plaintiff-tenant and defendant waiving jury trial for injuries related to lease applied to plaintiff's allegation that injury sustained in slip and fall was caused by defendant's failure to maintain premises of apartment community in reasonably safe condition, a duty plaintiff alleged was owed to her as an invitee However, trial court finds that it is appropriate in this case to impanel an advisory jury to assist in deciding issues framed by the pleadings**

MICHELE BAUMGARTNER, Plaintiff, v. MID AMERICA APARTMENT COMMUNITIES, INC., Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16 2018 CA 3421 AXXX, Division CV A. February 21, 2020. Waddell A. Wallace III, Judge. Counsel: Rob T. Cook and Jonathan J. Luca, for Plaintiff. Trevor T. Rhodes and Benjamin G. Lopez, for Defendant.

## ORDER STRIKING PLAINTIFF'S DEMAND FOR JURY TRIAL AND EMPANELLING ADVISORY JURY

This case is before the Court for consideration of the Amended Motion to Strike Plaintiff's Demand for Jury Trial, filed December 19, 2019, by defendant, Mid-America Apartment Communities, Inc.

In this action, plaintiff, Michelle Baumgartner, alleges that she was injured in a slip- and- fall accident that occurred on the premises of an apartment community owned and operated by defendant, Mid-America Apartment Communities, Inc. Plaintiff is a party to a lease agreement with defendant in which plaintiff leased from defendant an apartment unit on the premises where the slip and fall incident occurred. Plaintiff's claim is based on an alleged duty arising in tort requiring defendant to maintain the premises of the apartment community in a condition that is reasonably safe. Plaintiff, therefore, is suing to enforce a duty defendant owes to the general public and thus is not suing under an obligation arising under the subject lease. For that reason, plaintiff argues that the waiver of jury trial provision in the lease between plaintiff and defendant does not apply to the claim asserted in this action. In response, defendant argues that, in asserting her claim, plaintiff relies on her status as an invitee and that status is created by plaintiff's status as a tenant under the subject lease. To this extent, therefore, defendant argues that plaintiff's tort claim for the slip and fall injury is "related to" the lease and thus subject to the lease's waiver of jury trial provision.

Considering the breath of the "related to" language, the Court concludes that plaintiff's claim against defendant does rely at least in part on her status as a tenant, which status arises under the lease, and thus plaintiff's claim is "related to" and governed by the waiver of jury trial provision in the lease.

Under Florida law, the parties to a contract may waive the right to a jury trial for claims arising out of or related to the contract. See, for example, *Vista Centre Venture v. Unlike Anything, Inc.,* 603 So. 2d 576 (Fla. 5th DCA 1992); *Palomares v. Ocean Bank of Miami,* 574 So.2d 1159 (Fla. 3d DCA 1991); and *C & C Wholesale v. Fusco Management,* 564 So.2d 1259, 1261 (Fla. 2d DCA 1990). The record does not contain any evidence showing that the subject lease, "as a whole," is either procedurally or substantively unconscionable. *See* 564 So.2d at 1261. The Court is therefore required to force the jury trial waiver and strike Plaintiff's demand for jury trial.

When the parties to this civil action have waived their right to a jury trial, or a jury trial is not available as a matter of right, the trial court is nevertheless vested with the authority to appoint an advisory jury. See *Gelco Co. v. Campanile Motor Service Inc.*, 677 So.2d 952 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1719a]; and *Vista Centre,* 603 So.2d at 579. In a case such as this, a claim for personal injuries arising from a slip and fall incident, the Court finds that it would be particularly appropriate to impanel an advisory jury. The trial court shall remain ultimately responsible for making the findings of fact and conclusions of law necessary to resolve the issues framed by the pleadings.

Accordingly, for the reasons stated, it is

**ORDERED:**

1. Defendant's Amended Motion to Strike Plaintiff's Demand for Jury Trial is GRANTED.

2. This Court's pretrial order entered November 7, 2019, setting this action for jury trial, is amended to provide that this action is now set for a nonjury trial by the Court. All other terms of the pretrial order shall remain in full force and effect.

3. At the time of trial, the Court shall impanel an advisory jury to assist the Court in deciding the issues framed by the pleadings.

* * *

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**Insurance Homeowners Discovery Failure to comply Sanctions Insurer's answer and affirmative defenses are stricken, and default judgment is entered in favor of insureds where insurer has committed numerous discovery violations, intentionally failed to meet court-imposed deadlines, refused to comply with court-ordered sanctions, and exhibited abusive behavior toward witnesses, opposing counsel and court**

WILLIAM STOCKTON and JENNIFER STOCKTON, Plaintiffs, v. AVATAR PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2017 CA 011236 O, Division 35. March 10, 2020. Patricia L. Strowbridge, Judge. Counsel: Nathan E. Wittman, Morgan & Morgan, P.A., Orlando, for Plaintiffs. Curt L. Allen, Christopher M. Ballard, and Brian A. Hohman, for Defendant.

## ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT BY DEFAULT

THIS MATTER came before the Court on December 20, 2019, upon the Plaintiff's Motion for Entry of Judgment by Default, and the Court, having considered the arguments of counsel, having carefully reviewed the applicable case law and the filings within the court file, and having handled several discovery matters in this case, both in court and by telephone in chambers, and being otherwise fully informed, does hereby make the following findings of fact and rulings of law:

I. Procedural History and Findings of Fact

The following recitation outlines the numerous violations of discovery, intentional failures to meet court imposed deadlines, refusals to comply with court ordered sanctions, abusive behavior toward witnesses, opposing counsel and the Court, which has caused the Court to conclude that all reasonable steps have been taken to avoid the striking of Defendant's pleadings. The actions of the Defendant and their counsel have, however, continued to be unacceptable and inappropriate, by any measure.

On December 29, 2017, the Plaintiffs filed a complaint against the Defendant insurance company alleging that their home sustained damage covered under a policy of insurance issued by the Defendant. The Defendant was served with the complaint and Plaintiffs' initial discovery requests on January 5, 2018.

Defendant filed a Motion for Extension of Time to respond to Plaintiffs' initial discovery, and Plaintiffs did not object to the additional 30 days requested. Instead of responding to the discovery on or before March 21, 2018, as provided in the Order on Defendant's Motion for Extension of Time, Defendant again moved for an extension of time, requesting an additional three weeks, until April 11, 2018, to respond to Plaintiffs' initial discovery. Plaintiffs objected to the additional extension of time, arguing that they did not believe the Defendant was acting in good faith, and that the extension of time was for the purpose of avoiding discovery prior to a scheduled hearing on the Defendant's Motion to Dismiss the Complaint, noticed for April 5, 2018.

The Defendant subsequently served its discovery responses, on March 27, 2018, one week after the deadline imposed by the Court's order of February 28, 2018. The Defendant's responses contained unsworn Answers to Interrogatories with objections to most of the questions, objections to every document sought in the Request for Production, except for the policy of insurance, and legally insufficient responses to the Requests for Admissions. Defendant would, over the course of this litigation, file no less than fourteen (14) Motions for Extension of Time, and ultimately failed to comply with many deadlines, without seeking and obtaining an Order for extension of time.

Also of note during this same time frame, on March 1, 2018, Plaintiffs filed a Notice of Intent to Take Corporate Representative's Deposition and Demand for Designation of Representative Deponent. On April 6, 2018, Plaintiffs filed another Notice of Intent to Take Corporate Representative Deposition and Demand for Designation of Representative Deponent, again insisting upon the scheduling of a corporate representative deposition.

Plaintiffs' Amended Complaint was thereafter dismissed without prejudice on April 5, 2018, upon the Defendant's Motion to Dismiss. A Second Amended Complaint was filed by the Plaintiffs on April 11, 2018. Defendant was ordered to respond to the Second Amended Complaint within 10 days, but Defendant instead filed a Motion for Summary Judgment, arguing that no payment was owed under the policy.

The Hon. Heather Higbee, assigned to this Division in 2018, denied the Defendant's Motion for Summary Judgment on July 31, 2018, and ordered the Defendant to file a responsive pleading within 20 days. Having not previously or timely filed a Motion to Dismiss the Second Amended Complaint, Defendant responded to Judge Higbee's Order, not by filing a responsive pleading as directed, but by filing a Motion for Reconsideration requesting that it be allowed to file a Motion to Dismiss because the Plaintiffs had alleged multiple breaches of the insurance contract in one count, which Defendant asserted was "quite undeniably. . . improper". The Motion for Reconsideration was denied, and the Defendant filed its Answer and Affirmative Defenses on August 20, 2018.

Plaintiff's initial discovery was served with the original Complaint, as mentioned above. Thereafter, Plaintiff sought additional discovery in the form of depositions of the Corporate Representative of the Defendant, and of the witnesses listed in the Defendant's unsworn answers to interrogatories. Defendant sought the depositions of the Plaintiffs and of the witnesses identified by the Plaintiffs as supporting the factual allegations of their Complaint.

What followed can only be described as "scorched earth" litigation behavior on the part of the Defendant, consisting of abusive treatment of Plaintiff's counsel during court hearings, email correspondence and depositions (as evidenced by exhibits and transcripts filed in the court file), abusive treatment of the individual Plaintiffs and their witnesses (as evidenced by transcripts filed in the court file), disrespect for the Court and the Orders of the Court, and a pervasive lack of good faith and fair dealing in the defense of the case.

During the time this case has been pending before Division 35 of the Ninth Judicial Circuit, the case was first assigned to Judge Heather Higbee, prior to being assigned to the undersigned through judicial rotation. Judge Higbee sanctioned the Defendant on December 27, 2018 for discovery abuses related to the scheduling/conduct of the corporate representative deposition. The sanction Order followed a hearing held on November 15, 2018, stemming from a witness deposition that was conducted on July 27, 2018 and a corporate representative deposition that was noticed for October 3, 2018, but did not take place.

Anticipating further discovery issues, Judge Higbee's December 27, 2018 Order outlined that she was declining to strike the Defendant's pleadings at that time, but found Defendant's positions with regard to the scheduling, and subsequent objection to, the corporate representative's deposition was "unjustified and deserving of sanction". Judge Higbee ordered the rescheduling of the corporate representative's deposition before the end of January 2019, and directed the Defendant to review the areas of inquiry identified by the Plaintiff, and to "formally" object to any proposed areas of inquiry on or before November 26, 2018. Judge Higbee further directed that any such formally objected to areas of inquiry should be brought to a Short Matters hearing prior to the rescheduled deposition. The Defendant was ordered to pay the attorney fees and costs incurred by the Plaintiff for the attendance at the October 3, 2018 deposition and for the need to seek the assistance of the Court by the filing of a Motion and

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attendance at the hearing.

Despite Judge Higbee's clear directive, the Defendant filed no formal objections at any time prior to the rescheduled deposition, but objected throughout the rescheduled deposition, and instructed Kendra Shaw, the corporate representative (who is an attorney licensed to practice in Florida) not to answer the questions posed by the Plaintiff's counsel, based upon defense counsel's issues with the areas of inquiry. Ms. Shaw, in her capacity as corporate representative, was asked directly to properly answer the questions and she declined to do so.

In addition to the December 27, 2018 Order, Judge Higbee also entered an Order on November 27, 2018 finding the Defendant "in violation" of her previous Order as to overdue discovery responses. And, on January 2, 2019, Judge Higbee entered an Order relative to a hearing held on December 11, 2018 which struck portions of the Defendant's Answer and Affirmative Defenses as being "immaterial, impertinent and/or scandalous matter(s)" and struck the Fourth Affirmative Defense, finding "the inference or suggestions of 'fraud' was improperly pled. Defendant was granted "leave of court to file an amended answer within ten (10) days of the December 11, 2018 hearing." On December 21, 2018, Defendant filed an Amended Answer reasserting the Fourth Affirmative Defense, re-alleging "fraud" with the same lack of factual specifics, in defiance of Judge Higbee's ruling striking the affirmative defense just ten days earlier.

The parties' first appearance before the undersigned Judge, occurred on January 17, 2019. The Defendant had filed objections to the issuance of subpoenas to third parties (who had been identified by the Defendant in earlier discovery), and the Defendant was seeking sanctions against the Plaintiff for proceeding with a deposition of an individual named Wayne Frazier, which deposition had been coordinated and set for August 31, 2018. The Notice of Mr. Frazier's deposition was filed in the court file on July 24, 2018.

Despite coordinating the deposition with the Plaintiff's counsel and being served with the Notice of Deposition over a month before the deposition, Defendant waited until just before 6 pm on August 29, 2018, to file a Motion for Protective Order and For Award of All Reasonable Expenses Incurred, alleging that the Plaintiff was improperly attempting to take the deposition of a "consulting expert" retained by the Defendant, and asserting that "until such time as he is designated as a testifying trial expert, Plaintiffs cannot depose him."

Plaintiff's counsel advised Defendant's counsel that the deposition would be cancelled if the Defendant's counsel would stipulate that Mr. Frazier would not be called to testify at the trial (then expected to occur in April 2019). Defendant's counsel refused to so stipulate, and Plaintiff's counsel advised that the deposition would go forward as scheduled, absent an Order of Protection from the Court.

Thereafter, the deposition occurred, but Defendant's counsel inexplicably elected to not appear. Mr. Frazier appeared, however, and directly refuted the allegations of the Defendant's Motion for Protective Order, stating that he was not retained as a consulting expert, and had provided no consulting services to the Defendant or Defendant's counsel. An Order was entered on February 28, 2019, outlining all of the aforestated, and denying the relief requested by Defendant's.

Defendant's counsel then noticed video depositions of the custodian of records and the corporate representatives of the roofing company and environmental services company that had provided the repair estimates, which Plaintiff relies upon in the case. The environmental services company, Healthy Home Services, LLC ("HHS"), consists of the field inspector, Dana Aiken and his wife, Sally Aiken, who handles the office work. Defendant scheduled separate depositions of Sally Aiken, the Custodian of Records of HHS, and the Corporate Representative of HHS. Defendant's counsel, Curt Allen, Esq., was advised at the beginning of the depositions (approximately 10:27 am) that the Aikens had to leave by 2 pm, because they were responsible for picking up their seven year old granddaughter after school.

The transcript of the deposition reflects abusive and accusatory questioning of Sally Aiken, as the Records Custodian of HHS, by Mr. Allen, and abusive and unprofessional behavior directed toward Plaintiff's counsel. Despite being advised of the Aikens' need to pick up their granddaughter after school, several threats were made to keep Sally Aikens beyond that time period, because Plaintiff's counsel was making objections. Attorney Allen repeatedly told Plaintiff's counsel to "stop talking" when Plaintiff's counsel was making objections to the questioning, and repeatedly insulted and berated Mr. Wittman in the presence of the witness, for stating objections to his questioning. In sum, Mr. Allen's behavior during the deposition of this witness was inexcusably unprofessional and abusive. Mr. Wittman terminated the deposition because of the abusive behavior and advised that he would be seeking a protective order from the Court.

Later that day, Defendant's counsel cancelled several other depositions that had been scheduled for the following day, and then filed a series of Motions seeking an order of contempt against Sally Aiken personally, and for sanctions to be imposed against Healthy Home Services, LLC, the Plaintiff and Plaintiff's counsel, for the costs of all of the depositions which were cancelled by Defendant's counsel, as well as all of the costs associated with the terminated deposition of Sally Aiken. The tone and language of these Motions is similar to the transcript of Sally Aiken's deposition. These Motions were heard and denied on August 21, 2019.

Going back to the February 28, 2019 Order that dealt with the issue of Mr. Frazier's deposition, this Order also addressed Defendant's objections to Notices of Production directed to non-parties, Wizard Roofing and Blue Sky Multi Services. These Notices were objected to, without explanation. At the hearing held on January 17, 2019, Defendant's counsel argued that the records being sought were privileged, and therefore, were not discoverable. Defendant was given ten (10) days to brief its arguments relative to privilege. Fourteen (14) days later, the Defendant filed its legal brief addressing the privilege arguments.

After considering the legal arguments, The Defendant was ordered to produce an appropriate Privilege Log within ten (10) days and to coordinate an *in camera* review of documents alleged to be privileged within thirty (30) days thereafter. The Order specified that a failure to comply with the deadlines set out above would result in a waiver of the claims of privilege. Defendant did not file the Privilege Log until March 14, 2019, and did not provide the documents to the Court for an *in camera* review until April 19, 2019, failing to meet either deadline, without explanation. On July 8, 2019, the Court entered its Order finding that neither individual claimed to be a "consulting expert" was, in fact, a consulting expert, and was instead, a fact witness, relevant to the case. Further, the Court noted the Defendant's history of failing to comply with discovery deadlines and court orders relative to discovery deadlines. As warned in the February 28, 2019 Order, Defendant's failure to comply with the deadlines outlined in the February 28, 2019, all claims of work product privilege were deemed waived, although the Court found that the documents listed on the Privilege Log would not have been covered by an attorney work product privilege.

On May 16, 2019, the Defendant scheduled its Motions relative to Sally Aikins' depositions for August 21, 2019, and thereafter, on May 29, 2019, the Plaintiff noticed a Motion to Enforce the February 28, 2019 Order, to be heard on August 23, 2019. A third hearing was scheduled for August 26, 2019 upon the Plaintiff's Motion to Strike the Fourth Affirmative Defense (the fraud defense that was re-alleged

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with no substantive changes after having been struck by Judge Higbee).

At the hearing on August 21, 2019, the Court denied the Defendant's Motions, and advised the Defendant's counsel that the Court had read the transcript of the deposition of Sally Aikins and was concerned with Defendant's counsel's behavior toward the third party witness and toward opposing counsel.

At the hearing on August 23, 2019, the Court found that the Defendant had been obstructing discovery and ordered the Defendant to pay the attorney fees and costs incurred by the Plaintiff, specifying that the Plaintiff was to provide the Defendant with the fees and costs claimed within thirty (30) days, and the Defendant would have five (5) business days thereafter to provide specific objections, if any, to the Plaintiff's claimed fees and costs. If no specific objections were provided within the time frame, then the fees and costs claimed by the Plaintiff were to be paid within thirty (30) days thereafter, and if objections were provided, the objections were to be set for hearing within thirty (30) days. After the Court announced the ruling, counsel for the Defendant, Mr. Allen, expressed frustration with the Court and announced an intention to appeal the ruling of the Court, and to seek the disqualification of this Judge. The Court advised that those filings would be addressed when filed. They were never filed.

Later that day, Mr. Allen filed an Emergency Motion to Continue August 26, 2019 hearing, alleging in writing his intention to appeal the ruling of the Court from August 23, 2019 and to seek disqualification of the presiding judge. On August 26, 2019, the Court denied the request to continue the hearing, noting that neither a Notice of Appeal, nor a Motion to Disqualify the Trial Judge, had been filed. The Court dismissed the Fourth Affirmative Defense without prejudice and allowed the Defendant twenty (20) days to amend the pleading. The written Order from the August 23, 2019 hearing was entered on September 24, 2019, giving Plaintiff until October 24, 2019 to submit its claimed fees and costs to Defendant.

The Plaintiff filed a Motion for Default Final Judgment, Motion to Enforce September 24, 2019 Order and Motion for Contempt of Court on December 5, 2019, alleging that the time records and accounting for fees and cost were delivered to the Defendant's counsel on October 24, 2019, in accordance with the Order, but no objections had been received, and no payments made. A later amendment to the Motion alleged that counsel for the Defendant improperly asserted attorney client privilege and instructed a witness not to answer questions during a deposition, and that counsel for the Defendant continued to assert such a privilege, even after contact with the Court by phone resulted in a ruling that the witness, a former independent contractor who did work for the Defendant, was not a "client" of the attorney for the Defendant.

Plaintiff's counsel submitted documentation, including transcripts of depositions and court proceedings, as well as pleadings and court orders, of other cases involving these defense attorneys. These cases have no precedential value as to the decisions of this Court, however, the Court does note that the issue of improper instruction to witnesses during depositions, has been the subject of prior sanction orders. Attorney Allen has advised this Court, on more than one occasion, that he has been a member of the Florida Bar for twenty-five (25) years, with the not so subtle implication that he knows the applicable law better than his opposing counsel, and perhaps the Court. However, it appears that, despite these previous sanction orders, and prior orders of this Court, he continues to instruct witnesses to not answer proper questions during depositions.

These other cases, also reflect two familiar patterns of behavior that are concerning, in their similarity to this case. One deals with the abuse of the Court's and opposing counsel's calendar. . .the repeated requests for extensions of time, followed by refusals to comply in good faith when extensions are agreed upon or granted by the Court, the refusal to schedule depositions within a reasonable period of time, requiring the filing of motions to compel, the persistent refusal to properly comply with court imposed deadlines often followed by specious arguments for the non-compliance, and the last minute filing of objections or motions for protective order, despite having had plenty of advance notice of the request by opposing counsel. These behaviors have been persistent throughout this case, including Mr. Allen's most recent insistence that the hearing scheduled for December 20, 2019 (Notice of Hearing dated October 30, 2019) could not proceed because he was entitled to have this matter considered at an "evidentiary hearing". Despite being repeatedly told by the Court that the hearing on December 20, 2019, *was* an evidentiary hearing, Mr. Allen insisted it was not, and therefore, the Court could not proceed to hear the Plaintiff's motion.

The second pattern of behavior, reflected in these unrelated cases, deals with the demeaning and unprofessional treatment of opposing counsel during depositions, in court hearings and in pleadings. Mr. Allen appears to believe that his aggressive and insulting treatment of his opposing counsel is both appropriate and justified. He is incorrect on both counts.

At the hearing on December 20, 2019, the Defendant was represented by both Mr. Allen and Mr. Ballard. Plaintiff was represented by Mr. Wittman. Among the pre-hearing court filings, Mr. Wittman submitted a copy of an email from Mr. Ballard dated December 13, 2019, advising Mr. Wittman that "Avatar has not and will not agree to your entitlement to fees and costs in this matter." The email then purports to articulate non-specific objections to the "ledger and excel spreadsheet" submitted by Mr. Wittman pursuant to the Court's sanction Order of September 24, 2019. In that Order, the Defendant was unambiguously directed to provide its specific objections, if any, to Plaintiff's submitted fees and costs within five business days of receipt. The Order determined Plaintiff's entitlement, and clearly required payment of all claimed fees and costs within thirty (30) days, if no timely objection was made.

When questioned about the email on December 20, 2019, Mr. Allen and Mr. Ballard indicated that the Defendant "intends to appeal" the Court's ruling, and therefore does not intend to pay the attorney fees and costs of the Plaintiff. In other words, the intent of the Defendant is to contemptuously violate the Court's Order of September 24, 2019. To date there has been no compliance with the Court's Order of September 24, 2019, and there has been no appeal filed, nor any stay entered, which would give the Defendant color of authority in its violation of the Court's Order.

II. Applicable Legal Standard

The Florida Supreme Court has adopted the following factors to consider in determining whether to grant the extreme sanction requested by the Plaintiffs in this case: "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." *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993) "Upon consideration of these factors, if a sanction less severe. . .appears to be a viable alternative, the trial court should employ such an alternative." *Id.*

The actions of the attorneys in this case have been willful, deliberate and contumacious. The attorneys have been previously sanctioned for similar conduct in both this case, and in other cases for similar reasons. The client was personally involved in some of the acts of

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disobedience, in that the corporate representative is an attorney, and was present for her deposition when counsel for the Defendant was improperly instructing her not to answer questions. The corporate representative was directly asked to answer the questions over the improper instruction of her counsel and declined to do so. The corporate representative was presumably also aware of the previous sanction orders entered in this case. The Plaintiff in this case has been prejudiced by unreasonable delay, and unnecessary cost incurred to file numerous motions to obtain compliance with discovery. The attorneys offered no reasonable justification for noncompliance, and, in fact, offered primarily incorrect statements of the law, disparaging comments about Plaintiff's counsel, and challenges to the authority and integrity of the Court. The behavior of the Defendant and its counsel has caused unnecessary problems for judicial administration in that valuable court hearing time has been utilized for frivolous discovery disputes and refusal to comply with Court orders. Previous sanctions have had little or no effect upon the Defendant's behavior, and there has been no indication that the Defendant or its counsel have accepted responsibility for any of the inappropriate behavior that previously occurred. There has been no discernible improvement in the manner in which this case has been handled, and the challenges to the authority of the Court have continued unabated.

III. Conclusion

For all of the aforestated reasons, the Motion for Entry of Judgment by Default is hereby GRANTED. The Answer and Affirmative Defenses of the Defendant are hereby stricken as a sanction for violations of discovery as provided for in Rule 1.380(b)(2).

* * *

**Contracts Predecessor judge erred in granting motion for partial summary declaratory judgment concluding that indemnity/hold harmless clause in subcontract between stadium construction contractor and fabricator of stadium canopy barred quasi-contract claims brought by fabricator against stadium owner for payment of monies owed for work Subcontract clause merely requires fabricator to indemnify contractor and stadium owner against claims brought by third parties arising out of or related to fabricator's work and does not exculpate contractor or stadium owner from liability to fabricator for contract or quasi-contract claims Motion for reconsideration is granted**

SOUTH FLORIDA STADIUM LLC, A Florida Limited Liability Company and HUNT CONSTRUCTION GROUP, INC., an Indiana Corporation, a division of AECOM Technology Corporation, Plaintiffs, v. ALBERICI CONSTRUCTORS, INC., a Missouri Corporation d/b/a HILLSDALE FABRICATORS, Defendant/Counter Plaintiff, v. SOUTH FLORIDA STADIUM LLC, a Florida Limited Liability Company and HUNT CONSTRUCTION GROUP, INC., an Indiana Corporation, a division of AECOM Technology Corporation, Counter Defendants, and THORNTON TOMASETTI, INC., a New York Corporation, Third Party Defendant. Circuit Court, 11th Judicial Circuit in and for Miami Dade County, Complex Litigation Division. Case No. 2016 26070 CA 01. January 22, 2020. Michael A. Hanzman, Judge. Counsel: Joy Spillis Lundeen and Felix X. Rodriguez, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, for Plaintiff, South Florida Stadium, LLC. Wm. Cary Wright and Michael G. Rothfeldt, Carlton Fields, Jorden Burt, P.A., Tampa, and Jason Perkins, Carlton Fields, Jorden Burt, P.A., Orlando, for Plaintiff/Counter defendant, Hunt Construction Group, Inc. Stuart Sobel and Michael Clark, Jr., Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel, P.A., Coral Gables; Terrence L. Brookie, Frost Brown Todd, LLC, Indianapolis, Indiana; Richard Critchlow, Deborah S. Corbishley, and Elizabeth B. Honkonen, Kenny Nachwalter, P.A.,, Miami (Co counsel); and Jennifer Therrien and Andrew W. Manuel, Greensfelder, Hemker & Gale, P.C., St. Louis, Missouri, (Co counsel) for Defendant, Alberici Constructors Inc., d/b/a Hillsdale Fabricators. Ross D. Ginsberg, Weinberg, Wheeler, Hudgins, Gunn & Dial, Atlanta, GA, and Michael A. Hornreich and Harold Lang III, Weinberg, Wheeler, Hudgins, Gunn & Dial, Miami, for Third Party Defendant, Thornton Tomasetti, Inc.

**ORDER**

**I. INTRODUCTION**

Alberici Constructors, Inc., d/b/a Hillsdale Fabricators ("Hillsdale"), seeks reconsideration of a November 14, 2019 Order which granted South Florida Stadium LLC's ("SFS") "Motion for Partial Summary Declaratory Judgment" based upon the indemnity/hold harmless clause in the subcontract between Hillsdale and Hunt Construction Group ("Hunt"). According to Hillsdale, the Court's predecessor erred in concluding that this provision barred quasi-contract claims brought by Hillsdale against SFS in an effort to collect money allegedly owed for fabricating and installing a canopy over Hard Rock Stadium. The Court agrees.[1]

**II. ANALYSIS**

There is no doubt that a trial judge should hesitate to undo the work of another judge, *see Tingle v. Dade County Bd. of County Com'rs*, 245 So. 2d 76 (Fla. 1971), and "the rotation of judges from one division to another should not be an opportunity to revisit the predecessor's rulings." *Gemini Inv'rs III, L.P. v. Nunez*, 78 So. 3d 94, 97 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D240a]. These pragmatic principles serve to "promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise among them to the detriment of public confidence in the judicial function." *Epperson v. Epperson*, 101 So. 2d 367, 369 (Fla. 1958). For these reasons, as well as others, this Court is loath to—and has rarely—revisited rulings of a predecessor Judge. But it has done so when convinced that a prior ruling—particularly one of *pure* law—was clearly incorrect. *See, e.g., Teva v. Banif,* 23 Fla. L. Weekly Supp. 1009a (11th Jud. Cir., March 8, 2016) (Hanzman, J.); *Adams v. Surf House Condo. Ass.,* 26 Fla. L. Weekly Supp. 638a (11th Jud. Cir., Oct. 16, 2018) (Hanzman, J.). And considerations of comity and courtesy notwithstanding, the Court has the authority to revisit interlocutory rulings any time prior to the entry of a Final Judgment. *See Margulies v. Levy*, 439 So. 2d 336 (Fla. 3d DCA 1983); *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1412c]; *Torres v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 847 So. 2d 568 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1370d]; *Fed. Nat'l Mortgage Ass'n v. Gallant*, 211 So. 3d 1055 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D451a].

In this case there is no doubt that the Court's predecessor erred in concluding that the garden variety indemnity/hold harmless provision in the subcontract barred Hillsdale's claims against SFS. The indemnification clause, found in Attachment VII of the subcontract, is a ubiquitous term located in virtually all construction agreements (and many other commercial contracts). Through this clause—titled "Indemnification"—Hillsdale, as sub-contractor, obligated itself to:

> . . . indemnify, defend, protect and hold harmless [Hunt], [SFS]. . . and anyone else [Hunt] is required to indemnify pursuant to the terms of the Prime Contract . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontract Work (including, but not limited to, breach by Subcontractor [Hillsdale] of any obligation owed by it under the Subcontract. . .

Subcontract at section 33. This commonplace provision is exactly what it says it is—an indemnification clause which protects Hunt/SFS against claims brought by third parties arising out of or related to Hillsdale's work. *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999) [24 Fla. L. Weekly S216a] (a "contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party"); *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 262 (Fla. 2015) [40 Fla. L. Weekly S79a] (indemnification allocating the risk and liability for injuries to "an unknown third party"); *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205, 208 (Fla. 4th DCA 1973) ("an indemnity contract undertakes to protect the promisee (indemnitee) against loss or damage through a liability on the part of the latter to a third person"). So, for example, if a patron was injured

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because the canopy collapsed as a result of Hillsdale's defective work, and sued SFS as the owner of the stadium, Hillsdale would be obligated to indemnify SFS, and hold it harmless against any resulting liability. It is no more complicated than that.

In contrast to an indemnity/hold harmless clause, an exculpation clause operates to relieve one party to a contractual relationship from liability to the other party, thereby depriving "one of the contracting parties of *his or her right to recover damages* suffered due to the negligent act of the other contracting party." *Sanislo* at 265; *see also Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205 (Fla. 4th DCA 1973). Because an exculpation clause insulates a party to a contract against claims arising out of their own negligence or wrongdoing, such clauses are "are not favored" and enforceable only "where the intention to be relieved from liability was made clear and unequivocal and the wording was so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away." *Sanislo, supra* at 260-261; *Gayon v. Bally's Total Fitness Corp.*, 802 So. 2d 420 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2847b]; *Iglesias v. Crane Worldwide Logistics*, 24 Fla. L. Weekly Supp. 133a (11th Jud. Cir., May 5, 2016) (Hanzman, J.) (discussing the distinction between indemnification and exculpation agreements).

The garden variety indemnity/hold harmless clause contained in the Hunt/Hillsdale subcontract does not even purport to exculpate SFS or Hunt from liability to Hillsdale for contract or quasi contract claims (or any other claim for that matter). It is not an exculpatory clause at all, let alone one that states, in "clear and unequivocal" wording, that either SFS or Hunt is being relieved of liability to Hillsdale. *Sanislo* at 261. It is again a run-of-the-mill indemnity clause, nothing more or less. Indeed, the frivolity of SFS's argument is amply demonstrated by the fact that this indemnity/hold harmless clause runs in favor not only of SFS, but Hunt as well. And according to SFS, this provision operates as a "release that was issued by Hillsdale in which Hillsdale promised they would never sue SFS for any reason." *See* Nov. 14, 2019 TR at 7:18-20. If that is so (and it is not) the provision also would operate to release Hunt and represent a "promise" by Hillsdale never to sue it "for any reason." Thus, acceptance of SFS's strained interpretation of this clause would, by natural extension, mean that Hillsdale is also unable to sue Hunt for money due under the subcontract, enabling Hunt to breach the agreement with impunity.[2]

In a desperate effort to retain this obviously erroneous but favorable ruling, SFS cites *Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP*, 832 So. 2d 270 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2664b], for the proposition that a "hold harmless" clause is somehow different from an "indemnification" clause, and that the words "hold harmless" in an indemnification clause magically transform that clause into an exculpation provision. *Kitchens* says no such thing and wholly undermines SFS's position. The *Kitchens* court, like the Court here, was presented with a garden variety indemnification clause which, like the one here, provided that an accounting firm's client would indemnify the firm, and hold it "harmless from," any claims arising out of any "circumstances where there has been a knowing misrepresentation" to the firm made by a member of the client's management. *Id.* at 272. When the client sued for negligence in connection with the "planning and designing" of an audit, and for failing to detect an "ongoing embezzlement scheme by [the] client's controller," the firm claimed that this indemnity/hold harmless clause operated to exculpate it from liability. The trial court agreed and dismissed the case. Reversing, the Fourth District pointed out that the indemnity/hold harmless clause did not immunize the firm from liability "for their own negligence" because, quite simply, it did not even purport to exculpate the firm, let alone do so in "clear and unequivocal terms." *Id.* at 273. Rather, the hold harmless agreement, like the one here, was nothing more than an "indemnification agreement." *Id.* Put another way, the *Kitchens* court rejected the claim that the presence of the words "hold harmless from" turned the indemnification provision into an exculpation clause—the precise claim SFS now advances.

Despite the fact that the actual holding in *Kitchens* completely undermines its position, SFS directs the Court to Judge Farmer's comment that "there is a difference between contracts of indemnification and hold-harmless agreements." This isolated statement—unrelated to the holding (*i.e.*, pure *dicta*)—is incorrect. There are only two types of liability shifting clauses; an indemnity/hold harmless clause and an exculpation clause. Through the former, a party is again indemnified *and* held harmless against third party claims. In other words, they are "protected" from liability to third parties arising out of the indemnitor's performance. But there is no distinction between an "indemnification" and "hold harmless" agreement, as virtually every indemnity clause "indemnifies and holds harmless" an indemnitee against any potential liability to a third party arising out of the indemnitor's contractual undertakings, thereby shifting liability exclusively to the indemnitor.

The bottom line is there is no substantive difference between a clause that "indemnifies party A against liability" and one that "indemnifies and holds harmless party A against liability." Both accomplish the exact same thing. And the words "hold harmless" do not convert an indemnification clause into an exculpatory clause. They are simply two words routinely used in indemnity provisions which add nothing to the analysis, because by indemnifying a party the indemnitor is, by definition, holding the indemnitee "harmless" against liability. The words "hold harmless" are no more than added verbiage, just as are the words following the term "release" in a standard "General Release" form (*i.e.*, acquit, discharge, relinquish, etc. . . .). And SFS' claim that the words "hold harmless," which are contained in virtually all indemnification clauses, somehow transform an indemnification provision into an exculpation clause (or covenant not to sue) is, to say the least, intellectually frail.

For the foregoing reasons, Hillsdale's Motion for Reconsideration of Ruling Granting SFS' "Motion for Partial Summary Declaratory Judgment Regarding the Hold Harmless Provision in Hillsdale's Subcontract" is **GRANTED**. The Court finds, as a matter of law, that the indemnification clause in the subcontract does not bar, or in any way impact, claims Hillsdale may possess against SFS or Hunt for payment. Nor did Hillsdale breach this provision by filing suit in an effort to collect money it claims to be owed.[3]

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[1]This Court has reviewed the transcript of the hearing on this Motion, including its predecessor's oral ruling. It has not, however, seen or been provided with a written order memorializing that oral pronouncement.

[2]Because the indemnification/hold harmless provision in this subcontract is not an exculpation clause at all, the Court need not address whether an actual exculpation clause may operate to bar quasi contractual (as opposed to only tort) claims. There is doubt that a clause which attempts to exculpate a contracting party from liability for a breach would render the contract illusory, as such a clause would make the exculpated party's performance completely optional. *See Allington Towers N., Inc. v. Rubin*, 400 So. 2d 86 (Fla. 4th DCA 1981) (clause in executory contract for the purchase of a condominium that granted buyer the unfettered right to terminate with no consequence failed for lack of consideration); *OJ Commerce, LLC v. Ashley Furniture Indus., Inc.*, 359 F. Supp. 3d 1163 (S.D. Fla. 2018) (agreement that left defendant's performance conditional on the securing of an acceptance letter; an act that was wholly under its control, was illusory as defendant was never obligated to do anything); *Pier 1 Cruise Experts v. Revelex Corp.*, 9:16 CV 80567, 2017 WL 5713931 *2 3 (S.D. Fla. July 18, 2017) (holding that provision that purports to prevent contracting party from being able to sue the other contracting party for breach of contract renders the entire contract illusory). This does not, however, necessarily mean that a non party to a contract, such as SFS here, may not be exculpated from quasi contract claims if an exculpatory clause clearly and unequivocally says that the party claiming damages will not, under any circumstances, be permitted to bring that claim. But again, the Court need not grapple with this interesting but academic issue because this subcontract contains no exculpatory clause.

[3]In fact, Hillsdale's filing of its claims would not amount to a breach of contract

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even had its interpretation of the indemnity provision turned out to be incorrect. *See Dan Galasso Waste Serv., Inc. v. Hemery,* 528 So. 2d 1356, 1357 (Fla. 3d DCA 1988) ("[s]imply by incorrectly perceiving its legal rights under the contract and bringing an action to enforce these rights as it perceived them, the plaintiff was not, as urged, in "breach of this agreement" else every unsuccessful action for breach of contract would itself become a breach of contract. . .").

* * *

**Torts Attorneys Legal malpractice Former client's action against attorneys that unsuccessfully defended her in breach of guaranty action, alleging that attorneys committed malpractice by failing to object and move for directed verdict when plaintiff in underlying case did not put into evidence or reestablish original promissory note reflecting debt that she guaranteed Predecessor judge erred in denying attorneys' motion for partial summary judgment where, because plaintiff in underlying action was not required to introduce or reestablish original note in order to prevail on breach of guaranty claim, attorneys' failure to object to absence of original note did not in any way contribute to judgment entered against former client or proximately cause her any damages**

AVRA JAIN, Plaintiff, v. BUCHANAN INGERSOLL & ROONEY PC, a foreign profit corporation, and RICHARD A. MORGAN, an individual, Defendants. BUCHANAN INGERSOLL & ROONEY PC, a foreign profit corporation, Counter Plaintiff, v. AVRA JAIN, an individual, Counter Defendant. Circuit Court, 11th Judicial Circuit in and for Miami Dade County, Complex Litigation Division. Case No. 2017 026857 CA 43. March 13, 2020. Michael A. Hanzman, Judge. Counsel: Bruce Weil and Steven Davis, Boies Schiller Flexner LLP, Miami, for Plaintiff. James N. Robinson and Zachary B. Dickens, White & Case LLP, Miami, for Defendants.

## ORDER

### I. INTRODUCTION

Plaintiff, Avra Jain ("Jain"), brings this legal malpractice claim against her former counsel, Defendants Buchanan Ingersoll & Rooney PC and Richard Morgan (collectively "Buchanan"), seeking to recover approximately $11 Million she was required to pay in order to satisfy a judgment entered against her in the case of *Abraham Cohen v. Avra Jain*, 2009-14497-CA-01 (the "underlying case").[1] Jain insists that the Plaintiff in that case—Abraham Cohen ("Cohen")—failed to put into evidence (or reestablish) the original promissory Note reflecting the debt she had admittedly guaranteed, and that had Buchanan timely raised this deficiency she would have been entitled to a directed verdict on Cohen's claim against her for breach of that guaranty, thereby escaping liability altogether. Put another way, Jain alleges that Buchanan's failure to timely raise this objection and/or move for directed verdict "proximately caused" her to suffer the adverse judgment, a judgment she would not have been exposed to "but for" Buchanan's malpractice.[2]

Buchanan previously moved for summary judgment, insisting that its alleged failure to timely object to the absence the original Note did not proximately cause Jain injury because she was sued on her guaranty, and that in order to prevail on *that* claim Cohen was not required to introduce the Note into evidence at all. For that reason, Buchanan says that its alleged failure to insist upon a surrender of the Note, or move for directed verdict based on its absence, did not cause or in any way contribute to the adverse result Jain suffered. This Court's predecessor disagreed, concluding that "presentment of the original instrument, or reestablishment of a lost instrument, is not only necessary to enforce the instrument itself, but the guaranty that secures it." January 8, 2020 Order, citing *Buechel v. Korea Bone Bank Co., Ltd*, 2012 WL 12905649, at *4 (M.D. Fla. Aug. 15, 2012) (commenting, in *dicta*, that "a party may seek payment directly from a guarantor in the absence of the obligor, assuming the note is not lost. . . .").[3]

Buchanan seeks reconsideration of that ruling, arguing that a claim for the breach of a guaranty is a straight forward state law breach of contract claim, and that "to succeed in a breach-of-guaranty claim 'under Florida law, a plaintiff must show: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach.' " Defs.' Mot. For Recon. p. 10, citing *Fifth Third Bank v. Alaedin & Majdi Invs., Inc.*, 2013 WL 623895, at *3 (M.D. Fla. Feb. 20, 2013). And Buchanan insists that surrendering (or reestablishing) the original note evidencing the debt guaranteed is not the *sine qua non* of a plaintiff's ability to prove *that* claim. Defs.' Mot. For Recon. p. 10-14, citing *Fifth Third Bank,* 2013 WL 623895 (entering summary judgment on guaranty claims even though original promissory note had been lost or destroyed and had not yet been reestablished because elements to establish breach of guaranty had been met and that those elements were the same as for breach of contract); *Emerald Portfolio, LLC v. Outer Banks/Kinnakeet Associates, LLC*, 790 S.E. 2d 721, 726 (N.C. Ct. App. 2016) (affirming summary judgment against guarantors because "the unenforceability of the obligation by [the plaintiff] against [the borrower] is no defense for [the] guarantor," as the guaranty "created an obligation in contract . . . enforceable even in the absence of the note"); *Branch Banking v. D'Amore*, 2014 WL 3610953, at *4 (M.D. Fla. July 22, 2014) (rejecting argument that plaintiff, in order to prevail on claims against guarantor, was required to put the original note into evidence or reestablish it, as plaintiff "has a right to seek redress pursuant to the unconditional guaranty agreements . . . ." and, for that reason, "the Court does not need to obtain the original notes before entry of judgment" on the "breach of the guaranty agreements.").

Because this Court agrees that in order to prevail on his claim against Jain for breach of her guaranty, Cohen was not required to introduce the original Note into evidence, or reestablish it, Buchanan's failure to object to the absence of the original Note did not, as a matter of law, in any way contribute to the outcome Jain complains of. It inexorably follows, as a matter of law, that Buchanan's alleged malpractice did not "proximately cause" Jain any damages. Buchanan is therefore entitled to summary judgment on Jain's remaining claim of legal malpractice. *See, e.g., Law Office of David J. Stern, P.A. v. Sec. Nat. Servicing Corp.*, 969 So. 2d 962, 966 (Fla. 2007) [32 Fla. L. Weekly S396a] ("[a] legal malpractice action has three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of loss to the client.").

In granting reconsideration and entering summary judgment in Buchanan's favor, the Court is mindful that a trial judge should hesitate to undo the work of another judge, *see Tingle v. Dade Cty. Bd. of Cty. Com'rs*, 245 So. 2d 76, 78 (Fla. 1971), and "the rotation of judges from one division to another should not be an opportunity to revisit the predecessor's rulings." *Gemini Inv'rs III, L.P. v. Nunez*, 78 So. 3d 94, 97 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D240a]. These pragmatic principles serve to "promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise amount them to the detriment of public confidence in the judicial function." *Epperson v. Epperson*, 101 So. 2d 367, 369 (Fla. 1958).

For these reasons, as well as others, this Court is loath to revisit rulings of a predecessor Judge, but it has done so when convinced that a prior ruling—particularly one of pure law—was incorrect. *See, e.g., Teva Trading Ltd. v. Banif Fin. Serv.'s*, 23 Fla. L. Weekly Supp. 1009a (Fla. 11th Cir. Ct. 2016) (Hanzman, J.); *Adams v. Surf House Condo Ass'n*, 26 Fla. L. Weekly Supp. 638a (Fla. 11th Cir. Ct. 2018) (Hanzman, J.). And considerations of comity and courtesy notwithstanding, the Court has the authority to revisit interlocutory orders at any time prior to the entry of a Final Judgment. *See Campos v. Campos*, 230 So. 3d 553, 556 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2257a] ("[a]fter a case is assigned to a different judge, a successor judge has the inherent authority to reconsider prior interlocutory orders . . . ."); *Fratangelo v. Olsen*, 271 So. 3d 1051, 1055 (Fla. 3d

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DCA 2018) [44 Fla. L. Weekly D76a] (". . .prior to final judgment, a successor judge had the power to vacate or modify a predecessor's interlocutory rulings . . . .") (citing *Tingle,* 245 So. 2d at 78).

Despite this Court's hesitancy to grant requests for reconsideration, here a dispositive *legal* issue puts this claim to rest, and to go forward with a trial only to later direct a verdict in Buchanan's favor would be a complete waste of party and judicial resources. *See Mobley v. Homestead Hosp., Inc.,* 45 Fla. L. Weekly D2a (Fla. 3d DCA Dec. 26, 2019) (Logue, J., concurring) ("[d]irected verdicts and summary judgments are two sides of the same coin," and both are designed "to secure the just, speedy, and inexpensive resolution of cases by avoiding a trial when there is not sufficient evidence for a jury to legally find for the non-movant"); *Daub v. Allstate Life Ins. Co.*, 2017 WL 2868406, at *1 (M.D. Fla. Apr. 26, 2017) (where "the Court would be required to consider [the] same information at trial . . . to allow [the] matter to proceed to trial would result in a waste of judicial resources and the Parties' resources as there is no material fact in dispute."). So the Court can either deny reconsideration and later inevitably enter a directed verdict after Plaintiff rests her case, or save the parties and the Court unnecessary expense and labor by putting the matter to rest now. As it is clear that the *only* remaining act of legal malpractice alleged (*i.e.* Buchanan's failure to object to the absence of the original Note) did not contribute to the outcome of the underlying case, and hence did not "proximately cause" Jain to suffer *any* harm, the Court chooses to take the latter route.[4]

## II. THE UNDERLYING CASE

In 2006, Jain along with a partner invested $5 Million to acquire a 45% ownership interest in a real estate property known as "Doral Project." In 2007, Jain, through an LLC she controlled—H-H Investments, LLC ("H-H")—purchased Cohen's stake in the project for the sum of $5M. The Purchase and Sale Agreement ("PSA") required a ten percent (10%) down payment ($500k), with the balance of the purchase price to be paid pursuant to the terms of a promissory note ("Note") executed by H-H as the maker/obligor. Jain, as the principal of H-H, guaranteed payment of that Note pursuant to a separate Guaranty Agreement ("Guaranty") which, in pertinent part, provided:

> The Guaranty Agreement is a guaranty of payment and not a guaranty of collection. It shall not be necessary for [Cohen], in order to enforce such payment by [Jain], to first institute suit or pursue or exhaust any rights or remedies against [H H].

*See* Guaranty ¶ 2. Jain also "waive[d] presentment, protest, notice, demand, or action on delinquency in respect of any such indebtedness." *Id.* ¶ 1. Jain's Guaranty further expressly provided that it could not be modified by oral agreement and that Jain "WAIVE[D] . . . ALL RIGHTS TO RELY ON OR ENFORCE ANY ORAL STATEMENTS MADE PRIOR TO, CONTEMPORANEOUSLY WITH OR SUBSEQUENT TO THE SIGNING OF THIS GUARANTY AGREEMENT . . . ." *Id.* ¶ 3.

After H-H defaulted, Cohen sued H-H on the Note and Jain on the Guaranty. The case proceeded to trial before the Honorable Jacqueline Hogan Scola. Cohen testified as to the existence of the Guaranty (*i.e.*, the contract), and it was admitted into evidence. He also testified that H-H had defaulted on the Note and that Jain had not paid anything pursuant to the Guaranty. Finally, Cohen testified as to the amount remaining due and owing. Jain did not dispute any of this and admitted, as she had to, that her entity, H-H, had not paid the debt and that she had not paid it pursuant to the Guaranty. Put simply, it was *uncontested* that the money had not been paid. Jain defended the case by claiming that Cohen had fraudulently induced her to purchase his interest and, when confronted with this fraud, promised he would "rip up the note" thereby extinguishing of the debt, and that he would pay her an additional $10M.

At the close of the evidence, Cohen moved for a directed verdict on the claim against Jain for breach of the Guaranty and for directed verdict on the claim against H-H for breach of the Note, arguing that Jain had failed to present *any* evidence of fraud in the underlying transaction, and that because these contracts prohibited any oral modifications Jain's defense based upon Cohen's alleged agreement to "rip up the note" failed as a matter of law. *See Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship,* 45 So. 3d 897, 901 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2127a] (a "promise that any agreement waiving or modifying" a contract must be in writing "is no less entitled" to enforcement than any other contract term); *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a] (". . . when a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed of as a matter of law."). Judge Hogan Scola agreed and directed a verdict against Jain on the Guaranty and against H-H on the Note. Judge Hogan Scola later entered a Final Judgment against Jain and H-H consistent with this ruling.[5]

Both H-H and Jain subsequently moved to vacate the Final Judgment pursuant to Florida Rule of Civil Procedure 1.540(b)(1) and (3), arguing that Cohen's "failure to surrender [the] original note" stood as "a bar to entry" of the Final Judgment. Mot. p. 4. *See also*, Mot. p. 8 ("the failure to submit into evidence, or surrender to the Court, the original Note constitutes an absolute bar to the entry of Final Judgment . . . ."). In response, Cohen argued, as Buchanan does now, that even if the judgment against H-H was in error due to the absence of the original Note in the record, the claim against Jain was not at all dependent on surrender of the Note or reestablishing it, as Jain was sued only on her Guaranty—a distinct contractual undertaking.[6] Judge Hogan Scola denied the 1.540 motions.

H-H and Jain both appealed, and in requesting reversal of the Final Judgment against her on the Guaranty Jain advanced the same argument she now makes here; namely, that the "Guaranty claim cannot stand without the Note," Reply Brief p. 14, and Cohen could not "rely exclusively on the Guaranty claim to avoid his UCC obligation to surrender the original Note." *Id.* p. 15. In response, Cohen argued exactly what Buchanan now argues here; namely, that Jain was independently liable pursuant to her Guaranty regardless of whether Cohen presented and/or surrendered the original Note. Answer Brief p. 41. The Third District was obviously unpersuaded by Jain's argument, and the Final Judgment against her on her Guaranty was affirmed on plenary appeal. *Cohen v. Jain*, 219 So. 3d 100 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D891b].[7]

## III. THE CURRENT ACTION

As pointed out earlier, Jain's only remaining claim of malpractice here is simple. She insists that had Buchanan moved for directed verdict based upon Cohen's failure to admit the Note into evidence (or properly reestablish it), Judge Hogan Scola would have been required to grant that motion because a surrender of the Note (or reestablishment) was essential to Cohen's ability to succeed on the claim against her for breach of the Guaranty. She would therefore have "won" the case outright, and successfully avoided her contractual liability. The Court disagrees.

Florida law requires that in order to prevail in an action to enforce a negotiable instrument, the original document must be presented or, if lost, reestablished. *See, e.g., Downing v. First Nat. Bank of Lake City*, 81 So. 2d 486 (Fla. 1955); *Figueredo v. Bank Espirito Santo*, 537 So. 2d 1113 (Fla. 3d DCA 1989); § 702.015(4), Fla. Stat. (2013). And a promissory note is, generally speaking, a negotiable instrument. *Fed. Nat'l Mortgage Ass'n v. McFadyen*, 194 So. 3d 418, 419 (Fla. 3d

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DCA 2016) [41 Fla. L. Weekly D1021b] ("[p]romissory notes are, by definition, negotiable instruments . . ."). The reason for this requirement is simple: because "a promissory note is a negotiable instrument," before a judgment on a claim based upon it can be entered, the note must be surrendered in order "to remove it from the stream of commerce and prevent the negotiation of the note to another person." *Heller v. Bank of Am., NA*, 209 So. 3d 641, 644 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D277b]; *Deutsche Bank Nat. Tr. Co. v. Clarke*, 87 So. 3d 58, 62 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D923a] ("surrender removes a note from the stream of commerce").

A guaranty, however, is *not* a negotiable instrument. It is a "collateral promise to answer for the debt or obligation of another," *Federal Deposit Insurance Corp. v. University Anclote, Inc.*, 764 F. 2d 804, 806 (11th Cir. 1985), and "a claim for breach of a guaranty is a straightforward state law breach of contract claim," nothing more or less. *Fifth Third Bank,* 2013 WL 623895, at *3; *PGT Indus., Inc. v. Harris Pritchard Contracting Serv. LLC*, 2013 WL 1320434, at *6 (M.D. Mar. 29, 2013) ("a claim for breach of guaranty is simply a breach of contract claim"); *Warner v. Caldwell*, 354 So. 2d 91, 96 (Fla. 3d DCA 1977) (". . . the rules applicable to contracts, generally, likewise apply to contracts of guaranty . . . ."). And, like in any breach of contract case, a plaintiff in a case claiming the breach of a guaranty must prove: (1) the existence of the contract (*i.e.*, the guaranty); (2) a breach of the contract (*i.e.*, a failure of the guarantor to pay); and (3) damages resulting from the breach (*i.e.*, the amount remaining due). *See Fifth Third Bank,* 2013 WL 623895, at *3.

Because a guaranty is a contractual undertaking separate and distinct from the obligor's promise to pay the debt, a cause of action for breach of a guaranty can stand alone, and an absolute guaranty is enforceable immediately upon a default in payment. *Ft. Plantation Invs., LLC v. Ironstone Bank, FSB*, 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D874a] (noting that a claim to foreclose a mortgage and claims on guarantees of debt secured by a mortgage each present a distinct cause of action); *Anderson v. Trade Winds Enterprises Corp.*, 241 So. 2d 174, 177 (Fla. 4th DCA 1970) ("[o]ne who undertakes an absolute guarantee of payment by another becomes liable immediately upon default in payment by the other"). For this reason, Jain's liability under the Guaranty arose as soon as H-H defaulted on the Note, and the parties' written agreement (and the law) permitted Cohen to pursue a claim against her on the Guaranty regardless of whether he chose to sue H-H on the Note at all. *Agarwal v. Pinnacle Realty Mgmt. Co.*, 718 So. 2d 947, 948 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2332c] ("because the guaranty was 'absolute,' [plaintiff] was not required to pursue other potential defendants first . . . before pressing its claim against the guarantor.").

Cohen was also entitled to bring both claims at the same time and in the same lawsuit, as he elected to do. And to prevail on his claim under the Note he was required to put the original into evidence or reestablish it. On the other hand, to prevail on the claim against Jain based upon her breach of the Guaranty, Cohen was only required to prove, by competent evidence, the existence of the Guaranty (which was admitted); a breach of the Guaranty by Jain's failure to pay (which was admitted); and the amount owed (also admitted). The surrender or reestablishment of the original Note was not required to prove Cohen's *prima facie* case, and the fact that Cohen chose to pursue his separate claims in a single lawsuit did not superimpose the elements of one of those distinct causes of action (enforcement of the Note) upon the other (breach of the Guaranty).

In support of her position that surrender or reestablishment of the original Note is necessary to enforce a guaranty that secures it, Jain cites either *dicta* from cases that do not address the issue, or principles of law that have nothing to do with the question. For instance, *Sandefur*, 183 So. 3d 1258, 1259, and *Greene v. Bursey*, 733 So. 2d 1111 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1227b], both cited in the January 8, 2020 Order Denying Defendants' Motion, merely hold that when a sale or assignment of a note occurs, any guaranty of that debt "follows" the note to the third-party purchaser/assignee who may then enforce the guaranty. This is a well settled principal of law, and had Cohen sold or assigned the Note here, his buyer/assignee would have secured the right to enforce the Guaranty against Jain even absent a separate assignment of that instrument. But neither case holds, or remotely suggests, that one who sues on a guaranty must produce the original note or reestablish it.

Jain next relies upon two federal court orders—neither of which support her cause. In the first case, *Buechel*, 2012 WL 12905649, the court addressed a motion to dismiss for failure to join an indispensable party. The plaintiffs in that case had sold a business (Endotec) to defendant Young Bock Shim and his company (KBB), and had received a promissory note from Shim "which KBB endorsed and guaranteed." *Id.* at *1. The note and guarantee were contained in the same instrument. Plaintiffs alleged that Shim and KBB "failed to pay the installments due on the promissory note" and brought an action on the note and guaranty in a single count. *Id.* at *2. Plaintiffs also brought a claim to reestablish the lost promissory note (Count II) and a third count for damages on a separate agreement.

The court dismissed Shim as a defendant because "there was a lack of diversity of citizenship between Shim and the Plaintiffs." *Id.* The question then became whether Shim was an "indispensable party." That was the *sole* issue before the court. In concluding that Shim was an indispensable party to an action seeking to reestablish a note because "[a]s the maker of the lost note" he "clearly has an interest in this action . . .," the court commented in passing that "a party may seek payment directly from a guarantor in the absence of the obligor, assuming the note is not lost." *Id.* at *4, citing *Fort Plantation Invs., LLC v. Ironstone Bank*, 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D874a], and *Vernon v. Serv. Trucking, Inc.*, 565 So. 2d 905, 906 (Fla. 5th DCA 1990)). These two decisions do say that a party may proceed directly against a guarantor without suing the maker (obligor), but neither hold nor suggest that they may do so only if "the note is not lost," the *dicta* in *Buechel* Jain clings to here.

Likewise, in *Cordell Funding, LLLP v. Jenkins*, 2013 WL 12080922 (S.D. Fla. Jan. 30, 2013), also relied upon by Jain, Magistrate Judge Hopkins simply recommended denial of a motion for "entry of judgment in Plaintiff's favor" on claims seeking to recover under a note and guarantees because "Plaintiff has not alleged" the "elements necessary to recover on a lost instrument," and it was "not persuaded" that "the personal guarantees on which [plaintiff] is suing are not negotiable instruments." *Id.* at *4. The court was not addressing the question of whether a plaintiff suing on a guaranty must introduce into evidence the note guarantees (or reestablish it), and—in any event—Jain concedes that the Guaranty she executed here is *not* a negotiable instrument. This is not much of a "concession" because it is well settled under Florida law that a guarantee is *not* a negotiable instrument. *See Fewox v. Tallahassee Bank & Tr. Co.*, 249 So. 2d 55 (Fla. 1st DCA 1971).

The next case relied upon by Jain, *MBC Gospel Network, LLC v. Florida's News Channel, LC*, 277 So. 3d 647 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1017b]nb , is equally unremarkable and stands for nothing other than the well settled proposition that before entering a judgment "on a note," the trial court must require that the plaintiff "demonstrate its entitlement to enforce the note by producing the original promissory note, or reestablishing it as a lost note." *Id.* at 649. The court does not address, or even discuss, the question of whether a plaintiff—in a claim for breach of a guaranty—must put the original note into evidence or reestablish it if lost.

The same is true of *Hernandez v. Cacciamani Dev. Co.*, 698 So. 2d

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927 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2148a], another case Jain takes refuge in. In *Hernandez,* the plaintiff had filed a complaint to enforce a promissory note and "enforce the personal guarantee on said note" against defendant Cacciamani. *Id.* at 928 At the close of plaintiff's case, defendants moved for an involuntary dismissal based upon plaintiff's "failure to move the original promissory note" into evidence. The trial court granted that motion and entered a dismissal with prejudice. *Id.* It then denied plaintiff's motion for new trial and/or rehearing requesting an opportunity to "produce the original note . . ." *Id.* Affirming, the appellate court never addressed—presumably because the issue was never raised or argued—whether introduction of the original note was necessary in order to proceed on the claim against the guarantors.

Finally, Jain relies upon *Puryear v. Prokeen Mgmt. Co., Inc.*, 49 Misc. 3d 1207(A), 26 N.Y.S. 3d 215 (N.Y. Sup. Ct. 2015), a case where the court denied a motion for summary judgment because the lost note affidavit "lack[ed] details required," and plaintiff had "not established the underlying debt that Purdy allegedly guaranteed." *Id.* The court also noted that the record was "unclear whether Purdy guaranteed the note" at all, as opposed to "a different debt." *Id.* The case hardly stands for the proposition that to succeed at trial on a claim for breach of a guaranty, a plaintiff must introduce the original note or reestablish it if lost.

In contrast, cases which do squarely address this issue (*Fifth Third Bank,* 2013 WL 623895*; Emerald Portfolio,* 790 S.E. 2d 721; *Branch Banking,* 2014 WL 3610953) uniformly (and in this Court's opinion correctly) hold that a party proceeding on a claim for breach of guaranty need not put into evidence the note reflecting the underlying debt. They must prove the elements of a breach of contract claim, no more and no less.[8] While introduction of the note might assist a plaintiff in meeting that burden (or might not), the plaintiff is *not* suing on the note and is *not* required to put it into evidence or to reestablish it. And a defendant, like Jain, who is sued for breach of a guarantee agreement is of course free to defend the case by trying to prove that the debt guaranteed was in fact paid or otherwise extinguished.

## IV. CONCLUSION

Because Cohen's claim against Jain for breach of the Guaranty was never dependent upon introducing the original Note into evidence, or reestablishing it, Buchanan's alleged failure to timely object to the Note's absence had no impact on the ultimate result or, to put it in legal parlance, Buchanan's alleged failure to object to the absence of the Note did not, as a matter of law, "proximately cause" Jain any harm. Rather, Jain admitted to the debt, admitted that her company, H-H, failed to pay the debt, and also admitted that she had not paid the debt as required by her Guaranty. She then defended the case by claiming that Cohen had defrauded her in the underlying transaction and, when caught, had agreed to extinguish the debt—claims Judge Hogan Scola (and the Third District) rejected. *That* is why Jain lost the case, as she should have. And this bankrupt legal malpractice claim is nothing more than a misguided and desperate attempt to shift Jain's adjudicated *contractual* liability onto her former counsel. But like most "Hail Mary's," this throw falls far short of the end zone.

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

1. For the foregoing reasons, Defendants' Motion for Reconsideration of Order Denying Defendants' Motion for Partial Summary Judgment on Jain's "Lost Note" Theory of Liability is **GRANTED**.

2. The Order entered on January 8, 2020 denying that motion is **VACATED** and the Court **GRANTS** Defendants' Motion for Summary Judgment.

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[1]In addition to the amount she was required to pay to satisfy this adverse judgment, Jain also seeks other damages she claims were proximately caused by Buchanan's alleged malpractice, including: (a) attorney's fees; (b) lost business opportunities; (c) the cost of the supersedeas bond; and (d) the value of membership and/or shareholder interests in ventures she was forced to sell at below market prices in order to raise the funds needed to satisfy the judgment. SAC ¶ 43 a i.

[2]Jains' Second Amended Complaint ("SAC") set forth other alleged acts of alleged legal malpractice including: (a) a failure to sufficiently plead certain affirmative defenses; (b) a failure to properly lay a predicate for the admissions of certain evidence, and; (c) a failure to disclose documents material to her defenses. These claims have been disposed of and, as a result, the *only* malpractice claim remaining is premised upon Buchanan's alleged failure "to raise any issue about the non existence of the original note" prior to trial. SAC ¶ 41 a, c, e, f.

[3]Two Orders were entered on January 8, 2020 denying Buchanan's alternate motions for summary judgment: 1) Order Denying Defendants' Motion for Partial Summary Judgment on Jain's "Lost Note" Theory of Liability, and 2) Order Denying Defendants' Motion for Partial Summary Judgment on Jain's "Lost Note" Theory of Malpractice. This Court's ruling that Jain's liability pursuant to her guarantee was not dependent on Cohen's ability to introduce into evidence the original Note disposes of this malpractice claim, rendering moot Buchanan's motion to reconsider the order denying its alternate motion.

[4]"Summary judgment is designed to bring the case to final resolution in an expedient fashion, if appropriate." *State Farm Mut. Auto. Ins. Co. v. Figler Family Chiropractic, P.A.,* 189 So. 3d 970, 974 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D805b]. "[S]ummary judgment is appropriate where, as a matter of law, it is apparent from the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law." *Fla. Bar v. Greene,* 926 So. 2d 1195, 1200 (Fla. 2006) [31 Fla. L. Weekly S212a].

[5]The Final Judgment awarded Cohen the sum of $8,189,060.04.

[6]Jain makes much of the fact that Buchanan while advocating on her behalf argued that the surrender or reestablishment of the Note was a requirement for judgment on the Guaranty ("no note, no guaranty"). Pl.'s Resp. to Defs.' Mot. For Summ. J. *passim.* Only a brief discussion of this argument is warranted. Although "Florida recognizes the equitable doctrine of judicial estoppel, which prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party," Florida Courts have held that an attorney in a legal malpractice action is not estopped from raising as a defense the argument that the client's claim would have been unsuccessful. *Olmstead v. Emmanuel*, 783 So. 2d 1122, 1126 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D898b] (judicial estoppel does not bar an attorney from arguing in a former clients' legal malpractice case that the client's claim, had it been raised, would not have been successful). The opposite would lead to an absurd result *i.e.* that every single defense made in a case must be adopted by the attorney making it. *See also Encyclopedia Britannica, Inc. v. Dickstein Shapiro, LLP*, 905 F. Supp. 2d 150, 156 (D.D.C. 2012) ("[t]he logic of judicial estoppel unravels in the malpractice context. An entity acting as a lawyer to a client is fundamentally differently situated than an entity acting in its own interest in subsequent malpractice litigation. The positions a law firm takes in those two contexts are necessarily in significant tension as a lawyer representing a client, a firm defends the strengths of the client's position while in malpractice litigation it seeks to demonstrate the opposite, *i.e.*, that the client would have lost. A lawyer cannot be faulted for this inherent inconsistency, and where a party cannot be faulted, applying judicial estoppel is often inappropriate."); *Power Control Devices, Inc. v. Lerner*, 437 P. 3d 66, 73 (Kan. Ct. App. 2019) ("An attorney is an advocate for his or her client and is always trying to put the best case forward. But in a legal malpractice action, an attorney's opinion of the case, the attorney's pleadings or filings in the case, or even the attorney's puffing about his or her abilities to prevail, is not evidence of any of the claims made in the underlying lawsuit."); *Heinze v. Bauer*, 178 P. 3d 597, 603 (Idaho 2008) ("statements made on behalf of a client in the course of representation are not personal admissions that may be used against the attorney in subsequent litigation"). So the fact that Buchanan in an effort to zealously represent Jain attempted to persuade Judge Hogan Scola that Cohen's claim on the Guaranty failed absent introduction of the Note into evidence is of no consequence here. The issue is one of law. Was Cohen, in order to prevail on the claim against Jain for breach of the Guaranty, required to introduce into evidence the original Note or reestablish it? The answer is no.

[7]The Final Judgment against H H on the Note also was affirmed.

[8]Our appellate court apparently agreed in this *very* case, as it rejected Jain's argument that the absence of the original Note at trial was fatal to the Judgment entered against her on the Guaranty. *See, e.g., Contreras v. Bank of New York Mellon*, 259 So. 3d 310 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2708a].

* * *

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**Contracts Employment Action alleging, in part, that defendants/former employer breached terms of "Employment Letter" by wrongfully terminating plaintiff's employment and also breached implied covenant of good faith and fair dealing by falsifying or manipulating employment records to create fictitious grounds for termination in an attempt to avoid paying sums of money and other benefits that would be due under separate share purchase agreement Parties' agreements, read singularly and collectively, clearly provided that employment was terminable at will for any reason Fact that parties' agreement afforded defendants a 30-day cure period should plaintiff place them on notice that he was leaving employment "for good reason" does not require court to infer that plaintiff was entitled to remain employed for 30 days after defendants decided to terminate him Motion to dismiss certain counts with prejudice granted**

GOOD INVESTMENTS, SARL, Plaintiffs, v. BRIGHTSTAR NETHERLANDS COÖPERATIEF U.A. et. al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami Dade County, Complex Litigation Division. Case No. 2019 30928 CA 01. February 6, 2020. Michael A. Hanzman, Judge. Counsel: Gary Davidson and Kathleen S. Phang, Diaz, Reus & Targ, LLP, Miami, for Plaintiffs Good Investments, SARL and Warren Barthes. Wifredo A. Ferrer and Edward Diaz, Holland & Knight LLP, Miami; Mark L. Durbin, Vincent P. (Trace) Schmeltz III and David Slovick, Barnes & Thornburg LLP, Chicago, IL; and Anne Marie Estevez and Beth S. Joseph, Morgan, Lewis & Bockius LLP, Miami, for Defendant Brightstar Entities.

**ORDER DISMISSING COUNTS I, II AND IV WITH PREJUDICE**

## I. INTRODUCTION

Before the Court is Defendants' "Motion to Dismiss for Failure to State a Claim," directed at Counts I, II and IV of Plaintiffs' Complaint. Counts I and II, brought by Plaintiff Warren Barthes ("Barthes"), allege that certain Defendants breached the terms of an "Employment Letter" by wrongfully terminating his employment, and that these same Defendants breached an "Implied Covenant of Good Faith and Fair Dealing" by "falsifying or manipulating employment records to create fictitious grounds for termination." Complaint ¶ 54. Through Count IV, Co-Plaintiff, Good Investments, SARL ("Good Investments"), alleges that certain Defendants—in "an attempt to avoid paying Plaintiff large sums of money and other benefits" that would be due under a Share Purchase Agreement ("SPA")—breached the "implied duty of good faith and fair dealing" imposed by that contract when they improperly terminated Barthes' employment. Complaint ¶ 69.

Defendants insist that these claims should be dismissed with prejudice because Barthes' Employment Letter clearly says that he was employed "at Will," and that "either you or the Company may terminate your employment at any time, with or without advance notice, and for any reason or no particular reason or cause." The SPA, entered into contemporaneously, also specified how a termination of Barthes' employment would impact Good Investments' right to receive certain earnouts that may become due under that contract. Thus, in Defendants' view, these agreements—even if read collectively—expressly permitted a termination of Barthes' employment at any time and for any reason, and painstakingly delineated how any such termination would impact Good Investments' right to future earnouts.

In opposition, Plaintiffs maintain that the Employment Letter and SBA should be read together, in *pari materia*, as one contract, *see, e.g., MV Ins. Consultants v. NAFH Nat. Bank*, 87 So. 3d 96 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1003a], and point out that under the SPA, Barthes was required to provide notice if he believed that a "Good Reason" existed for him to terminate his own employment, thereby giving Defendants a "cure period" of "30 days from the date of receipt of the notice to remedy such condition." Plaintiffs then reason that because this provision gave Defendants 30 days to cure any circumstances Barthes claimed to be "Good Reason" to leave, "it is reasonably inferable that the parties contemplated that Barthes would be entitled to remain employed with [Defendants] for at least 30 additional days after invoking the SPA Good Reason provision." Pls.' Mem. p. 7. Put simply, Plaintiffs argue that because Defendants had a 30 day period in which to "cure" any "Good Reason" for cause that Barthes might assert, the Court should "infer" that Barthes must have a corresponding right to remain employed for 30 days after Defendants decide to terminate him.[1] The Court disagrees.

## II. ANALYSIS

As this Court has written time and time again, both as an associate appellate and trial judge, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1556a]; *Sky Bell Asset Mgmt., LLC and Sky Bell Select, L.P., v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 23 Fla. L. Weekly Supp. 535a (11 Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard*, 23 Fla. L. Weekly Supp. 1022a (1 Jud. Cir., April 7, 2016). Put another way, "[c]ontracting parties are at liberty to address any issue they see fit . . . ," *Perera v. Diolife LLC*, 44 Fla. L. Weekly D1067a (Fla. 4th DCA Apr. 24, 2019), and when they do so the Court's task is "to enforce the contract as plainly written." *Okeechobee Resorts, LLC*, 145 So. 3d at 993; *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a].

Here the parties' agreements, read singularly and collectively, could not be any clearer. As this Court said earlier, the Employment Letter expressly provides that either party may terminate the employment of Barthes with or without cause at any time. It says, in plain English, that the employment is "at Will," and for "no specific period of time" "meaning that either you or the Company may terminate . . . at any time, with or without advance notice, and for any reason or no particular reason or cause." Similarly, the SPA also says, in plain and understandable language, that "no Person shall have any right to continued employment with the Buyer, any Group Company or any of its Affiliates as a result of the Seller's contingent right to receive Additional Consideration," thereby making it clear that Barthes had no right to further employment simply because Good Investments possessed a right to possible further earnout payments.

These provisions, whether read in isolation or collectively, convey the same unambiguous message, and grant Defendants the same unambiguous right. Barthes could be terminated at any time and for any reason—end of story. The SPA then addresses, with specificity, how any termination of Barthes' employment would impact Good Investments' possible entitlement to future earnouts, covering every possible scenario (*i.e.*, the Employer's decision to terminate "for cause" or "without cause," and the Employee's decision to terminate for "Good Reason" or for "any reason other than Good Reason"). Put simply, these provisions, which neither party claims to be ambiguous, expressly permit Defendants to terminate Barthes' employment with no continuing obligation to "keep him on" for any subsequent period of time, and dictate precisely how such a termination could impact any entitlement Good Investments might have to future earnouts. These bargained for provisions are legally enforceable. *See DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980); *Laguerre v. Palm Beach Newspapers, Inc.*, 20 So. 3d 392 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1997a]; *J.R.D. Mgmt. Corp. v. Dulin*, 883 So. 2d 314 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1956a]; *Ross v. Twenty-Four Collection, Inc.*, 617 So. 2d 428 (Fla. 3d DCA 1993).

Despite the clarity of these contracts, Plaintiffs ask the Court to

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"infer" that because Defendants had a 30 day period in which to "cure" any circumstances Barthes claimed would constitute "Good Reason" for him to leave, the parties must have intended that he would have a reciprocal right to stay employed at least 30 days post-termination. The contracts of course do not grant him that claimed "right," and this Court cannot do so under the guise of judicial interpretation, for it is not the prerogative of a court to re-write a contract "in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973). Rather, the Court's task is to "enforce the contract as plainly written," *Gulliver Sch.*, 137 So. 3d at 147, giving "[t]he words in [the] contract their plain and ordinary meaning." *295 Collins, LLC v. PSB Collins, LLC*, 44 Fla. L. Weekly D2900a (Fla. 3d DCA Dec. 4, 2019).

Nor may the Court employ the implied covenant of good faith and fair dealing as a tool to tweak the express terms of a written agreement. While it is well settled that "Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract," *Ins. Concepts & Design, Inc. v. HealthPlan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1316a], such a claim may not operate to contradict an express term of the contract. *Hahamovitch v. Delray Prop, Investments, Inc.*, 165 So. 3d 676 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D881a]. This is so because the doctrine is designed to protect "the reasonable expectations of the contracting parties in light of their express agreement," *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1438 (S.D. Fla. 1996); it is not a blue-pencil to be used in order to override "the express terms of the agreement," *Ins. Concepts & Design, Inc. v. HealthPlan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1316a], and turn contractually permitted conduct into a breach.

Finally, even if it were legally relevant (and it is not), there is nothing irrational or the least bit "unfair" about the lack of complete symmetry Plaintiffs complain of. Defendants were given the right to a 30-day cure period if Barthes placed them on notice of "Good Reason" for his departure because his leaving for "Good Reason" would trigger certain obligations Defendants would not have if he left "for any reason other than Good Reason." So before he left for "Good Reason," Defendants bargained for a right to cure. But, if Defendants terminated Barthes, as Plaintiffs argue happened here, Good Investments' entitlement to future earnouts was dependent not upon how long Plaintiff worked (*i.e.*, whether he stayed an additional 30 days), but rather upon whether the termination was "for cause" or "without cause" an issue which will again be litigated through Count III. In any event, had Barthes wanted a right to stay 30 days post-termination, or a right to cure any circumstance that might justify a "for cause" termination, he should have bargained for those rights. He did not, and this Court is not able to do it for him.

**III. CONCLUSION**

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

Defendants' Motion to Dismiss Counts I, II and IV is **GRANTED** and said counts are hereby dismissed with prejudice.

[1]The parties dispute the circumstances underlying Barthes' termination (*i.e.*, whether Barthes terminated his own employment or Defendants terminated him) but that issue is not before the Court today. That question will be adjudicated through Count III, which Defendants do not challenge at this stage of the proceedings.

* * *

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[redacted]

The Court disagrees that the Amended Information is a

[redacted]

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[redacted]

[redacted]

[redacted]

**Criminal law Defendant who is not in custody is not entitled to adversarial probable cause hearing**

STATE OF FLORIDA v. FLOYD DANIELS, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami Dade County. Case No. F20 255, Criminal Division. February 6, 2020. Ramiro C. Areces, Judge. Counsel: Colin William Milam, Miami Dade State Attorney's Office, for State. Gabriela Centofanti, Miami Dade Public Defender's Office, for Defendant.

**ORDER DENYING DEFENDANT'S *ORE TENUS* MOTION FOR ADVERSARY PRELIMINARY REARING**

THIS MATTER having come before the Court on Defendant's *ore tenus* Motion for Adversary Hearing on February 4, 2020 and this Court, having heard the argument of counsel, examined the case file and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is DENIED.

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Defendant, who is not in custody, contends he is entitled to an adversary preliminary hearing because the State has not charged him in an information or indictment within twenty-one days of his arrest. Defendant is incorrect.

It is true that Rule 3.133(b) provides for an adversary preliminary hearing for "[a] defendant who is not charged in an information or indictment within 21 days from the date of arrest or service of the capias." Fla. R. Crim. P. 3.133(b)(1). However, this language comes from a subsection titled "*When* Applicable" and concerns *when* an adversary preliminary hearing may be requested, not *who* can request it. *Id.* (emphasis added). Subsection (b)(5) makes plain that Rule 3.133(b) does not apply to defendants that are not in actual physical custody. *See State v. Debaun,* 129 So. 3d 1089, 1092 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2266a] ("we are guided by the tenets that a statute must be construed in its entirety and as a whole")(internal quotation marks omitted). Specifically, subsection (b)(5) provides that if a defendant is successful at the adversary preliminary hearing, the sole remedy is "release. . .from custody."[1] *Id.* The Third District Court of Appeal has defined "custody" in the context of the phrase "release[ ] from custody" and determined it must mean that a defendant be "in actual physical custody." *Branch v. Junior,* 281 So. 3d 1280, 1281 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2574b].

In this case, Defendant is not in actual physical custody and, as a result, cannot be *released* from custody. Rule 3.133(b), therefore, cannot afford this Defendant any relief. To interpret Rule 3.133(b) as requiring a hearing that cannot afford any relief is absurd. *See Amente v. Newman,* 653 So. 2d 1030, 1032 (Fla. 1995) [20 Fla. L. Weekly S172a] ("If possible, courts should avoid a statutory interpretation which leads to an absurd result.").

Notwithstanding the plain meaning of the rule at issue, Defendant contends this Court should rule in accordance with a forty-two-year-old decision out of the Fourth District Court of Appeal. *See Bell v. State,* 361 So. 2d 818 (Fla. 4th DCA 1978) (finding a defendant that is not in custody is entitled to an adversary preliminary hearing). This Court respectfully disagrees with the analysis in *Bell*.[2], [3] Instead, this Court finds the more recent opinion by the First District Court of Appeal in *Williams v. State* to be a more faithful interpretation of the rule. 271 So. 3d 1248, 1249 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1396a] ("this Court has held that no adversary preliminary hearing is required where a defendant has posted bail and is already on pretrial release.") (citing *Dumlar v. State,* 808 So. 2d 272, 273 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D471b]).[4]

A plain reading of Rule 3.133 (b), as a whole, demonstrates that only a defendant in actual physical custody need have an adversary preliminary hearing. Accordingly, Defendant's *ore tenus* Motion for Adversary Preliminary Hearing is DENIED.

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[1]Rule 3.133 is clear and envisions two possible scenarios for in custody defendants. First, if an in custody defendant succeeds at an adversary preliminary hearing and no information has been filed at the time of his release, then he is to be released without any restraint on his liberty. This is true even when, subsequent to his release from custody, defendant is charged in an information with the sole exception that the defendant shall then be required to appear at trial. Second, if an in custody defendant succeeds at an adversary preliminary hearing, but has been charged in an information sometime between the 21st day following his arrest and his release, then said defendant is to be released on recognizance with the condition that he appear at all court hearings, or as otherwise ordered by a summons. Both of these scenarios concern *in custody* defendants. *See* generally Fla. R. Crim. Pro. 3.133(b); *see also e.g. Branch,* 281 So. 3d at 1282 (finding the legislature knowingly distinguishes between "release from custody" and an additional "restraint on liberty").

[2]Even the *Bell* Court reached its decision "reluctantly." *Bell,* 361 So. 2d at 818 ("As we can see no useful purpose to be served by such an adversary hearing in view of our present speedy trial rules and liberal discovery rules we, nevertheless, reluctantly agree with petitioner.").

[3]The *Bell* Court found "[d]ue process requires that, at some point in time, a defendant has the right either to be formally charged with the commission of crime or removed from under the cloud of informal accusations." *Id.* at 819. This concern, however valid, is addressed by the State's speedy trial rules.

[4]Neither the Parties, nor this Court, have found an opinion from the Third District Court of Appeal that addresses this issue.

* * *

**Attorneys Misconduct Disqualification Sanctions Due process Plaintiff and his former counsel were denied procedural due process where plaintiff and current counsel were excluded from hearing on motion to disqualify and sanction former counsel for allegedly illegally securing and subsequently using confidential attorney-client communications of defense counsel, failing to disclose possession of additional privileged materials, and leveling allegations that defense counsel were plotting to have plaintiff falsely arrested and incarcerated in Bolivia in order to coerce a favorable settlement in plaintiff's successful civil action against defendant Further, trial court denied due process by finding that former counsel engaged in multiple acts of bad faith misconduct that are not charged in motion Former counsel's conduct did not rise to level warranting sanctions where counsel had right to explore whether defendant brought criminal case in Bolivia in order to gain advantage in damages phase of civil proceeding and to argue that defendant did so Given unusual and possibly dangerous circumstances, former counsel's decision to review recordings of phone calls between defendant and his counsel is understandable and excusable, and he gained no tactical advantage in civil action by doing so Upon discovering contents of recordings, former counsel exercised poor judgment and possibly violated Rules of Professional Responsibility by filing motion to strike defendant's pleadings charging defense counsel with attempting to extort settlement from plaintiff rather than bringing matter to attention of defense counsel and court Former counsel did not act in bad faith, vexatiously, wantonly or for oppressive reasons warranting sanctions Given fact that defendant instigated situation by attempting to have plaintiff arrested and incarcerated on false charges, requiring former counsel to pay sanctions to defendant would result in miscarriage of justice Order granting sanctions is vacated Renewed motion for disqualification of former counsel is mooted by former counsel's voluntary withdrawal of representation**

HAROUT SAMRA, individually, Plaintiffs, v. VICKEN BEDOYAN, individually, et. al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami Dade County, Complex Litigation Division. Case No. 2014 22854 CA. March 4, 2020. Michael A. Hanzman, Judge. Counsel: Jose A. Ortiz, Christopher King, and Luis Delgado, Miami; Jose M. Ferrer, Melissa Pallett Vasquez, and Desiree Fernandez; and Scott Cosgrove, Coral Gables, Co Counsel, for Plaintiff. Scott J. Link, West Palm Beach; Gonzalo R. Dorta, Coral Gables; and Angel A. Cortiñas, Jonathan H. Kaskel, and Jason M. Murray, Miami, for Defendants Bedoyan, WPM Miami, Inc. and WPM Boca, Inc.

## I. INTRODUCTION

Plaintiff Harout Samra ("Samra"), and non-parties Bilzin Sumberg Baena Price & Axelrod, LLP ("Bilzin") and Jose Ferrer ("Ferrer"), move for reconsideration of a September 16, 2019 "Order Granting Sanctions Against Plaintiff's Lawyers" ("Order") entered by this Court's predecessor, the Honorable Beatrice Butchko. Samra insists that the Order must be vacated because he was denied due process, as "neither Samra nor his counsel was permitted to attend or participate in the hearing, Samra was offered no opportunity to hear the testimony, review the exhibits, cross examine the witnesses, or present a response or rebuttal to the evidence presented by Bedoyan [the Defendant] at the hearing." Mot. p. 8, citing *Samra v. Bedoyan*, 2020 WL 216010 (Fla. 3d DCA Jan. 15, 2020) [45 Fla. L. Weekly D114c].[1] Bilzin also claims to have been denied "fundamental due process" as a result the sequestration of Samra and his counsel. Mot. p. 15. Bilzin/Ferrer also challenge the Order on the merits, insisting that it "imposed a sanction beyond the maximum permitted for the conduct alleged" (in their view disqualification), and that the evidence falls woefully short of demonstrating that Ferrer acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Moakley v.*

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*Smallwood*, 826 So. 2d 221, 224 (Fla. 2002) [27 Fla. L. Weekly S357b] (citing *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998) [23 Fla. L. Weekly S168a].

Upon careful review of the parties' submissions, and after entertaining oral argument, this Court concludes that Samra, Bilzin and Ferrer were denied procedural due process. The Court also concludes that while Ferrer's handling of the extremely delicate situation he found himself in was far from "perfect," and while he *may* have been a bit overzealous in his effort to protect his client from being falsely arrested and from rotting in a Bolivian jail cell, he did not engage in *any* behavior deserving of monetary sanctions. The Court also agrees that after Bilzin/Ferrer voluntarily withdrew from Samra's representation, thereby mooting Defendants' "renewed" motion for disqualification, the curtain should have fallen on this unseemly sideshow.[2]

In granting reconsideration, this Court is mindful that a trial judge should hesitate to undo the work of another judge, *see Tingle v. Dade County Bd. of County Com'rs*, 245 So. 2d 76 (Fla. 1971), and that "the rotation of judges from one division to another should not be an opportunity to revisit the predecessor's rulings." *Gemini Inv'rs III, L.P. v. Nunez*, 78 So. 3d 94, 97 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D240a]; *Russ v. City of Jacksonville*, 734 So. 2d 508 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1208a] (a judge should hesitate "to undo the work of another judge because of the code of restraint based upon comity and courtesy"). These pragmatic principles serve to "promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise among them to the detriment of public confidence in the judicial function." *Epperson v. Epperson*, 101 So. 2d 367, 369 (Fla. 1958).

For these reasons, as well as others, this Court is loath to revisit rulings of a predecessor Judge. It has nonetheless done so on rare occasions. *See, e.g., Teva v. Banif,* 23 Fla. L. Weekly Supp. 1009a (11th Jud. Cir., March 8, 2016) (Hanzman, J.); *Adams v. Surf House Condo. Ass.,* 26 Fla. L. Weekly Supp. 638a (11th Jud. Cir., Oct. 16, 2018) (Hanzman, J.). And considerations of comity and courtesy notwithstanding, a successor court undeniably has the authority to revisit interlocutory rulings any time prior to the entry of a final judgment. *See Campos v. Campos*, 230 So. 3d 553, 556 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2257a] ("[a]fter a case is assigned to a different judge, a successor judge has the inherent authority to reconsider prior interlocutory orders . . ."); *Fratangelo v. Olsen*, 271 So. 3d 1051, 1055 (Fla. 3d DCA 2018) [44 Fla. L. Weekly D76a] ("...prior to final judgment, a successor judge had the power to vacate or modify a predecessor's interlocutory rulings . . ."). Moreover, because the Court's predecessor was disqualified, Rule 2.330(h) expressly permits reconsideration of the Order.

> Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

Fla. R. Jud. Admin. 2.330(h).[3]

## II. PROCEDURAL HISTORY AND BACKGROUND

### A. The Case

In 2014 Samra brought this action alleging, among other things, the breach of an oral partnership entered into between himself and Defendant Vicken Bedoyan ("Bedoyan"). Bedoyan (and his two affiliated entities that also were named as Defendants), answered, raised affirmative defenses, and brought counterclaims. Samra was represented by Bilzin through Ferrer, and Defendants were represented by Gunster Yoakley & Stewart, P.A. ("Gunster") through Angel Cortiñas ("Cortiñas") and Jonathan Kaskel ("Kaskel").

The case was initially assigned to Judge John Thornton who, in 2016, bifurcated it, ordering a trial on liability to be followed by a trial on damages, if necessary. The case was then transferred to Judge William Thomas who, in early 2017, presided over a jury trial on liability. On March 1, 2017 the jury rendered its verdict, finding that Samra and Bedoyan had "formed a partnership commencing in 2009 to purchase and sell gold for a profit," and that "Bedoyan breached" that partnership agreement. Verdict ¶¶ 1, 2.[4]

Up to that point, the case was a garden variety commercial dispute. It then began to go off the rails when Defendants—in a motion filed in the Third District—represented that Plaintiff's counsel had filed a brief:

> "... the day after Samra's arrest in Bolivia on criminal charges arising out of illicit gold and money laundering transactions undertaken by him after misappropriating assets belonging to Petitioner WPM Miami, Inc."

*see* Mot. p. 2, fn. 1.[5] This bombshell obviously upped the ante, and Samra responded by swearing that this representation was "absolutely false." *See* Notice of Filing Decl. The Third District eventually denied Defendants' petition and the parties proceeded towards a trial on damages.

### B. The Events in Bolivia and Ferrer's Receipt of Allegedly Confidential Materials

As it turns out, but unbeknownst to Ferrer (and possibly Samra) at the time, on June 1, 2018 Bedoyan had filed a criminal complaint in Bolivia, accusing Samra of fraud and seeking $60 million in damages. Samra had not, however, been arrested on "charges arising out of illicit gold and money laundering transactions," as Defendants had represented to the Third District. Rather Bedoyan, as permitted under Bolivian law, had a filed a criminal proceeding based upon allegations arguably within the scope of the counterclaims the jury in Miami had already rejected. [6]

Shortly after Bedoyan's criminal case was filed, Samra says he was approached by a "woman he had never met before" who told him "that someone she knew wanted to speak" with him about Bedoyan, and that this unidentified person was waiting for him at a local café in La Paz, Bolivia. Samra Affidavit ("Aff.") ¶ 2. Samra and his partner, Yohan Gonzalez, then went to the café and "met a man who claimed that he had information that Mr. Bedoyan was plotting to set [him] up on charges of child pornography" Aff. ¶ 3. According to Samra, the man then "played an audio recording on his phone of a conversation between a woman and a man discussing the plan" to frame him and offered up "more information if [he] paid him $60,000.00." Aff. ¶ 3.

Samra testified that he refused that proposal and "reported what had happened to the police in Bolivia." Aff. ¶ 4. Within days, the Bolivian police had detained the man "along with several of the persons he identified as part of the group of people planning to frame [him]," including a woman named Adma Inchausti ("Inchausti"). Aff. ¶ 5. The Bolivian police then offered Samra an opportunity to speak with Inchausti in their presence, an offer Samra accepted. According to Samra, during that meeting Inchausti told him that "Mr. Bedoyan had hired her to bring a criminal action against [him] in Bolivia," advancing charges of "fraud . . . child pornography and murder of a Bolivian minister." Aff. ¶ 6. To avoid Samra pressing charges against her, "Inchausti offered to cooperate and provide information about the plot to bring [these] false charges." Aff. ¶ 6.

Samra accepted Inchausti's offer of cooperation and on June 22, 2018 he says she sent him four audio recordings of conversations she claimed to have recorded, two of which were with Cortiñas and one which was with Kaskel. Aff. ¶ 7. The next day Inchausti allegedly delivered to Samra's "security guard" a "packet containing a disk with the same audio recordings," as well as other "documentation," including screen shots of WhatsApp communications between her

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and Mr. Kaskel, and her and Mr. Bedoyan." Aff. ¶ 8. During his next trip to Miami, Samra "personally delivered the disk and packet of documentation" he received from Inchausti to his attorney, Ferrer. Aff. ¶ 9.

Ferrer has repeatedly testified that prior to receiving these materials he had also spoken directly with Inchausti when Samra placed her on his [Samra's] cellphone, and after Samra had told him Inchausti was "helping with the police" in Bolivia. Tr. pp. 86-96, Dec. 5, 2018; Tr. p. 216, Feb. 6, 2019; Tr. pp. 443-444, Feb. 7, 2019. That was the first time Ferrer became aware "of anything going on in Bolivia." Tr. pp. 86-88, Dec. 5, 2018. Ferrer has testified that at the beginning of this call Inchausti introduced herself as Bedoyan's "apoderado," and claimed that she had been "duped by Mr. Bedoyan into believing that Mr. Samra had participated in child pornography charges." Tr. p. 15, Aug. 24, 2018; Tr. p. 84, Dec. 5, 2018. Inchausti also told Ferrer that "they were working to implicate Mr. Samra in a scheme to murder a vice chancellor of Bolivia." Tr. p. 15, Aug. 24, 2018; Tr. p. 84, Dec. 5, 2018.

According to Ferrer, Inchausti said that "she needed to come clean," and that "she would be providing [him] information but [he] had to keep it quiet." Tr. p. 16, Aug. 24, 2018; Tr. p. 84, Dec. 5, 2018. Ferrer then told her that "I'm not going to keep anything quiet. You should understand that anything you provide me I'm going to provide to the Court." Tr. p. 16, Aug. 24, 2018. So at the time Ferrer received these materials from his client:

> (a) he was aware that Bedoyan's counsel had represented to the appellate court that Samra had been arrested on criminal charges of illicit gold and money laundering; an arrest his client denied and that he could not locate *any* record of;
>
> (b) he had been told that his client had reported an extortion scheme that led to Inchausti's detention by Bolivian authorities;
>
> (c) he had personally spoken to Inchausti who, according to Ferrer, confirmed a plot on the part of Bedoyan to frame his client for criminal charges of child pornography and a scheme to murder a public official; and
>
> (d) he had been told by Inchausti (again according to Ferrer) that she had spoken with Cortiñas and Kaskel and that she would be "producing documents" to him.

Needless to say, Ferrer insists that he had reason to suspect that Bedoyan might be attempting to secure his client's arrest in Bolivia on extremely serious criminal charges.

**C. Ferrer's Review of the Materials and Filing of a Motion to Strike Defendant's Pleadings**

Upon receipt of the materials from Samra, Ferrer reviewed the communications and had the audio tapes transcribed. He testified that at the time he did not "ever consider that maybe these were protected communications just because of the people who were involved" (*i.e.*, Cortiñas and Kaskel). Tr. p. 97, Dec. 5, 2018. He did, however, consult with Bilzin's general counsel "the moment I got off the phone with Adma Inchausti," *Id.* at 98, because of concerns "that a stranger was calling me on the phone telling me that she was going to give me information to show that the Defendant was complicit in a crime. This is a bazaar [sic] situation." *Id.* at 101. But he did not seek the advice of, or an opinion from, the Bar. *Id.* at 101-102. Nor did he bring this evidence to the attention of Cortiñas, Kaskel, or the court.

Instead of immediately revealing these communications to opposing counsel, or simply reporting the matter to the court, Ferrer secured a "certified translation of the recordings" and an "actual copy of the Bolivian complaint" filed against his client. He then decided to review those materials and, as a result of that review, his fear that Bedoyan might be attempting to secure his client's arrest on serious criminal charges, including charges of child pornography and murder, was validated.

Specifically, the disturbing conversations between Inchausti and Bedoyan reveal that *these two parties* were plotting criminal charges against Samra "to push him to negotiate," with Inchausti telling Bedoyan that they have "already [bought] a senator" to accuse Samra of "the assassination of the vice minister," and predicting that Samra probably won't run but if he does he can be shot by police and that would be "better" for Bedoyan because then (presumably) the need to negotiate would be over. Tr. pp. 2-6, Recording 1. Inchausti goes on to explain that the conditions of the prison that they *will be requesting Samra is sent to* are so poor that "[Samra] will try to commit suicide there," they will use the conditions to their advantage to offer him "the solution to all [his] problems," and that with the "pressure, he will negotiate." *Id.* at 8-9. Inchausti and Bedoyan also discuss the possibility of Samra being prosecuted "for the child pornography," and Inchausti's need to get information regarding "the Sheriff and Interpol" from Kaskel and Cortiñas. Tr. pp. 2, 6-8, Recording 5. And they again ruminate about what might happen "if [Samra] commits suicide" or is killed "in jail"—something that happens to child pornographers. *Id.* at 8.

In contrast, the conversations between Inchausti and Cortiñas and Inchausti and Kaskel appear to involve only the criminal fraud and related charges Bedoyan filed (or planned to file) arising out of the business relationship at issue in this case. Tr. p 1, Recording 2 (Cortiñas discussing with Inchausti her preparation of a claim for fraud, misrepresentation, influence peddling, use of a counterfeit instrument). The recordings also show that Cortiñas and Kaskel knew that Inchausti was filing criminal charges on behalf of Bedoyan as part of "our legal strategy" to "reach a good deal" and "resolve the suit that he has here in the United States . . ." *Id.* at 5, 10. *See also* Recordings 2, 3. Finally, the conversations reflect that Cortiñas and Kaskel were assisting Inchausti in attempting to facilitate Samra's arrest through Interpol. *See* WhatsApp message from Kaskel to Inchausti, referring her to U.S. Marshal Barry Goldberg. [7]

Understandably distressed by what he had heard, Ferrer decided to file "Plaintiff's Emergency Motion to Strike Defendants' Pleadings as a Sanction for Litigation Misconduct," alleging that Bedoyan—with the assistance of Cortiñas, Kaskel and others—had brought criminal charges in Bolivia against Samra solely to "extort settlement from Samra by leveraging a bogus criminal complaint against him. . ." Mot. pp. 6-7. The Motion described how "Bedoyan's Bolivian attorney," Inchausti, had provided Ferrer "with audiotapes of her recorded conversations with Defendants' Miami attorneys, Angel Cortiñas and Jonathan Kaskel," *Id.* at 3,[8] "evidence" which, according to the motion, provided "a disturbing glimpse into the murky depths to which Bedoyan and his counsel are willing to delve in order to prevail in this lawsuit." *Id.* at 3-4. The motion accused both Cortiñas and Kaskel of being "entirely complicit in the Bolivian criminal filing . . .," and in having "provided all the information Ms. Inchausti used to bring it." *Id.* at 4. Citing Rule of Professional Conduct 4-3 4(g), Ferrer argued that Bedoyan's pleadings should be stricken because he and his lawyers were "[u]sing criminal process to coerce settlement of civil claims . . . ." *Id.* at 6-7.[9]

**D. Defendants Respond with a Motion to Disqualify Bilzin/Ferrer**

In response to Ferrer's filing, Bedoyan moved to disqualify Bilzin/Ferrer, claiming that the firm had received, and was using, illegally intercepted attorney-client communications. A hearing on that matter was held before Judge Thomas on August 24, 2018. At that hearing, Ferrer confirmed receiving the allegedly protected communications directly from Samra and acknowledged reviewing them. Tr. vol. I pp. 9-10, Aug. 24, 2018. These communications consisted of audio recordings (referred to as "tapes") and written communication (referred to as "documents"). *Id.* at 11. Ferrer also acknowledged that

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he knew the communications were between "Ms. Inchausti, Mr. Cortiñas, and Mr. Kaskel, and there is a communication between Mr. Bedoyan." *Id.* He also confirmed his understanding at the time that Ms. Inchausti was "working as part of a legal team for Mr. Bedoyan in Bolivia." *Id.* at 12. While he testified that he believed Cortiñas and Kaskel had consented to these recordings "because Ms. Inchausti provided those communications to us," he did not contact either of them to "confirm that." *Id.*

After reviewing the materials, Ferrer believed that they evidenced "misconduct." *Id.* at 13-14; Tr. p. 96, Dec. 5, 2018 ("[t]hey were discussing, effectively, extorting my client"). He then testified that he had no participation in "making the tapes" or "obtaining the documents." Tr. vol I p. 14, Aug. 24, 2018. As pointed out earlier, Ferrer also testified that he had personally spoken with Inchausti prior to receiving the materials, and that she had told him that: (a) "she had been duped . . . . into believing that Mr. Samra had participated in child pornography charges"; (b) that they "were working to implicate Mr. Samra in a scheme to murder a vice chancellor of Bolivia"; and (c) that she would be providing him "information but [he] had to keep it quiet." *Id.* at 16.

Mr. Bedoyan was then called as a witness. He testified that Ms. Inchausti was a "legal advisor" to him in Bolivia, and that he never consented to having any of these conversations with her or his Florida counsel recorded. *Id.* at 19. Nor did he ever waive any "privacy" right or "attorney-client privilege" that might attach to these communications. On cross-examination, Ferrer asked Bedoyan whether he had reviewed the transcripts of his conversations with Inchausti. He said he had, but he did not know "if it is me or somebody else. I have no clue." *Id.* at 20-21. When he was again asked whether it was him "on those recordings," he testified it "[c]ould be, could not be. I don't know." *Id.* at 23. This prompted Judge Thomas, in response to an objection based upon the "attorney-client privilege," to comment that "if it is not him, if it is not him, then what's the privilege." *Id.*

The court then heard from Cortiñas, who testified that he had had "three telephone conversations with Mr. Bedoyan's legal team in Bolivia," and that each was "in furtherance of my representation of Mr. Bedoyan and WPM Miami in this case." Tr. vol I p. 27, Aug. 24, 2018. He never consented to his conversations being recorded, or waived his client's "attorney/client privilege with regard to those communications." *Id.* On cross examination, he confirmed it was his voice on the recordings, and that he believed his conversations with Inchausti took place in June. Then, when Ferrer attempted to question Cortiñas about whether anything on the recordings related to his "strategy regarding the damages trial that we are having on Monday," Bedoyan's counsel, joined by Cortiñas' counsel, objected—arguing that the recordings were "illegal," "can't" be used for any purpose whatsoever, and that Bedoyan was not required to "waive an attorney-client privilege simply because it assists the other side." *Id.* at 30-34. Defendants counsel also objected to Judge Thomas reviewing the communications. *Id.* at 36.

After briefly taking testimony from Kaskel, who also confirmed that the transcripts reflected communications between himself and Inchausti, Tr. vol. II p. 5, Aug. 24, 2018, Defendants called Inchausti via video conference. She testified that she was a lawyer in Bolivia and a "legal advisor in the present case," though she "do [sic] not sign as a lawyer." Rather, she was working with attorney Karina Cuba on behalf of Mr. Bedoyan. *Id.* at 9. She then confirmed that she represented "Mr. Vicken Bedoyan in the criminal proceedings against Mr. Harout Sambra [sic] . . ." and that the charges leveled were the "crime of fraud." *Id.* at 9-11. Inchausti testified that she had not brought any charges against Mr. Samra on behalf of Mr. Bedoyan related to "child pornography" or "with regard to killing a Bolivian minister." *Id.* at 12.

Inchausti also confirmed that she had been arrested and detained by Bolivian police on June 18, 2018 and taken to the central police district in La Paz. *Id.* She claimed that she was detained illegally, and that during that detention she "was deprived of [her] freedom until Mr. Samra came to speak to me at the office of the national police office, Daci." Tr. vol. II p. 14. According to Inchausti, Samra advised her that he had hired an "FBI detective" to "investigate us," and that he had "documents against me in order to use them in court." *Id.* at 15. Inchausti then admitted (as Ferrer had testified) that she had spoken to Ferrer "on an occasion when Mr. Samra handed [her] his telephone," but denied telling him that she would "send him documents." *Id.* at 15-16. She also denied telling Ferrer that she had been "duped" by Bedoyan and said that it would be "against the law in Bolivia for [her] to discuss [with Ferrer] conversations [she] had with Bedoyan." *Id.* at 17. Inchausti also denied ever recording any conversations with Cortiñas, Kaskel or Bedoyan, or providing recordings or other documents to Samra. *Id.* at 19.

The last witness called was Roxana Karina Cuba Chirinos, who testified—via video conference—that: (a) she was an attorney in Bolivia; (b) she was "the lawyer in the criminal case for fraud brought by Bedoyan against Samra that is being handled by Ms. Inchausti; (c) that Inchausti worked with her as part of a team in the "capacity of an expert"; and (d) that Bedoyan had never authorized her to reveal any conversation she had with him. Tr. vol. II p. 32, Aug. 24, 2018.

On August 31, 2018 Judge Thomas entered an order denying the motion to disqualify Bilzin/Ferrer, finding that "[t]he Defendants have not advanced even a scintilla of evidence that any of he alleged intercepted communications relate, in any way, to the scheduled damage trial that is before the Court." Order pp. 1-2. Judge Thomas further concluded that "the Defendants' allegation that the Plaintiff's Lawyers [Bilzin-Ferrer] were provided attorney-client and attorney work-product communications and advice involving the allegations asserted in this action, is simply not supported by the evidence" and—as a result—no evidence suggested—let alone proved—that "the alleged intercepted communications will disadvantage the Defendants in the remaining matter to be tried before this Court." Order p. 2.

Put simply, Judge Thomas correctly concluded that by denying him the opportunity to even review the allegedly confidential materials, Defendants made a tactical decision which resulted in their abject inability to meet their burden of proof. *See Gutierrez v. Rubio*, 126 So. 3d 320, 321 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D725f] ("[d]isqualification cases require the court to make a factual determination that 1) there is proof that confidential information was actually disclosed and, 2) that this information gave the non-moving party an unfair tactical advantage . . . in the litigation between the [parties]"); *Moriber v. Dreiling*, 95 So. 449, 454 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D169a] (receipt of privileged information "standing alone, does not automatically warrant disqualification." There must also be a "possibility that the receiving attorneys obtained an unfair informational advantage . . ."). The entire hearing was in fact a complete waste of party and judicial resources, as there was no possibility Defendants could meet their burden of proof without permitting the court to examine the communications and determine: (a) whether they were privileged, and (b) if so, whether there was a "possibility" that Ferrer's review gave Samra an "informational advantage" in the upcoming damages trial. *See Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London*, 911 So. 2d 155, 158 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1698a]. It is therefore no surprise that the Third District summarily denied Defendants' Petition for Certiorari challenging Judge Thomas' ruling.[10]

**E. Defendants Move to Disqualify Judge Thomas and Move for Reconsideration of the Order Denying Their Motion to Disqualify Bilzin/Ferrer**

Once Judge Thomas (and the Third DCA) rejected their attempt to

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disqualify Bilzin/Ferrer, Defendants moved to disqualify Judge Thomas on grounds of bias. Judge Thomas denied that motion as legally insufficient, but later that same day elected to voluntarily recuse himself for reasons unrelated to the disqualification motion. *See* Order of Recusal, August 31, 2018. The matter was then transferred to Judge Butchko, and it seemed to be back on track and heading towards a trial on damages. Defendants, however, immediately requested that Judge Butchko reconsider Judge Thomas' order denying the Motion to Disqualify Bilzin/Ferrer. Judge Butchko granted that motion "on an expanded evidentiary basis," Tr. p 26, Dec. 5, 2018, thereby giving Defendants the proverbial "second bite" at the disqualification "apple," and an opportunity to "mend their hold" by now introducing—and allowing Judge Butchko the opportunity to review—the alleged confidential materials; an opportunity they strategically decided not to afford Judge Thomas.[11]

On December 21, 2018 Defendants filed their "renewed" motion for disqualification, and for the first time requested monetary sanctions against Bilzin/Ferrer pursuant to the court's inherent authority.

In a futile attempt to deescalate matters and allow the case to be concluded on the merits, Bilzin later elected to withdraw Plaintiff's previously filed Motion to Strike Defendants' pleadings (a motion that the court began to hear at the December 5, 2018 hearing). Bilzin/Ferrer also voluntarily withdrew as Samra's counsel, thereby rendering Defendants' disqualification motion moot. Defendants nevertheless continued to press forward in an attempt to obtain monetary sanctions.

**F. The Sanctions Motion, Hearing, and Order**

**i. The Motion**

In their "Renewed Motion for Disqualification of Plaintiff's Lawyers . . . and for Sanctions," Defendants claimed that "Sanctions [were] Warranted Against Plaintiff's Lawyers [Bilzin/Ferrer] Under the Court's Inherent Authority" because they "received and reviewed at least five (5) recorded privileged communications . . . between Ms. Inchausti and Mr. Bedoyan." Mot. p. 6. Defendants insisted that "[o]n their face, each of these five (5) recordings were attorney-client privileged," and that "it was obvious from the face and content of many of those documents received by Ferrer that they were also attorney-client privileged communications related to Mr. Bedoyan's claims against Plaintiff in Bolivia." *Id*.

According to Defendants, it was "a clear violation of Florida's ethics rules for Ferrer to have purposefully received and reviewed these clearly privileged documents and kept [sic] them hidden from Defendants for six months, all the while using these privileged materials to seek to strike Defendants' pleadings." *Id.* Defendants also claimed that "Plaintiff's Lawyers misconduct and bad faith conduct was amplified here where the Privileged communications were also recorded in violation of Chapter 934, Florida Statutes." *Id*.

As a second "independent basis" for sanctions, Defendants claimed that Bilzin/Ferrer "continued to conceal from Mr. Bedoyan and Mr. Bedoyan's Florida lawyers, for six months from June 2018 until December 5, 2018 the existence of the Additional Privileged Communications as well as hundreds of page of attorney-client privileged documents." Mot. p. 7. Defendants insisted that the "existence and nature" of these additional privileged communications were not disclosed "until Plaintiff's Lawyers attempted to ambush Defendants during [the] evidentiary hearing on December 5, 2018." *Id.* at 8.

Finally, Defendants claimed that sanctions were appropriate because Bilzin/Ferrer "falsely and without any basis misrepresented to the Court, on multiple occasions, that Defendants' Florida lawyers had 'framed' or 'drummed' up false child pornography charges against Plaintiff in Bolivia." Mot. p. 9. These allegations, which Defendants insisted "are utterly divorced from reality," further established, in their view, Bilzin/Ferrer's "bad faith conduct in this case and, independently warrant sanctions." *Id*.

In sum, the sanctions motion accused Samra and/or Bilzin/Ferrer of: (a) illegally securing, and subsequently using, confidential attorney-client communications; (b) failing to disclose their possession of additional privileged materials until December 5, 2018; and (c) leveling "outrageous allegations" against Cortiñas and Kaskel.

**ii. The Hearing**

The sanctions motion was heard over a two-day evidentiary hearing conducted on February 6 and 7, 2019.[12] During a telephonic status conference conducted the day before that hearing was set to commence, one of Samra's new counsel, Scott Cosgrove, appeared. Samra's other substituted counsel (Homer Bonner) was not on the call and the hearing was not transcribed. During that conference, Bedoyan's counsel admittedly threatened to seek substitute counsel's disqualification if they listened to the allegedly privileged audio taped discussions—claiming that doing so would provide them an advantage in the damages phase of the case. In order to prevent that claimed "harm," Judge Butchko sequestered Samra's new counsel and advised them not to review the transcripts of the proceedings, a fact recognized by the Third District in *Samra*, 2020 WL 216010 at *1 ("[i]mportantly, Samra did not attend this two-day evidentiary hearing on the motion for sanctions; in fact, Samra's new counsel . . . was instructed by Judge Butchko that it could not attend the hearing").

Defendants now claim that "[t]he truth of the matter is that Samra nor his new counsel were excluded," pointing out that: (a) Samra appeared at the December 5th, 2018 hearing; and (b) "[t]here was no order of record excluding Samra from the [sanctions] proceedings." Defs.' Am. Resp. p. 10.[13] Indeed, Defendants go so far as to say that "[t]o even suggest . . . that Bedoyan sought the exclusion of Samra and his new counsel is comical," *Id.* at 11, and that the Third District "mistakenly" found that Samra's new attorneys were in fact sequestered. Gunster likewise claims that the Third District's finding "that Mr. Samra was 'excluded' . . . is factually incorrect," and describes this exclusion as "purported." Resp. in Opp'n p. 12, fn. 6. Unlike Defendants, however, Gunster does not claim that Samra's new counsel was permitted to attend the hearing. Rather, it attempts to minimize their sequestration by claiming that they were merely "excused from appearing because the proceedings involved an examination of attorney-client privileged communication, . . ." *Id.* at 13.

This revisionist history notwithstanding, the record makes it abundantly clear that Samra's counsel was excluded from the hearing, a "fact" no one contested until now. To the contrary, in response to Samra's motion to disqualify Judge Butchko, Defendants acknowledged that "Mr. Samra's current counsel was sequestered, because the proceedings would involve the examination of attorney-client privileged communications, the discussion of which would preclude their continued participation in the case." Defs'. Resp. to Mot. for Disqual. pp. 11-12., Oct. 6, 2019. Defendants also never challenged the existence of a sequestration order in their response to the Petition for Writ of Prohibition Samra filed in the Third District.[14]

Without belaboring the point, the record in this case confirms, beyond doubt, that Samra's counsel was excluded from the evidentiary hearing, and Defendants (and Gunster's) belated attempt to claim otherwise rings hollow. And without counsel, Samra (even if he himself was not excluded) had no ability to participate, let alone in any meaningful way. As the Third District aptly put it, he "was afforded no opportunity to hear the testimony, review the exhibits, cross-examine the witnesses, or present a response or rebuttal to the evidence presented by Bedoyan . . .," and "no opportunity to contest,

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or defend against, the allegations of egregious misconduct . . ." levied against himself and his then former counsel. *Samra*, 2020 WL 216010 at n. 3.

The first witness called by counsel for Bedoyan at the sanctions hearing was attorney Culver "Skip" Smith. Mr. Smith is an expert in matters of ethics, as he has practiced in the state of Florida for 51 years and has focused primarily on "the ethical and professional responsibility of lawyers." Tr. pp. 43-44, Feb. 6, 2019. Mr. Smith testified that he reviewed the transcripts attached to the Motion to Strike and interviewed Cortiñas and Kaskel in preparation of his testimony. *Id.* at 45.

The crux of Smith's testimony was that the communications Ferrer received were clearly privileged and that Ferrer should have known as soon as he started listening to the tapes that they contained privileged information. At that point he should have ceased his review and turned them over to opposing counsel and/or the court. *Id.* at 48-49. Smith went on to opine that if Ferrer was unsure of what to do, there were resources available to him, *i.e.* he should have reached out to the Bar, or the general counsel of his firm, or another attorney experienced in matters such as this. *Id.* at 50.[15]

The second witness for Bedoyan was Robert Wyman who testified as a forensic expert retained for the purposes of analyzing the audio recordings. He opined that there were identifiable "anomalies" in the recordings that indicated that they were manipulated. Tr. pp. 165-169, Feb. 6, 2019. He could not, however, opine as to who manipulated the recordings. *Id.* at 173-174.

Bedoyan himself then testified that: 1) he hired Inchausti as one of his "lawyers" to represent him with regards to matters related to the subject which is the basis for this action in Bolivia; 2) he believed Inchausti was acting as his lawyer; and 3) any recordings of conversations between himself and Inchausti or Cortiñas or Kaskel were unauthorized. Tr. pp. 176-181, Feb. 6, 2019. Bedoyan also—for the first time—confirmed that it was his voice on the audio recordings between himself and Inchausti and that the transcripts appeared to be accurate transcriptions of the calls. *Id.* at 199-200. Kaskel and Cortiñas then each testified that they did not consent to being recorded, they had nothing to do with the alleged charges against Samra in Bolivia, and that Ferrer's allegations have damaged them because dealing with this issue has taken time away from both family and other clients. Tr. pp. at 231-241, 278, 282-284, 302, 316-322, Feb. 7, 2019.

Bilzin/Ferrer called just two witnesses: Clinton R. Losego, Esq. and Ferrer himself. Losego is co-general counsel for Gunster. He testified regarding a letter he sent to Ferrer following the filing of the Motion to Strike ("the August 3 letter"), wherein he acknowledged his awareness of additional recordings, and further acknowledged that he did not request a copy of them. Tr. pp. 398, 400, 403-405, Feb. 7, 2019. The purpose of this questioning was to challenge the claim that Ferrer had "concealed" the existence of additional communications from Bedoyan and his counsel. *Id.* at p. 394, 396. Losego went on to testify that the allegation that Bedoyan, together with the Gunster attorneys, was attempting to frame Samra for possession of child pornography was published in open court in front of "40 lawyers" at an August 2 hearing. *Id.* at 430-437.

Mr. Ferrer then briefly testified and, consistent with all of his prior testimony, stated that he did not believe at the time, or presently, that the communications he received were in fact privileged. *Id.* at 443-444.

**iii. The Sanctions Order**

On September 16, 2019 Judge Butchko entered the Order, finding that "Plaintiff's Lawyers orchestrated" the disclosure of confidential materials "in bad faith and without factual basis in an attempt to gain a tactical advantage in the action which had the effect of damaging the reputation and credibility of Defendant's attorney [sic]." Order pp. 50-51. The Order then awarded "Defendants and their attorneys, Mr. Cortiñas, Mr. Kaskel and the lawyers from Gunster, Yoakley and Stewart, P.A." their "reasonable attorney's fees and costs arising from" the filing of the "Motion to Strike Defendants Pleadings and subsequent false allegations against Defendants, Mr. Cortiñas and Mr. Kaskel," reserving jurisdiction to "determine a reasonable amount of attorney's fees and costs," even though Gunster, Cortiñas and Kaskel had made it clear at the hearing that they were not seeking any relief. Tr. p. 396, Feb. 7, 2019.[16]

Turning to the substance of the Order, it begins by finding that Bilzin/Ferrer—in "writing in public court files," "orally in court hearings," and "under oath during evidentiary hearings," accused Cortiñas and Kaskel of "participating in an scheme to extort Plaintiff by allegedly orchestrating the filing of criminal charges against Plaintiff in Bolivia for fraud and child pornography." Order p. 2. The Order then finds that these allegations "stemmed from attorney-client privileged communications" that were "intercepted and recorded" without the consent of any of the participants, and later used in support of a Motion to Strike Defendants' Pleadings. Order p. 3; *See also* Order p. 6. ("[A]ll of these intercepted communications plainly concerned legal advice for Mr. Bedoyan or were in furtherance of legal services to Mr. Bedoyan").

After a brief discussion of the sanctity of the attorney-client privilege, why it attached to these materials, and why the so-called "litigation privilege" does not insulate an attorney from *Moakley* sanctions, Order pp. 3-8, the Order begins its "Finding of Facts"; the first being that "prior to [even] reviewing" the materials received from his client, "Mr. Ferrer knew [they] were protected by the attorney client privilege," and that "within the first 30 seconds of listening to any of the recordings" Ferrer also "knew the materials were attorney-client privileged." Order p. 8. The court then again finds that "the privileged attorney-client telephonic communications were illegally intercepted without the consent of all participants and, at a minimum, highly suspicious under the circumstances that should have alerted Mr. Ferrer not to use them," suggesting that either Samra, with Ferrer's possible knowledge, had illegally "intercepted" the calls. Order p. 9. The Order then proceeds to discuss why these particular communications were "facially attorney-client privileged," and what the law required Ferrer to do once he came into possession of these materials, even if he believed the communications might be subject to a "crime-fraud" exception. Order pp. 12-18 (citing *First Union Nat. Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2776f]; *Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050 (Fla. 5th DCA 1994)).

The Order next concludes that Ferrer's "review and use of the attorney-client privileged communication was wrongful," and that "Mr. Ferrer's failure to immediately contact Defendants' counsel was improper and a violation of Florida's laws and ethics rules." Order p. 19 (citing *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D260a]; Fla. Bar Prof'l Ethics Comm., Formal Op. 07-1). The court also found that Ferrer "actually concealed the true extent of the materials he received," omitting to disclose "a 17-minute recording" that he attempted to introduce . . . at the conclusion of the December 5, 2018 evidentiary hearing." Order p. 20. This section of the Order then concludes by reciting the "bad faith conduct" found by the court; 26 transgressions which can be condensed into six (6) separate acts—at most:

1. Obtaining the materials without notifying opposing counsel of his contact with Inchausti or his receipt of the communications (Findings 1, 2, 3, 14);

2. Reviewing the materials and sharing them with Third parties including Bilzin's General Counsel, translators, and transcribers (Findings 2, 4, 5, 6);

3. Failing to seek guidance from the Court or immediately obtain

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a legal or ethics opinion from the Florida Bar (Findings 7, 8);

4. Using the communications as a basis for seeking to strike Defendants' pleadings and gain a litigation advantage (Findings 9, 15, 16, 17, 24);

5. Concealing from opposing counsel "the extent of the attorney client privileged communication for at least 6 months" (Findings 12, 14, 18, 24, 25 and 26); and

6. Making unsubstantiated, false and defamatory remarks concern ing Mr. Cortiñas and Mr. Kaskel (Findings 19, 20).

After detailing these "26" separate acts of "bad faith conduct," the Order finds that Ferrer made a number "Bad Faith Misstatements of the Law"—something he had not been accused of in the renewed motion. First, he was found to have "falsely" argued that these communications may not be protected because they were oral communications on mobile phones, and there "has to be a reasonable expectation of privacy" before such communications can be improperly intercepted for purposes of Chapter 934. Order p. 27. Again, the claim that Ferrer's argument on this point rose to the level of being sanctionable was not asserted in the renewed motion. And as the next "Bad Faith Misstatement of the Law," the court found that Ferrer "falsely stated" that "cellular telephone calls are oral communications and not wire communications." Order p. 28. This "finding" is duplicative of "Bad Faith Misstatement of the Law" number one, and again was never raised in the motion.

The next "Bad Faith Misstatement of the Law" found by the court was Ferrer's citation to a California case in support of his argument that opposing counsel violated Fla. R. Prof. Conduct 4-3.4(g), which dictates that a lawyer must not "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." *Id.* According to the Order, it was sanctionable for Ferrer to cite that case without also highlighting the fact that California's analogous rule "does not include the word 'solely,' " Order p. 29, a material distinction according to Order because if Cortiñas and Kaskel were in fact participating in presenting criminal charges against Samra in Bolivia (something they vehemently denied), they may not have been doing so "solely" to obtain an advantage in this case, and therefore may not have been violating Florida's version of the Rule. Regardless of whether this Court believes that this failure on Ferrer's part is sanctionable (and it clearly does not), the fact remains that this transgression is mentioned nowhere in Defendants' renewed motion.

Finally, as the last "Bad Faith Misstatement of the Law," the court found that Ferrer "falsely represented" the circumstances under which a successor judge "is allowed to reconsider a predecessor judge['s] interlocutory ruling by arguing that such reconsideration is permitted only when "there's something new. When the facts are the same, there is no basis for reconsideration." Order p. 30. This was a "Bad Faith Misstatement of the Law," according to Judge Butchko, because "the law is well settled that any judge, including a successor judge, may revisit an earlier interlocutory ruling." Order p. 30. That is of course true, but lawyers (including those in *this* case) routinely argue exactly what Ferrer did here; namely, that a successor judge should not reconsider a predecessor's ruling absent "something new." In any event, and again regardless of whether making this argument is sanctionable (and this Court does not believe it is), this is yet another allegation that is nowhere to be found in the Defendants' renewed motion.

Commencing at page 31 the Order next sets forth no less than 34 "Bad Faith Misstatements of Fact," the first nine (9) of which relate to the same conduct; namely, falsely accusing Cortiñas and Kaskel of assisting Bedoyan with a plan to "frame" Samra on false charges, including charges relating to child pornography. (Findings 1, 2, 3, 4, 5, 6, 7, 8, 9). The court then finds that filing the Motion to Strike Defendants' Pleadings as an "Emergency" was a "Bad Faith Misstatement of Fact" because Ferrer had the materials in his possession "for nearly a month." Order p. 34, Finding 10. Assuming filing a motion that really is not an "emergency" as an "emergency"—something lawyers do virtually every day—is sanctionable, it is yet another alleged act of "bad faith" conduct that is nowhere to be found in Defendants' motion.

The next twenty (20) "Bad Faith Misstatements of Fact" found by the court overlap with the first nine, with the court again finding that Ferrer falsely accused Cortiñas and Kaskel of assisting Bedoyan in bringing criminal charges in Bolivia "in an effort to force Samra to walk away from this case altogether or settle it cheaply to avoid the threat of incarceration**."** Order pp. 34-39, Findings 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30. The next two "Bad Faith Misstatements of Fact" are Ferrer's misstatements "concerning his knowledge of Ms. Inchausti's status in Bolivia in an attempt to . . . later claim that the communications were not privileged. . ."—something Ferrer also was never accused of in the renewed motion. Order p. 40, Findings 31, 32. And finally, findings 33 and 34 relate to Ferrer's failure to disclose his receipt of "the 17 minute attorney-client privileged audio recording, which he attempted to play in open court at the end of the December 5, 2018 evidentiary hearing and which Plaintiff's Lawyers had in their possession since June 2018 but had never disclosed or provided to Defendants." Order pp. 41-45.

Although the only issue framed by the motion was whether Bilzin/Ferrer's conduct was sanctionable, the Order next goes on to completely exonerate Cortiñas and Kaskel from any misconduct, with the court finding that each "testified credibly and unequivocally that they did not participate in any way in bringing child pornography charges against Plaintiff," Order p. 45, and that the "clear and convincing evidence established that the accusations [by Ferrer] that Mr. Cortiñas and Mr. Kaskel participated in the bringing of fraud charges in Bolivia against Plaintiff for the sole purpose of gaining an unfair advantage in this litigation were similarly without merit and false." Order pp. 46.

Finally, although neither Cortiñas nor Kaskel (nor Gunster for that matter) were seeking sanctions, the Order concludes by noting that these non-parties "were forced to engage local counsel to represent their interests," and that in addition to this "heavy financial toll," Ferrer's conduct "had a significant personal and professional impact on the lives of both Mr. Cortiñas and Mr. Kaskel." Order p. 50. It then awards these non-parties sanctions they never requested.

## III. ANALYSIS

There is no doubt that a court has the inherent authority to sanction attorneys—a power "reserved for those extreme cases where a party acts 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Moakley*, 826 So. 2d at 224. Trial courts must exercise this inherent authority "sparingly and cautiously," striking an "appropriate balance" between "condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes," and "ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests." *Id.* at 225-226.

Because imposing sanctions against counsel can both deter the pursuit of lawful claims, and severely damage one's reputation, this power "carries with it the obligation of restrained use and due process." *Id.* at 227.[17] And on top of the exacting substantive standard that must be met, an attorney facing the prospect of sanctions must be afforded procedural due process; meaning "a real opportunity to be heard" and present evidence, including any mitigating or excusing circumstances. *Keys Citizens for Responsible Gov't, Inc. v. Florida*

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*Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]; *Moakley,* 826 So. 2d at 227.

Application of these principles here leads to the inexorable conclusion that the Order must be vacated both on procedural and substantive grounds. As for procedure, both Samra and Bilzin/Ferrer were denied fundamental due process when Samra and his counsel were precluded from participating in the proceedings. As the Third District has twice observed, the Order "deduced" that Bilzin/Ferrer and Samra "engaged in treacherous conduct, including lying and fabricating allegations of a criminal conspiracy," *JJN FLB, LLC v. CFLB P'ship, LLC*, 283 So. 3d 922, 926 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2706a], *Samra v. Bedoyan,* 2020 WL 216010 at *3 ("we hold that a reasonably prudent person might conclude that the findings of egregious misconduct against Ferrer and the Bilzin firm implicated Samra . . ."), and the Order undeniably reflects the court's belief that Samra, with Ferrer's possible assistance/acquiescence, improperly "intercepted" and/or "orchestrated" the interception of the allegedly confidential communications. Order pp. 3, 6, 9. Yet Samra was denied any opportunity to explain his conduct, present evidence refuting the claim that he participated in the surreptitious recording of these conversations, or explain the circumstances surrounding his receipt of the materials. Bilzin/Ferrer was likewise denied an opportunity to present Samra as a witness.

Moreover, the Order finds that Ferrer engaged in multiple acts of "bad faith" misconduct that are not charged in the motion—another due process violation. *See, e.g.*, *Turgman v. Boca Woods Country Club Ass'n, Inc.*, 198 So. 3d 1125, 1126 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1980a] ("[i]t is well-settled that a party cannot be awarded relief that is not framed by the pleadings"); *Collins v. Bannon,* 774 So. 2d 66, 67 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2611a] (a judgment that is not based on an issue that had been framed by the pleadings, noticed for hearing, or litigated by the parties may not stand). As just a few examples, the Order finds that: (a) Ferrer made three bad faith misstatements of law nowhere mentioned in the motion (*see* discussion pp. 31-33 *supra*); and (b) multiple misstatements of fact never mentioned in the motion (*see* discussion pp. 33-34 *supra*). As a result, Bilzin/Ferrer were denied notice of these accusations and, *a fortiori*, a meaningful opportunity to defend against them. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So. 2d 561, 563 (Fla.1988) ("[l]itigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared."); *Williams v. Primerano,* 973 So. 2d 645, 647 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D361a] ("[a] fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).[18]

Turning to the merits, the Court has carefully reviewed the entire record and concludes, without hesitation, that Ferrer's conduct does not rise to a level warranting sanctions.[19] First off, there is no doubt that Bedoyan, after losing the liability trial, commenced a criminal proceeding in Bolivia, advancing claims that arose out of the business relationship at issue in this case, and likely subsumed within the counterclaims the jury had rejected. Ferrer—with or without the confidential communications—had every right to explore whether Bedoyan brought that "criminal" case in order to gain an advantage in this "civil" proceeding, and argue that he did. Bedoyan was of course free to deny that claim and/or insist that he did not bring the criminal case in Bolivia "solely" for purposes of extracting a favorable settlement (or dismissal) here. But Bedoyan fired the first shot in Bolivia and both Samra and Ferrer were entitled to fight back against what they believed to be an effort to derail these proceedings or coerce a favorable settlement.

Next, at the time Ferrer received the confidential materials, he had already seen that Bedoyan, in a public filing, had falsely accused his client of having been arrested "on criminal charges arising out of illicit gold and money laundering transactions," and he was aware of the fact that Inchausti had been arrested and detained by Bolivian police for participating in a plan to extort his client—an arrest Inchausti has admitted. Inchausti also admitted that she spoke to Ferrer on Samra's cellphone prior to the time Ferrer received the materials. Where Ferrer and Inchausti part ways is in their versions of what happened on that call.

According to Ferrer, Inchausti acknowledged her participation in a plot to frame his client, offering her cooperation. While Inchausti denies Ferrer's version of the call, the Court cannot conceive of any reason why she would be talking with Ferrer in the first place—particularly in Samra's presence and on Samra's cellphone—unless she had in fact decided to share with him information relating to her activities in Bolivia. Absent that, there is no reason why Inchausti—Bedoyan's "attorney in fact"—would be in Samra's presence at all, or agree to speak with Samra's counsel on Samra's phone; the equivalent of a paralegal having a private discussion with an opposing counsel in the presence of the adverse litigant, using the adverse litigant's phone. Of course, Inchausti cannot now "admit" to any of this without implicating herself in a breach of her obligations to Bedoyan and criminal activity. In any event, whether Ferrer or Inchausti's version of the call is accurate is irrelevant to the Court's disposition of this motion.[20]

Given these highly unusual and possibly dangerous circumstances, Ferrer's decision to review these materials is understandable and excusable, even if others might have proceeded differently, and that review confirmed Ferrer's fear and suspicion that Bedoyan was attempting to have his client arrested on serious criminal charges. As noted earlier, the substance of the conversations between Inchausti and Bedoyan is disturbing to say the least. And because these discussions had nothing to do with the "damages" phase of this case, Ferrer secured no tactical advantage in *this* proceeding by listening to them.[21]

Ferrer also had a right to bring these troubling communications to the attention of the court. But instead of simply bringing the matter to the attention of his opposing counsel and the court, and asking the court to review the materials (or appoint a Special Master to review them) he elected—like the proverbial "bull in a china shop"—to plow forward with a Motion to Strike Defendants' pleadings, charging Cortiñas and Kaskel with assisting Bedoyan in an effort to "extort settlement from Samra" by leveraging a bogus criminal complaint against him . . . ." Mot. pp. 6-7. This was a mistake.

Upon realizing that these materials included conversations involving Cortiñas and Kaskel, Ferrer should have ceased his review and brought the matter to the attention of opposing counsel and the court. *See Castellano v. Winthrop*, 27 So. 3d 134, 137 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D260a] (when an attorney "knows or reasonably should know" that confidential documents "were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party . . .").[22] By failing to take this route he exercised poor judgment and arguably violated our Rules of Professional Responsibility. Ferrer also may have gone too far with his accusations against Cortiñas and Kaskel, but these attorneys are far from blameless here.

Despite Ferrer's "imperfect" performance, the record—viewed in its entirety—reveals that he did not act "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Moakley,* 826 So. 2d at 224. He attempted to protect a client who might otherwise rot in jail, and vindicate that client's legal rights. He did not act "solely" for bad faith

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purposes. *Id.* And while Ferrer may have exercised poor judgment, and may have been a bit overzealous, the Court will not ignore the fact that he was involuntarily thrust into a bizarre (and potentially dangerous) situation he had never encountered; a situation instigated by Bedoyan's attempt to have his client arrested on false charges and thrown in jail. Given this undeniable fact, requiring Bilzin/Ferrer to pay Bedoyan "sanctions" would, in this Court's view, result in a perverse miscarriage of justice.

## IV. CONCLUSION

This run of the mill partnership dispute has gone far off the rails (and arguably over the cliff). These combatants have now spent three (3) years litigating collateral matters having absolutely *nothing* to do with the merits of this case, thereby wasting precious judicial resources at both the trial and the appellate levels, and unnecessarily escalating a war Bedoyan started when he decided to bring "criminal" charges in Bolivia after losing the liability trial here. Maybe Bedoyan had a legitimate reason to bring criminal charges, and maybe he brought them to coerce a settlement (or dismissal) of the civil claim for damages he was then facing. At this point it makes no difference, and the Court does not know (nor care) why Bedoyan did what he did.

What the Court does know is that this routine commercial case morphed into a barroom brawl, with each side throwing haymakers in the form of motions to strike, motions for disqualification, motions for sanctions, etc.[23] All counsel share responsibility for this fiasco as none of them exercised restraint or attempted to de-escalate this "feud" and re-focus on the merits of the lawsuit. That is unfortunate, but this nonsense is over and the case will now be brought to a swift conclusion on the merits. *See e.g. Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F. 2d 594, 597 (5th Cir. 1963) ("it is for the public interest and policy to make an end to litigation . . . so that . . . suits may not be immortal, while men are mortal . . .").

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

1. Plaintiff's and Bilzin/Ferrer's Motions for Reconsideration of the September 16, 2019 "Order Granting Sanctions Against Plaintiff's Lawyers" are **GRANTED,** and said Order is **VACATED**.

2. Defendants' "Renewed Motion for Disqualification of Plaintiff's Lawyers and For Sanctions" is **DENIED**.

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[1]In *Samra,* the Third District granted a Writ of Prohibition, concluding that Judge Butchko erred in denying Samra's motion for disqualification. The court did not "address the merits" of the Sanction Order. *Id.*

[2]Disqualification alone is "an extraordinary remedy which should be resorted to sparingly." *See City of Apopka v. All Corners, Inc.*, 701 So. 2d 641, 644 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2588a]; *Pascucci v. Pascucci,* 679 So. 2d 1311 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2142d]; *Swensen's Ice Cream Co. v. Voto, Inc.,* 652 So. 2d 961 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D811a]; *Arcara v. Philip M. Warren, P.A.,* 574 So. 2d 325, 326 (Fla. 4th DCA 1991). So where disqualification is ordered (or counsel withdraws voluntarily), and the further relief of monetary sanctions is sought, that relief should necessarily be awarded only in the most egregious cases. But to be clear, the Court rejects Bilzin/Ferrer's claim that "the *most* severe penalty for an attorney's disclosure of the contents of a privileged communication is disqualification of the attorney." Mot. p. 18. (Emphasis in original). While that penalty is certainly the one most often imposed, a court has the inherent authority to award monetary sanctions against counsel for misconduct, and nothing in *Moakley* exempts from that grant of inherent authority situations involving the disclosure or misuse of privileged communications. The fact that no court has yet to impose monetary sanctions against an attorney for the misuse of protected communications, and that to date disqualification alone has been the chosen sanction, does not mean that such authority is lacking. It clearly is not.

[3]Defendants, and non parties Angel Cortiñas, Jonathan Kaskel and Gunster Yoakley & Stewart, P.A., attempt to circumscribe this Rule, claiming that it affords only the party who "successfully" moved to disqualify the judge a right to seek reconsideration. *See* Defs.' Am. Resp. in Opp'n to Mot. for Recons., p. 6.; Non parties' Resp. in Opp'n, p. 5. The Rule contains no such limitation, and no precedent cabins it in the manner these parties claim. The Court also notes that these parties relied upon this Rule in asking Judge Butchko to revisit Judge Thomas' Order denying their first (and obviously unsuccessful) motion to disqualify Bilzin/Ferrer, even though Judge Thomas was never disqualified. *See* Tr. pp. 22 23, Dec. 5, 2018. In any event, because the Order is interlocutory, and no Final Judgment awarding sanctions has been entered, it may be revisited even in the absence of disqualification.

[4]The jury also addressed Samra's claims for unjust enrichment, breach of fiduciary duty, fraud and constructive fraud, as well as Bedoyan's affirmative defenses and counterclaims. Verdict pp. 3 6. The specifics of the jury's findings on each of these claims/counterclaims are irrelevant for present purposes. Suffice it to say, Samra prevailed on his claim for breach of an oral partnership (*i.e.*, "liability"), and Bedoyan's counterclaims were rejected in their entirety.

[5]Defendants had filed a Petition for Writ of Certiorari challenging Judge Thomas' denial of their motion for directed verdict during the liability trial.

[6]Apparently private citizens in Bolivia are authorized to file criminal charges. A prosecutor then has the ability to "reject the case." Tr. vol. II p. 11, Aug. 24, 2018.

[7]The Court will give Cortiñas and Kaskel the benefit of the doubt, and assume that neither of them, as highly respected members of the Bar, were aware of Bedoyan's and Inchausti's discussions involving possible child pornography and murder charges, or of their desire to see Samra thrown in a jail so miserable that he might consider suicide, as no evidence shows that these specific charges were ever discussed with them. But the Court is troubled by the fact that Kaskel and Cortiñas were coordinating with and assisting Inchausti at all, even if they believed she was *only* bringing "criminal" charges for fraud. These experienced practitioners should have had nothing to do with Bedoyan's attempt to have Samra arrested on criminal charges period. Even *if* their "participation" in that effort was completely lawful and ethical, it was beneath lawyers of their caliber.

[8]Inchausti is/was a member of Bedoyan's "legal team" in Bolivia and acting as the "attorney in fact" for Bedoyan in regard to the filing of the criminal complaint(s) on his behalf. Tr. vol. II pp. 9, 22, Aug. 24, 2018.

[9]Attached to the Motion were certified and translated transcriptions of the audio files provided by Inchausti. The materials were not filed under seal.

[10]Like Judge Thomas, the appellate court noted that it "had not been able to independently confirm the existence of confidential information in the petition, response, motions or appendices . . . ." *Bedoyan v. Samra*, 254 So. 3d 392 (Fla. 3d DCA 2018).

[11]Defendants had obviously made a tactical decision to prevent Judge Thomas from reviewing the materials and, as a result, knew they could not possibly meet their burden of proof at the August 24, 2018 disqualification hearing. Then, after wasting party and judicial resources, and receiving the inevitable denial of their motion, and the inevitable denial of relief in the Third District, they were allowed to "try again" and avoid the consequences of a strategic decision they made the first time around. This was not merely "reconsideration" of an allegedly erroneous interlocutory ruling. It was, as the Court said earlier, a chance for Defendants to "mend their hold" and get a second shot at disqualification after they failed to meet their burden of proof the first time around. *See Bedoyan v. Samra*, 254 So. 3d 392 (Fla. 3d DCA 2018) (reconsideration "should not be used merely to obtain 'a second bite at the apple' with respect to prior judicial rulings"). Now, Defendants ironically argue that "the foreseeable consequences from Bilzin's deficient presentation [at the sanction hearing] should not now be visited on Bedoyan to give Bilzin/Ferrer a second bite at the apple," and that a rehearing should not be "given just because the litigant dislikes a prior result . . . and desires another try." Defs.' Am. Resp. pp. 8, 12.

[12]Remarkably, not only did Bilzin decide to represent itself "in house," it elected to have Ferrer the target of these serious accusations handle the proceedings himself, thereby forcing him to act as both an advocate and witness in a case where he could not possibly be objective.

[13]Samra's appearance at a December 5, 2018 hearing is irrelevant, as the Motion for Sanctions was not even filed until December 21, 2018, and the hearing on *that* motion did not commence until February 6, 2019.

[14]In his Petition for Writ of Prohibition, Samra repeatedly advised the Third District that "[t]he sanctions and findings arose from segregated proceedings to which Samra was not a party and from which Samra's current counsel was specifically excluded." *See* Pet. p. 2; Pet. p. 6 ("at the behest of Bedoyan's counsel Judge Butchko instructed Samra's counsel, the undersigned, not to attend the hearing"); Reply p. 6 ("The undersigned's counsel for Samra did not attend any of the February evidentiary hearings, in accordance with Judge Butchko's instructions . . ."). At no time did Defendants take issue with that assertion.

[15]Ferrer testified that he did, in fact, reach out to the general counsel of his firm regarding this matter. Tr. p. 444, Feb. 7, 2019. He did not, however, call the firm's general counsel as a witness in order to corroborate that testimony.

[16]On that note, Bilzin/Ferrer says that the Order does not represent "a thoughtful and deliberate approach taken by Judge Butchko" pointing out that the court entered Bedoyan's proposed order "essentially verbatim" a practice that has been criticized. *See, e.g., Corp. Mgmt. Advisors, Inc. v. Boghos*, 756 So. 2d 246 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1058c] ("a judge's practice of delegating the task of drafting sensitive, dispositive orders to counsel, and then uncritically adopting the orders nearly verbatim would belie the appearance of justice and creates the potential for overreaching and exaggeration on the part of the attorney preparing findings of fact"); *Perlow v. Berg Perlow*, 875 So. 2d 383 (Fla. 2004) [29 Fla. L. Weekly S293a] ("[w]hen the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding

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is fair to neither the parties involved in a particular case nor our judicial system . . . the better practice would be for the trial judge to make some pronouncements on the record of his or her findings and conclusions in order to give guidance for preparation of the proposed final judgment"). The fact that the court entered the order prepared by Bedoyan's counsel, virtually verbatim, is of course not alone a basis for reconsidera tion. But as the Court will discuss, *infra*, the Order contains a number of "findings" beyond the scope of the issues framed by the motion, grants relief not requested, and is "so one sided in its findings and conclusions" that an objective observer might conclude that it reflects "the views of the party that drafted and proposed it." *Id.* at n. 5. That party (*i.e.*, Defendants) clearly overreached here.

[17]Although *Moakley* does not define "bad faith," our appellate courts have instructed that absent intentional conduct designed to do harm, or at the very least reckless misconduct, improper or unethical behavior lacks "the bad faith element." *Rush v. Burdge*, 141 So. 3d 764, 767 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1447a]; *Rivero v. Meister*, 46 So. 3d 1161 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2452b]. And even when an attorney acts improperly or unethically, sanctions are not warranted unless she did so "solely for bad faith purposes," and for no legitimate reason. *Moakley*, 826 So. 2d at 227; *See also Hudson v. Int'l Computer Negotiations, Inc.*, 499 F. 3d 1252, 1262 (11th Cir. 2007) [21 Fla. L. Weekly Fed. C9a] (unreasonable and vexatious conduct . . .is conduct that "is so egregious that it is tantamount to bad faith.").

[18]*See Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] (Plaintiff was not permitted to proceed on a claim that had not been pled in her complaint.); *Bloom v. Dorta Duque,* 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] ("[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled").

[19]Having concluded that the Order must be vacated based upon a denial of procedural due process, the Court would ordinarily apply "the cardinal principle of judicial restraint" and "go no further." *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F. 3d 786, 799 (D.C. Cir. 2004) (Roberts, J concurring). But there is nothing "ordinary" about this case, and the Court has no intention of perpetuating this sideshow by leaving the merits "open" so as to invite yet another evidentiary hearing on the motion.

[20]On that note, the Order also does not appear to accept one parties' version of the call over the others. Order p. 19 (finding that Ferrer violated Florida laws and Ethics rules "even if the Court was to assume [Ferrer's testimony] was true . . .").

[21]The Court has again reviewed the materials and there is absolutely no discussion of this case, Bedoyan's defenses to Samra's damage claim, or anything else that would have given Ferrer an edge in the damages trial. The bottom line is that after reviewing the materials, the Court comes to the same conclusion Judge Thomas reached without reviewing them: nothing about the "alleged intercepted communication [would] disadvantage the Defendants in the remaining matter to be tried before this Court." Order, Aug. 31, 2018.

[22]While the rule in *Castellano* applies when the attorney "knows or reasonably should know" that the materials were "wrongfully" obtained, the Court believes the same protocol should be employed even if the attorney believes that the client innocently secured the materials. This Court is not concluding that Ferrer "knew or had reason to know" that Samra obtained the materials "wrongfully." To the contrary, he had been told by Inchausti that she would be voluntarily providing them. But he knew they involved communications with Cortiñas and Kaskel, and he knew that only the client (Bedoyan) could lawfully waive the attorney client privilege. *See Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 508 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2623c] ("all personal privileges may be waived by the client."); *Schetter v. Schetter*, 239 So. 2d 51, 52 (Fla. 4th DCA 1970); *Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) ("[t]he law is clear; it is only the client who has the power to waive the attorney client privilege.). Under the circumstances, he should have stopped reviewing the materials and notified opposing counsel and the court.

[23]In addition to the motions already discussed, Defendants have also filed a "Motion to Strike Plaintiff's . . . Pleadings," claiming that he has been "convicted by a court in Bolivia for altering criminal recordings of third parties made without their consent as part of a fraudulent scheme to manipulate a legal proceeding in the United States" (*i.e.*, this case). *See* Mot. p. 1, Aug. 23, 2019. That motion represents that "Mr. Samra now faces prison." *Id.* at 2. In response, Plaintiff accused Defendants of submitting to the Court "a *fake* criminal judgment and conviction against Samra from a Bolivian case that does not exist" (emphasize in original) and has filed another "Motion to Strike Defendants' Pleadings" for this "outrageous fraud." Although that motion has since been withdrawn, Defendants' motion remains pending and each side has now expended considerable resources hiring investigators, lawyers, etc., in Bolivia, attempting to prove (or disprove) the existence of this criminal conviction.

* * *

**Insurance Personal injury protection Affirmative defenses Setoff Insurer's motion to amend affirmative defenses to add setoff defense claiming entitlement to setoff for money paid to insured in settlement of action against tortfeasor is denied Insurer is not entitled to setoff as matter of law where there is no possibility of double recovery by insured because, pursuant to section 627.736(3), insured could not have recovered any medical expenses from tortfeasor Further, under PIP statute, only tortfeasor is entitled to setoff for PIP benefits paid or payable Subrogation provision in policy does not give rise to setoff defense**

AVENTURA ORTHOPEDIC CARE CENTER, a/a/o Eli Taerstein, Plaintiff, v. DAIRYLAND INS. CO., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami Dade County. Case No. 2017 009000 CA 01, Section CG01. February 25, 2020. Linda Diaz, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Stephen Mellor, for Defendant.

## ORDER ON DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS AFFIRMATIVE DEFENSES TO ADD SET-OFF AS A DEFENSE

**THIS MATTER,** having come before the Court on January 23, 2020, on Defendant's Motion for Leave of Court to Amend its Affirmative Defenses in which Defendant seeks to add 'set-off' as a defense in this case, and after hearing the arguments of counsel, having reviewed all authorities cited by the parties and being otherwise fully advised therein, the Court finds as follows:

This is an action filed by Plaintiffs, Aventura Orthopedic Care and Eli Taerstein, seeking to recover damages for unpaid medical bills incurred by Plaintiff Taerstein for injuries sustained in a motorcycle accident on January 8, 2012. Plaintiffs claim that Defendant Dairyland owes them more than $22,000 in unpaid medical bills as a result of that accident. In 1999, Defendant Dairyland issued a motorcycle insurance policy to Taerstein while he resided in New York. A few years later, between 2004 and 2005, Taerstein moved to Florida and advised Dairyland of his move. Dairyland proceeded to mail notices and insurance premium invoices to Taerstein at his Florida address for the next 6-7 years. Taerstein claims he requested and purchased insurance coverage to pay his medical bills in the event he was injured in an accident while operating his insured motorcycle.

After the January 8, 2012 accident, Taerstein asserted a claim against the tortfeasor to recover damages for his accident-related bodily injuries. Prior to the initiation of this action, Taerstein reached a settlement with the tortfeasor (and the tortfeasor's liability insurer, State Farm), for the sum of $115,000.

Defendant Dairyland seeks to amend its defenses to add a setoff defense claiming it is entitled to a setoff for the money paid by the tortfeasor (and the tortfeasor's liability insurer) to Taerstein. Plaintiffs contend that Dairyland, as Taerstein's PIP insurer is not entitled to a setoff for moneys paid by the tortfeasor, as a matter of law. Obviously, Defendant's claim for a setoff only pertains to Taerstein, and not to Aventura Orthopedic Care because it is undisputed that Aventura Orthopedic Care never had a legal basis to assert a tort claim against the tortfeasor, and the tortfeasor never had any obligation to pay anything to Aventura Orthopedic. Therefore, Defendant's request to add a setoff defense only pertains to Taerstein.

Rule 1.190 provides: Amended and Supplemental Pleadings

> a. **Amendments.** A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. *Otherwise a party may amend a pleading only by leave of court* or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. *Leave of court shall be given freely when justice so requires.* A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.

In *Quality Roof Services, Inc. v. Intervest Nat'l Bank* 21 So. 3d 883 (Fla 4th DCA 2009) [34 Fla. L. Weekly D2205d], the District Court provided analysis of Florida law relative to the standard of review on a motion for leave to amend and held that a trial court's denial of a motion to amend is reviewed for abuse of discretion. *See Noble v.*

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*Martin Mem'l Hosp. Ass'n,* 710 So.2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. Florida Rule of Civil Procedure 1.190(e) states that "[a]t any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading." A court "should be especially liberal when leave to amend is sought at or before a hearing on a motion for summary judgment." *Thompson v. Bank of New York*, 862 So.2d 768, 770 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2536d] (citation omitted); *see also Montero v. Compugraphic Corp.*, 531 So.2d 1034, 1036 (Fla. 3d DCA 1988). In ruling on a motion for leave to amend, "all doubts should be resolved in favor of allowing an amendment and the refusal to do so generally constitutes an abuse of discretion *unless* it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Cason v. Fla. Parole Comm'n,* 819 So.2d 1012, 1013 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1538a]; *see also Fields v. Klein,* 946 So.2d 119, 121 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D200a]; *Thompson,* 862 So.2d at 770. A proposed amendment is futile if it is insufficiently pled, *id.,* or is "insufficient as a matter of law," *Burger King Corp. v. Weaver,* 169 F.3d 1310, 1320 (11th Cir. 1999). *Quality Roofing* at 885.

While Defendant has not abused its right to seek leave to amend its defenses and Plaintiff has not argued that the proposed amendment would cause irreparable prejudice, Plaintiff asserts that Defendant's proposed setoff amendment is futile because Defendant is not entitled to a setoff for money paid to Taerstein by the tortfeasor, and that only the tortfeasor is entitled to a setoff, not the PIP insurer.

The purpose of a setoff is to prevent a plaintiff from obtaining a double recovery, *i.e.,* receiving as damages sums for which PIP benefits were already paid. See, § *627.736(3), Fla. Stat.* A plaintiff is not permitted to recover from the defendant the same damages it already received from another payor. In the context of the instant case, Plaintiff Taerstein is seeking to recover unpaid PIP benefits from Defendant Dairyland based on an insurance contract between Dairyland and Taerstein. Although Dairyland admittedly paid nothing towards Plaintiff's PIP benefits / medical expenses, it claims entitlement to a setoff to the extent that those expenses were already paid by the tortfeasor.

In considering a litigant's entitlement to a setoff, the initial question is whether Fla. Stat. section 627.736(3) (dealing with setoff of PIP benefits which are "paid or payable"), or whether Fla. Stat. 768.76, the collateral source rule, applies to the setoff of PIP benefits. *Rollins v. Pizzarelli* 761 So. 2d 294 (Fla. 2000) [25 Fla. L. Weekly S331a] unequivocally held that Fla. Stat. 627.736 (3) applies to the setoff of PIP benefits.

The Court in *Caruso v. Baumle* 880 So. 2d 540 (Fla. 2004) [29 Fla. L. Weekly S316a] explained that under section 768.76(1), the trial court will reduce the jury award by the amount of collateral source benefits. That section itself states that it must be followed "in any action in which this part applies." "This part" refers to Part II of Chapter 768, sections 768.71-.81, Florida Statutes (2001). Part II applies "[e]xcept as otherwise specifically provided, . . . to any action for damages, whether in tort or in contract." See section 768.71(1). The statute clarifies, however, that "[i]f a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply. *Id.* Another provision, section 627.736(3), *is* in conflict. That section is part of the Florida Motor Vehicle No-Fault Law, sections 627.730-627.7405 Florida Statutes, which, among other things, governs suits arising out of motor vehicle accidents, and it provides:

> (3) INSURED'S RIGHTS TO RECOVERY OF SPECIAL DAM AGES IN TORT CLAIMS. No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. **An injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405, or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable.** The plaintiff may prove all of his or her special damages notwithstanding this limitation, *but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable.*(Emphasis added.)

Thus, in contrast to the procedure under section 768.76(1), in which the court offsets the collateral source amount, under section 627.736(3), the trier of fact—whether judge *or* jury—is to offset the amount. As noted, section 768.71(3) provides that any conflicting statute governs over section 768.76. Therefore, in lawsuits concerning motor vehicle accidents (like the instant case), section 627.736(3), not section 768.76(1), applies. PIP benefits are collateral sources; "that is, first-party benefits for which the insured has paid a separate premium." *Rollins,* 761 So.2d at 300.

But, since Fla. Stat. 627.736(3) provides that a plaintiff (like Taerstein) "shall have no right to recover any damages for which [PIP] benefits are paid or payable" then by operation of law, Taerstein was not entitled to recover and could not have recovered any medical expenses from the tortfeasor, which also means that the tortfeasor (and its liability insurer were supposed to be paid or payable through Taerstein's PIP coverage. The tortfeasor would still be entitled to a setoff for the first $10,000 in medical expenses paid or payable, even if Taerstein did not even have PIP coverage. See, *Holt v. King* 707 So. 2d 1141 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D498a]. See also, *Allstate v. Rudnick* 761 So. 2d 289 (Fla. 2000) [25 Fla. L. Weekly S329d]. Hence, although a setoff is intended to prevent a plaintiff from obtaining as damages sums for which PIP benefits were already paid (i.e., a double recovery) there is no possibility of a double recovery in this case because neither the tortfeasor nor Defendant Dairyland have paid anything towards the first $10,000 of Taerstein's medical bills. Accordingly, Defendant Dairyland is not entitled to a setoff as a matter of law for those expenses and therefore the proposed setoff defense is futile.

Furthermore, under Florida law—as it pertains to setoffs involving motor vehicle accidents—only the tortfeasor is entitled to the benefit of a setoff for PIP benefits paid or payable. There is nothing in the law which provides for a setoff for the benefit of the PIP insurer, like Defendant Dairyland. Defendant's reliance on *DeCespedes v. Prudence Mut. Cas. Ins. Co*. (Fla. 3rd DCA 1966) is misplaced because it predates the no-fault / PIP statutory scheme and the incorporated setoff provisions unique to PIP and motor vehicle accidents by at least 5 years. See, Fla. Stat. 627.736(3).

The cases relied upon by Defendant support the conclusion that the setoff belongs to the tortfeasor, not the PIP insurer. See, *Caruso v. Baumle* 880 So. 2d 540 (Fla. 2004) [29 Fla. L. Weekly S316a] (the tortfeasor is entitled to the setoff, not the PIP insurer; and the injured party is not entitled to sue the tortfeasor for PIP benefits that are paid or payable). See also, *Felgenhauer v. Bonds* 891 So. 2d 1043 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D2049a] (only the tortfeasor is entitled to the benefit of a PIP set off.).

Finally, Defendant's reliance on its own policy provision labeled "Our Right to Recover From Others" found at page 6 of the subject policy, is a subrogation clause which allows the Defendant insurer to recover from the person or entity that caused injuries to Taerstein,

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which necessitated the medical bills referenced above. It does not give rise to a setoff defense. In fact, Defendant's subrogation provision, by its own terms, is not even triggered until ". . .*after*. . ." Dairyland has ". . .made payment" and it is undisputed that Dairyland has not made any payment to or for the benefit of Taerstein as of the date of this order.

Accordingly, for the reasons expressed above, Defendant's Motion for Leave to Amend to Add the Affirmative Defense of Setoff is hereby DENIED, without prejudice. Defendant Dairyland may revisit its motion after the verdict, if necessary.

* * *

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**Dissolution of marriage Marital settlement agreement providing that, if former wife intends to remain in marital home after terminating event, she will pay former husband his 20% of positive net equity in home and that "net equity shall be determined after deducting from the appraisal value the remaining balance of the first mortgage existing on the date of this Agreement" unambiguously provides that amount of equity in home would be calculated by deducting from appraisal value first mortgage's balance as of date of terminating event, not as of date of agreement**

IN RE: THE FORMER MARRIAGE OF ROBERT D. LEE, Former Husband, and DEBORAH L. LEE, Former Wife. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 09 DR 9251, Division C. March 9, 2020. Anne Leigh Gaylord Moe, Judge. Counsel: Carl. J. Ohall, for Former Husband. Adrian R. Castro, for Former Wife.

**ORDER**

THIS CAUSE comes before the Court on the Former Husband's Motion to Enforce Marital Settlement Agreement (the "**Motion**"). At the hearing on the Motion, the Former Husband ("**Mr. Lee**") was present with his counsel, Carl Ohall, Esq. and the Former Wife ("**Ms. Lee**") was present with her counsel, Adrian Castro, Esq. Upon consideration of the Motion and having heard argument of counsel, the Motion was GRANTED in a ruling from the bench for the reasons set forth here.

**I. Background**

Mr. Lee and Ms. Lee were divorced ten years ago. Their divorce was finalized after they entered into a Marital Settlement Agreement ("**MSA**"). The MSA resolved all matters relevant to their divorce, including the division of their assets and debts. Their only child was young at the time, and Mr. Lee and Ms. Lee determined it was desirable for the child to remain in their former marital home (the "**Home**") with Ms. Lee until a later date. The MSA provided that Ms. Lee and the child would remain in the Home until a 'terminating event' occurred. The MSA defined 'terminating event' and the relevant terminating event in this case proved to be the child's attainment of the age of 18.

When the child turned 18, Ms. Lee notified Mr. Lee that she intended to remain in the Home. The notification triggered this procedure established in paragraph 4.3(f) of the MSA:

> f. . . . In the event the Wife has notified the Husband of her intent to remain in the marital home, the Wife shall pay to the Husband his twenty percent (20%) of the positive net equity within ninety (90) days of completion of the appraisal. In the event Wife has elected to remain in the marital residence, ***net equity shall be determined after deducting from the appraisal value the remaining balance of the first mortgage existing on the date of this Agreement***. . . . .

Ms. Lee secured an appraisal, and Mr. Lee agrees with the appraisal's opinion of value. They agree that the MSA requires that net equity be calculated by deducting from the appraisal value the balance of the first mortgage.

The heart of the dispute here is that they do not agree which mortgage balance should be used. Ms. Lee contends the relevant mortgage balance is the one that existed on the date the MSA was signed. Mr. Lee contends that the relevant mortgage balance is the one that remained as of the date of the terminating event.

**II. Analysis**

**A. Legal Standard**

If the terms of an agreement are clear and unambiguous, then the agreement is interpreted according to the plain and ordinary meaning of its words. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) [25 Fla. L. Weekly Fed. S68a] ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.") (citing 11 R. Lord, Williston on Contracts § 30:06, p. 108 (4th ed. 2012)). In such a case, the court does not try to discern the subjective intent behind the agreement. *See, e.g.*, *BKD Twenty-One Mgmt. Co., Inc. v. Delsordo*, 127 So. 3d 527 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2541c] (plain language of an agreement is the best evidence of the parties' intent); 11 R. Lord, Williston on Contracts § 31:4 (4th ed. 2012) ("Except in cases of ambiguity . . . the object in interpreting or construing a written contract is to ascertain the meaning and intent of the parties as expressed in and determined by the words they used, irrespective of their supposed actual, subjective intent, and to give effect to their apparent, objectively expressed intent as long as it does not conflict with any rule of law, good morals, or public policy.").

In determining whether a contract term or provision is ambiguous, it is appropriate to consider the context of that term or provision within the entirety of the contract. Restatement (Second) of Contracts § 202 (1981) (Rules in Aid of Interpretation) ("Where the whole can be read to give significance to each part, that reading is preferred."). "Courts are not to isolate a single term or group of words and read that part in isolation; the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose." *Delissio v. Delissio*, 821 So. 2d 350, 353 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1426c].

The fact that the parties do not agree on the meaning of a text does not make that text ambiguous. *BKD Twenty-One Mgmt. Co., Inc.*, 127 So. 3d at 530 (quoting *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. 4th DCA 1984) (an ambiguity does not exist "merely because a contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations.")). Nor is a contract ambiguous merely because interpretation involves a careful reading and consideration of context.

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*See, e.g.*, *The Doctors Co. v. Health Mgmt. Assoc., Inc.*, 943 So. 2d 807, 810 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2350a] ("Ambiguity does not exist merely because an insurance contract is complex and requires analysis to interpret it. Where no ambiguity exists, the policy shall be construed according to the plain language of the policy as bargained for by the parties"); *see also Weir v. Fed. Asset Disposition Ass'n*, 123 F.3d 281, 286 (5th Cir. 1997) ("Disagreement as to the meaning of a contract does not make it ambiguous, nor does uncertainty or lack of clarity in the language chosen by the parties.").

"[C]ontractual language is ambiguous only if it is susceptible to more than one reasonable interpretation" and "where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *BKD Twenty-One Mgmt. Co., Inc.*, 127 So. 3d at 530 (quoting *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a] and *King v. Bray*, 867 So. 2d 1224, 1227 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D632a]).

**B. Application**

**1. Consideration of the MSA as a Whole.**

Paragraph 4.3(f) is clear and unambiguous when read in the context of the entire MSA. Ms. Lee and Mr. Lee decided not to sell or refinance the Home at the time of the divorce. Two mortgages encumbered the Home. The second mortgage was to be paid off immediately, as indicated in paragraph 4.3(c). Ms. Lee would attempt to refinance the first mortgage within the next three years, as indicated in paragraph 4.3(b). Unless or until a refinance occurred, paragraph 4.3(b) indicated that the first mortgage would remain in place. Mr. Lee would quit claim all right, title, and interest he had in the Home, as indicated by paragraph 4.3(a) and Ms. Lee was obligated to indemnify him. The parties would divide the cost of all major repairs to the Home equally and Mr. Lee would contribute $498.00 per month to "the presently existing mortgage on the martial home" until a terminating event occurred. Although paragraph 5.2 characterized these contributions as undifferentiated spousal support for tax purposes, paragraph 5.1 made explicit the agreement that Mr. Lee was not paying alimony to Ms. Lee. *See* paragraph 5.1 ("Neither party shall pay alimony to the other."). Mr. Lee's obligation to make these contributions to the first mortgage explicitly ended with the occurrence of a terminating event.

When viewed in this context, it is evident that the language of 4.3(f) provides a formula to calculate net equity (appraisal value - remaining mortgage balance = net equity) and clarifies which mortgage should be used when it came time to determine net equity ("the first mortgage existing on the date of this Agreement").

**2. Consideration of the Plain and Ordinary Meaning of the Language.**

The plain and ordinary meaning of the language of paragraph 4.3(f) supports Mr. Lee's argument. A mortgage balance is ephemeral. Today the amount due is one thing. Whether or not the monthly payment is made, the amount due next month will be different. The Cambridge Dictionary defines 'remaining' as that which "continu[es] to exist or be left after other parts or things have been used or taken away." *See* The Cambridge Dictionary, at http://dictionary.cambridge.org/us/dictionary/english/remaining (last visited Mar. 6, 2020); *see also Gem Estates Mobile Home Village Ass'n v. Bluhm*, 885 So. 2d 435, 437 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2332a] (Canady, J.); *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1592a] (to give effect to the generally understood meaning of words, it is appropriate to refer to dictionaries). Considering this, the commonly understood meaning of a remaining mortgage balance is the balance of the mortgage that is left over after one or more payments have been made.

In contrast, an existing mortgage balance is commonly understood to mean the mortgage balance at that point in time. At the time the MSA was signed, there was an existing balance of the first mortgage. The exact dollar amount of it was or should have been readily available to Ms. Lee and Mr. Lee. *See* Rule 12.285(e)(13), Fla. Fam. L. R. P. (establishing mandatory disclosure obligations with regard to indebtedness). The parties could have identified the existing balance numerically or simply stated that the existing balance of the first mortgage was to be used to calculate net equity. However, that is not what they did and those are not the words they chose.

**3. Consideration of Grammar.**

Judges are not grammarians; however, "ordinary principles of English prose" are relevant to contract interpretation. *See Flora v. United States*, 362 U.S. 145, 150 (1960). To that end, when considering the plain and ordinary meaning of words it is appropriate to consider the structure of a sentence written in the English language.

In English, "[t]he position of the words in a sentence is the principal means of showing their relationship." W. Strunk & E. White, The Elements of Style, 28 (4th ed. 2000). A modifier—a word or phrase describing, defining, or qualifying something else—must be placed as near as possible to what it modifies. *See* The Guide to Grammar, at http://guidetogrammar.org/grammar/modifiers.htm (last visited Mar. 6, 2020) ("Modifiers are like teenagers: they fall in love with whatever they're next to. Make sure they're next to something they ought to modify!"). When the modifier is an adjective, particularly when it describes the time and place of a thing, it must appear before the noun. *See* The Cambridge Dictionary, Grammar, at https://dictionary.cambridge.org/us/grammar/british-grammar/adjective-phrases-position (last visited Mar. 4, 2020). Paragraph 4.3(f) describes a formula for calculating net equity. To describe which balance should be used in that formula, the time-and-place adjective 'remaining' was placed before the noun 'balance.' To reflect an agreement to use an existing balance, a drafter would have placed the adjective 'existing' in front of the noun 'balance.'

The same principle applies to the adjacent phrase 'existing on the date of this Agreement.' The dispute is whether this phrase modifies the noun 'balance' or the noun 'mortgage.' There is only one reasonable construction. 'Existing on the date of this Agreement' is a postpositive modifier, meaning it is a phrase that modifies something that came before it. When a modifier is postpositive, it applies to the nearest reasonable referent. *See*, A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 152 (2012). 'Existing on the date of this Agreement' modifies or describes the nearest reasonable referent—'the first mortgage'—and identifies which mortgage should be used in calculating net equity. Rather than (a) the second mortgage, which the MSA elsewhere states would be paid off, or (b) a future mortgage that might exist if Ms. Lee refinanced as the MSA contemplated, the parties agreed to calculate net equity based on whatever the balance was in the future for the first mortgage that existed when the MSA was signed.

**C. Conclusion**

For the reasons stated here, paragraph 4.3(f) is unambiguous. The context of the entire agreement, the plain and ordinary meaning of the words used in the provision, and principles of English grammar together compel the same interpretation. Mr. Lee and Ms. Lee agreed that the amount of equity in the Home would be calculated by deducting from the appraisal value the first mortgage's balance as of the date of the terminating event.

Accordingly, it is now

ORDERED and ADJUDGED that:

1. The Former Husband's Motion to Enforce Martial Settlement Agreement is GRANTED.

* * *

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**Insurance Homeowners Coverage Summary judgment Affidavit of insureds' public adjuster is insufficient to preclude entry of summary judgment in favor of insurer that disputes that damage to insureds' home was due to wind damage from hurricane where affidavit contains inconsistences as to address of property and dates of loss and inspection and is bereft of any discernable factually-based chain of underlying reasoning to support conclusory opinion that loss was caused by hurricane**

ALTAGRACIA MERA, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE18020878, Division 13. February 20, 2020. Michael Robinson, Judge. Counsel: Roshini Cheeran, Pazos Law Group, Coral Gables, for Plaintiff. Michael J. Kranzler, Goldstein Law Group, P.A., Fort Lauderdale, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

**THIS CAUSE** having come to be heard before the Court on Defendant's Motion for 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, located at 6480 Kimberly Boulevard, North Lauderdale, FL 33068, incurred damages from Hurricane Irma.

2. After conducting an investigation through an independent adjuster, the Defendant denied the Plaintiffs' claim in full, via a letter dated July 16, 2018. The Defendant denied this claim because:

> *Citizens found no wind damage to your roof but we did notice wear, tear and deterioration. Citizens is unable to provide coverage for wear tear and deterioration. . . Based on the findings of our investiga tion, Citizens is unable to provide coverage for your loss, as your policy does not provide coverage to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.*

3. The Plaintiffs subsequently filed the instant lawsuit alleging breach of contract.

4. On June 28, 2019, the Defendant filed its Motion for Summary Judgment, a hearing on which was set before the Court for February 18, 2020.

5. On February 11, 2020, the Plaintiffs filed their Response in Opposition to Defendant's Motion for Summary Judgment. Notably, the only evidence offered in opposition by the Plaintiffs was an estimate from the Plaintiffs' Public Adjuster and an Affidavit from that same Public Adjuster.

6. The Plaintiffs' Public Adjuster, Luciano Assuncao, offered his Affidavit to support the Plaintiffs' claim, which attests in full as follows:

> 1. *Affiant, the licensed public adjuster from Five Star Claims Adjusting, in the above entitled action, has personal knowledge of the matters testified to herein.*
>
> 2. *On or about June 5, 2018, a claim for property damage was filed with Defendant on behalf of Plaintiffs, which identified Plaintiffs' date of loss as September 8, 2017 and the cause of loss as "Wind/Hurricane."*
>
> 3. *On or about June 29, 2018, Affiant assessed and evaluated the damage to the Plaintiff's home located at 8028 NW 41 Street, Sunrise, Florida 33351.*
>
> 4. *Affiant believes, in his professional experience, that the type of loss to Plaintiff's home to be caused by a hurricane, specifically Hurricane Irma.*
>
> 5. *Further, after Affiant's inspection, Affiant advised in his estimate dated June 28, 2019 that the type of loss was caused by hurricane. A true and correct copy of said estimate, is attached to this affidavit.*

7. No estimate, or any supporting documentation of any kind, was attached to Mr. Assuncao's affidavit, although the estimate was included as an earlier exhibit to the Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment.

8. At the February 18, 2020 hearing on Defendant's Motion for Summary Judgment, the Defendant raised facial, technical, and legal deficiencies which the Defendant argues preclude this Court from considering the Affidavit of the Plaintiff's Public Adjuster at the summary judgment stage. In response, the Plaintiffs raised issues with arguments not raised orally by the Defendant as to late notice, prejudice, and failure to protect the property from further damage, without addressing the purported deficiencies in their Public Adjuster's Affidavit. The Plaintiffs further argued that the Defendant's Affidavit, from its Corporate Representative, similarly only stated an adjuster's belief, and therefore there is a disputed issue of fact as to the cause of the Plaintiffs' loss which should preclude summary judgment.

### 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 Summary Judgment, was sufficient to meet the Defendant's *prima facie* burden of proof. The Defendant's Affidavit was made by a Corporate Representative, who properly attested to personal knowledge of the file, and who properly referred to the Policy, photographic findings of the independent adjuster, and the ultimate denial letter issued to the Plaintiff, all of which were properly attached as exhibits to the Affidavit.

It therefore became the burden of the Plaintiffs, as the Party opposing the Defendant's Motion for 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 upon which the adverse party relies," pursuant to Florida Rule of Civil Procedure 1.510(c). In filing the Affidavit of Luciano Assuncao, 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).

Under Florida Rule of Civil Procedure 1.510(e), "[s]upporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in an affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions to interrogatories, or by further affidavits." The Defendant argues that the failure for the Affidavit to incorporate Mr. Assuncao's estimate as an exhibit to same is fatal to the Affidavit. The Court does not agree. Under the plain language of Rule 1.510(e), such evidence may be "served therewith," and therefore does not necessarily have to be attached to the Affidavit itself. The Plaintiffs meets this standard through the inclusion as an earlier exhibit to their Response in Opposition to Defendant's Motion for Summary Judgment.

The Defendant further argues that Mr. Assuncao is not an expert witness, and therefore he cannot offer opinion testimony. While this point does have some merit, and would likely receive a more thorough evaluation during a hearing pursuant to *Daubert v. Merrell Dow*

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*Pharm., Inc.,* 509 U.S. 579 (1993), "the decision of whether or not to allow lay witness opinion testimony is within the discretion of the trial court." *See Fino v. Nodine,* 646 So. 2d 746 (Fla. 4th DCA 1994) [19 Fla. L. Weekly D1741a] (*citing Huges v. Canal Ins. Co.*, 308 So. 2d 552 (Fla. 3d DCA 1975)). Mr. Assuncao is a licensed public adjuster, with at least some knowledge as to the cause and extent of damages to a residential property. Therefore, at this stage in litigation the Court does not elect to strike Mr. Assuncao's Affidavit on the basis that he is not properly qualified to provide opinion testimony in opposition to summary judgment.

With that being said, the Defendant's primary arguments as to deficiencies in Mr. Assuncao's affidavit carry far more weight. First and foremost, Mr. Assuncao's Affidavit refers to the wrong property address (8028 NW 41 Street, Sunrise, Florida 33351 as opposed to the correct property address at issue here, 6480 Kimberly Boulevard, North Lauderdale, FL 33068), as well as an impossible Hurricane Irma date of loss of September 8, 2017. It is a matter of common knowledge that Hurricane Irma did not strike Florida until September 10, 2017, when it made landfall in Cudjoe Key. *See, e.g.* https://weather.gov/mfl/hurricaneirma (last accessed February 18, 2020). Mr. Assuncao's Affidavit further refers to an estimate dated June 28, 2018 based upon the results of his June 29, 2018 inspection. On its face, Mr. Assuncao's Affidavit claims to have inspected the wrong property, based upon an impossible date of loss, in order to create an estimate generated one day *before* his inspection of the subject property. The Court is troubled by the myriad inconsistencies in Mr. Assuncao's Affidavit, the sole evidence offered by the Plaintiffs in opposition to the Defendant's Motion for Summary Judgment.

The Defendant, in further support of its Motion for Summary Judgment, refers the Court to *Yosvani Gonzalez and Yeinsleidy 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, upon which the Plaintiffs seek to rely here, that "[if] 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) (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 to 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)). Additionally, in analyzing the requirements of Florida Rule of Civil Procedure 1.510(e), the appellate court noted that "affidavits opposing summary judgment must identify admissible evidence that creates a genuine issue of material fact. . . . The purpose of this requirement is to ensure that there is an admissible evidentiary basis for the case rather than mere supposition of belief." *Id.* at 1036 (internal citations and quotations omitted).

The record is clear that Mr. Assuncao's Affidavit is simply bereft of any "discernible, factually-based chain of underlying reasoning." His Affidavit merely states that he inspected the property (which is identified incorrectly), and based upon that inspection he "believes, in his professional experience, that the type of loss to Plaintiff's home to be caused by a hurricane, specifically Hurricane Irma" (which did not make landfall in Florida until two days after the date stated in Mr. Assuncao's Affidavit). As the *Gonzalez* court made clear, evidence in opposition to summary judgment must be go beyond "mere supposition or belief." The plain language of Mr. Assuncao's Affidavit clearly demonstrates on its face that it fails to meet this standard. His "belief" is not a sufficient evidentiary basis for denying summary judgment. The defects in Mr. Assuncao's Affidavit are further magnified by lack of any analysis, testing, or stated evaluation processes at the subject property, from which Mr. Assuncao may have been able to reasonably come to an opinion that goes beyond "mere supposition or belief."

The question now becomes whether or not these myriad deficiencies in Mr. Assuncao's Affidavit are so significant that the Affidavit fails to create a genuine issue of material fact. This Court is bound to follow the law, and "in the absence of an interdistrict conflict, district court decisions bind all Florida trial courts." *See Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992). Therefore, with respect to an analysis of the admissibility of Mr. Assuncao's Affidavit as evidence in opposition to the Defendant's Motion for Summary Judgment, this Court is bound by the majority in *Gonzalez.*

The Plaintiffs rely entirely in opposition to the Defendant's Motion for Summary Judgment on Mr. Assuncao's Affidavit, which simply lacks the discernible, factually-based chain of underlying reasoning to overcome what is entirely speculative and conclusory opinion testimony which fails to even properly identify the location of the subject property or the date of loss. The Court therefore finds that Mr. Assuncao's Affidavit fails to reasonably meet the admissibility requirements outlined in *Gonzalez.* In the absence of any other evidence filed by the Plaintiffs in opposition to the Defendant's Motion for Summary Judgment, no genuine issue of material fact remains in this matter. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

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

2. Final Summary Judgment is hereby entered in favor of the Defendant, Citizens Property Insurance Corporation, and against the Plaintiffs, Altagracia Mera and Elizabeth Mejia f/k/a Elizabeth Ledesma. 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.

* * *

**Criminal law Counsel Disqualification Conflict of interest Prior representation Representation of adverse interests Contact between co-defendant and attorney that included legal advice and discussion of item relevant to case was sufficient to rise to level of attorney-client relationship, and co-defendant's interests were materially adverse to interests of defendant in same matter Attorney is disqualified from representing defendant**

STATE OF FLORIDA, Petitioner, v. MITCHELL ROBERT LANDIS, Defendant. Circuit Court, 19th Judicial Circuit in and for Martin County. Case Nos. 432017CF001344B, 432018CF000341A, 432018CF000347A, 432018CF000519A. March 13, 2020. Rehearing denied March 24, 2020. Sherwood Bauer, Judge. Counsel: Richard A. Barlow, Stuart, for Mitchell Landis, Defendant. Ira D. Karmelin, West Palm Beach, for Brenda Ingram, Co Defendant.

## ORDER ON AMENDED MOTION TO DISQUALIFY DEFENSE COUNSEL

THIS CAUSE having come before this Honorable Court on the amended motion, filed by the attorney on behalf of Brenda Dee Ingram, who is the co-Defendant / witness in the above noted cases. This Court, upon review of the motion and court file, after a full hearing in open court on March 12, 2020 it is hereby;

ORDERED that the motion is granted. The attorney, Richard A.

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Barlow (hereinafter "Attorney"), is disqualified from representing the Defendant in the above noted cases.

The motion and evidence at hearing established the following:

1) Upon the arrest of Brenda Dee Ingram (hereinafter "Ingram"), the Attorney, on March 6, 2018, went to the Martin County Jail to meet with Ingram. The Attorney and Ingram discussed the case, at least to the extent that the Attorney advised the matter could take 2 to 3 years to complete; to not talk to anyone about the case; if contacted by law enforcement to not talk to them and to refer law enforcement or any questions to his law office.

2) Two to four weeks later, the Attorney came back out to see Ingram at the Martin County Jail and further met regarding the case. Ingram testified that he showed her "something" (not disclosed what it was to according to attorney who filed the motion to maintain the privileged nature of the item) and Ingram responded to the Attorney in relation to the item (again the response was not disclosed under claim of maintain the privilege).

3) The Attorney recalled the first meeting, but did not recall or deny the second meeting. The Attorney agreed that he told Ingram to not talk to anyone about the case and to refer any law enforcement to his office.

4) The Attorney testified that his advice to not talk is standard procedure, as far as advice to anyone arrested, for any defense attorney to tell a defendant.

5) At the end of the second meeting, the Attorney told Ingram that he could not represent her because it would be a conflict of interest.

6) Ingram is now a witness against the Defendant in these cases.

7) The attorney who filed the motion represents Ingram.

8) The motion raises the issue that if the Attorney and Ingram had an attorney/client relationship, can the Attorney now represent the Defendant in the same matter where the interests of the Defendant are materially adverse to the interests of the former client.

The question for the Court in this motion is whether the Attorney and Ingram had an attorney/client relationship. If so, the Rules of Professional Conduct, Rule 4-1.7 and Rule 4-1.9 would prohibit the Attorney from representing the Defendant in these matters.

Rule 4-1.7 clearly states that ". . . *a lawyer must not represent a client if: . . .there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibility to . . .a former client. . .* " Rule 4-1.9 clearly states that *"[a] lawyer who has formerly represented a client in a matter must not afterwards: (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."*

There is no question that the interests of Ingram and the Defendant are materially adverse and that this adverse position is in the same matter(s). Ingram is now a witness against the Defendant in the same cases in which the contact between the Attorney and Ingram occurred. The Attorney would be, if he chooses, cross-examining Ingram in the same matter(s). Ingram has not given informed consent.

The Court was not presented any cases regarding the legal determination of when the attorney/client relationship is consummated. The definition of the relationship is most often set forth in matters relating to invocation of the lawyer/client privilege.

An attorney/client relationship is established when a person consults with a lawyer for the purpose of obtaining legal services or who was, in fact, rendered legal services by a lawyer. *See State v. Branham*, 952 So. 2d 618 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D839b] and *State v. Rabin*, 495 So. 2d 257 (Fla. 3d DCA 1986).

Florida Statute §90.502 titled "Lawyer-client privilege" states that *"[f]or purposes of this section: (a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.* It also states that, *"(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer."* (emphasis added)

Regardless of whether or not any statement was made which would be privileged, it is the relationship which is the focus of this order.

Ingram by meeting with the Attorney did manifest the intention to seek and did receive legal advice and services from the Attorney. She was advised of her Constitutional 6th Amendment right to counsel and her 5th Amendment right to remain silent. The Attorney did advise her to invoke her 6th and 5th Amendment rights if approached by law enforcement or anyone else who wanted to speak with her. The Attorney advised Ingram to refer any person to him if they had any questions, which would indicate to any observer that he was presenting himself to Ingram and, potentially others, that he was acting as her legal representative. Although there is no evidence that any other person attempted to speak to Ingram or the Attorney about the case, it is Ingram who knew of this stated intention and role of the Attorney. Additionally, there was at least one item relevant to the cases which the Attorney discussed with Ingram during their conversations.

Neither the Rules of Professional Conduct, Rule 4-1.7 and Rule 4-1.9, nor Florida Statute §90.502 quantifies the level at which legal services need to be rendered, however §90.502 does state that the consultation with the purpose of obtaining legal services is enough to establish the relationship. In *Dean v. Dean*, 607 So. 2d 494, at 497, (Fla. 4th DCA 1992) the Fourth District Court of Appeal noted: *"Hence, it logically follows that the privilege does not turn on the client actually hiring or engaging the attorney; it is enough if the client merely consulted the attorney about a legal question with the view to employing [the attorney] professionally although the attorney is not subsequently employed."*

It is clear that under the definition of the attorney/client relationship as noted herein that the contact between Ingram and the Attorney rose to the level of Ingram being a client of the Attorney at the time the consultation and legal advice rendered. She is thus now a former client of the Attorney in the same matter(s) where that persons interests are materially adverse to the interests of the former client.

The Defendant testified that he wants Richard A. Barlow as his attorney. This is an irrelevant fact for the purpose of this motion. The protection is for the former client.

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**ORDER ON MOTION FOR REHEARING AND OR MOTION FOR RECONSIDERATION AND/OR MOTION FOR CLARIFICATION RE: AMENDED MOTION TO DISQUALIFY DEFENSE COUNSEL**

THIS CAUSE having come before this Honorable Court on the motion. This Court, upon review of the motion and court file, it is hereby;

ORDERED that the motion is denied.

The motion raises four areas of concern. They are as follows:

1. That the order disqualifying the attorney from representing the Defendant does not address the status of his representation of a co-Defendant, Melissa R. Esposito. The order does not address that co-Defendant, as the motion only requested disqualification as to the Defendant. The Court was not asked to address the co-Defendant, Melissa R. Esposito. A motion for the disqualification of the co-Defendant has since been filed and will be addressed by future order.

2. That the order disqualifying the attorney from representing the Defendant does not address the status of his representation of a co-Defendant, Weston M. Landis. The order does not address that co-Defendant, as the motion only requested disqualification as to the Defendant. The Court was not asked to address the co-Defendant, Weston M. Landis. A motion for the disqualification of the co-

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Defendant has since been filed and will be addressed by future order.

3. That the order stated "[t]he Defendant testified that he wants Richard A. Barlow as his attorney. This is an irrelevant fact for the purpose of this motion." For completeness, the order added that "[t]he protection is for the former client." The motion for reconsideration includes case law regarding the disqualification of attorneys in support of its claim that the Court failed to address the 6th Amendment rights of the Defendant. This matter, however, is different than the cases cited. In this matter (thus the words "for the purpose of this motion" and "[t]he protection is for the former client) the issue for disqualification was due to the attorney and Brenda Ingram having an attorney-client relationship. Thus she attained the status of a former client, resulting in the application of Rules of Professional Conduct, Rule 4-1.7 and Rule 4-1.9 which prohibit the Attorney from representing the Defendant in these matters. In the cases cited by the motion for reconsideration, none the facts include former clients.[1] The order of this Court for the disqualification set forth its findings as to the attorney-client relationship.

4. That the order is overbroad. If, as the Court found, that there was an attorney-client relationship between the attorney and Brenda Ingram, making her now a former client in the same litigation, Rules of Professional Conduct, Rule 4-1.7 and Rule 4-1.9 do not permit some form of limited representation. Rule 4-1.7 clearly states that *"... a lawyer must not represent a client if: . . .there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibility to . . .a former client. . . "* Rule 4-1.9 clearly states that *"[a] lawyer who has formerly represented a client in a matter must not afterwards: (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."* This is not a situation where a member of a large law firm had some tangential contact with a potential material issue. The attorney here represented the co-Defendant/material witness.

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[1]*Lieberman v. Lieberman,* 160 So.3d 73 (4th DCA 2014) [39 Fla. L. Weekly D2457a], involves a former wife moving to disqualify her former husband's attorney from representing him on a subsequent contempt proceeding because he is a "material witness." *Caruso v. Knight,* 124 So. 3d 962 (4th DCA 2013) [38 Fla. L. Weekly D2171c], involves a former employee moving to disqualify the Defendant's corporate counsel because they had access to employee personnel files. **NOTE: In the matter the District Court even stated a difference between that situation and one of an attorney client situation when it stated "This case does not involve attorney client confidences or work product concerns which serve as grounds for many of the attorney disqualification cases."** *Manning v. Cooper,* 981 So. 2d 668 (4th DCA 2008) [33 Fla. L. Weekly D1370b], involves an attorney who may have had a conflict of interest. **NOTE: In this matter the District Court specifically found that the attorney ". . . never represented" the other party. Therefore there was no application of Rule 4 1.9.**

* * *

**Criminal law Immunity Stand Your Ground law Where defendant failed to swear to any of the facts asserted in motion for declaration of immunity and dismissal or point to any sworn evidence contained in record from which elements of self-defense claim could be inferred, defendant has failed to establish prima facie claim of self-defense immunity and burden of proof did not shift to state Defendant's motion is stricken without prejudice**

STATE OF FLORIDA, Plaintiff, v. CALVIN THOMAS LINDSEY, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05 2019 CF 013168 AXXX. September 27, 2019. Robin C. Lemonidis, Judge. Counsel: Amy Tucker McLaughlin, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. A. Michael Bross, Melbourne, for Defendant.

[Cert. denied December 11, 2019, 5DCA, Case No. 5D19-2885.]

**ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S MOTION FOR DECLARATION OF IMMUNITY AND DISMISSAL, WITHOUT PREJUDICE**

This cause came before the Court on August 20, 2019, and on September 25, 2019, upon the Defendant's Motion for Declaration of Immunity and Dismissal filed on May 28, 2019, and the State's Motion to Strike Defendant's "Self-Defense Immunity" Motion to Dismiss, or, in the Alternative, State's Motion to Require Defendant to Satisfy "Prima Facie Claim" Requirement Through the Presentation of Evidence at the Hearing, filed on August 19, 2019. Amy McLaughlin, Esq., represented the State. Michael Bross, Esq., and Eric Wicks, Esq., appeared on behalf of the Defendant.

The State charged the Defendant with Aggravated Battery with a Firearm and Aggravated Assault with a Firearm, based upon events occurring on January 24, 2019. The Defendant claims that he is entitled to immunity based upon sections 776.012, 776.031 and 776.032, Florida Statutes, known as the "Stand Your Ground Law."

**STATUTE**

Section 776.032(1), Florida Statutes, Immunity from criminal prosecution and civil action for justifiable use or threatened use of force, provides:

> A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforce ment officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

**BURDEN OF PROOF**

The Legislature amended section 776.032, Florida Statutes effective June 9, 2017 to shift the burden of proof to the State. The statute requires the Defendant to state a "prima facie claim of self-defense immunity." Section 776.032(4), Florida Statutes. Once the Defendant states a prima facie claim that he acted in self-defense the burden shifts to the State to prove by clear and convincing evidence that the defendant is not entitled to immunity.

The Florida Supreme Court is currently considering the issue of whether the amended statute applies retroactively. The Fifth District Court of Appeal has determined that the statutory amendment applies retroactively. *Fuller v. State,* 257 So. 3d 521 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D2237a].

**ANALYSIS**

The State's Motion to Strike posits that the Defendant's motion fails to present a prima facie claim of self-defense immunity. The motion provides a factual basis that is not sworn to by the Defendant. The Defendant's attorney claims this unsworn motion is sufficient to state a prima facie claim and that he is not required to present any evidence.

The State's position was adopted by the Fourth District Court of Appeal in *Langel v. State,* 255 So. 3d 359 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2058a], wherein the Court explained:

> To raise a "prima facie claim of self defense immunity from criminal prosecution" under section 776.032(4), a defendant must show that the elements for the justifiable use of force are met. Ordinarily, this will require the defendant to testify or to otherwise present or point to evidence from which the elements for justifiable use of force can be inferred. Only then would the burden shift to the state to "overcome the immunity" by clear and convincing evidence.

*Langel v. State,* 255 So. 3d 359, 362-63 (Fla. 4th DCA 2018) [43 Fla.

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L. Weekly D2058a]. As in *Langel,* the Defendant herein failed to swear to any of the asserted facts or point to sworn evidence contained in the record, such as sworn statements or deposition transcripts. The motion is merely the assertions of counsel. The Fourth District Court of Appeal noted the problems inherent in the common practice of trial courts ruling based on only factual assertions by an attorney.

> [T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.

*Leon Shaffer Golnick Advert., Inc. v. Cedar,* 423 So. 2d 1015, 1016-17 (Fla. 4th DCA 1982). *See also Arnold v. Arnold,* 889 So. 2d 215, 216 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2838b] ("unsworn statements cannot serve as the basis for a trial court's factual determinations."

Section 776.032(4), Florida Statutes, requires that the Defendant present a prima facie claim before the burden of proof shifts to the State. This standard requires, at the least, sworn factual assertions before the Court must accept the assertions as true. As there are no sworn facts before the Court, the Court finds the Defendant has failed to establish a prima facie claim of self-defense immunity.[1] Therefore, the burden of proof did not shift to the State. Accordingly, it is

**ORDERED AND ADJUDGED**:

The State's Motion to Strike Defendant's "Self-Defense Immunity" Motion to Dismiss is **GRANTED** and the Defendant's Motion for Declaration of Immunity and Dismissal is **STRICKEN** without prejudice to refile a facially sufficient motion.

---

[1]Due to the facial insufficiency of the motion the Court makes no determination on the merits of the self defense immunity claim.

* * *

**Real property Declaratory judgment action seeking declaration of boat yard owner's riparian access rights to river for use of its boatlift after Florida Department of Transportation's condemnation of right of way for construction of bridge over river Where seawall around boatlift area is riparian line, plaintiff has riparian access rights across disputed area between boatlift piers and navigation channel of river Further, lands between boatlift and river are sovereign submerged lands, not land owned by department No merit to argument that plaintiff's predecessors in interest lost riparian right of access to river by dredging to construct boat basin and boatlift where original property had riparian right of access along its entire boundary with river, and boat basin and boat lift were created within boundaries of existing uplands No merit to argument that plaintiff has no express easement to cross from boatlift piers to riparian boundary with parcel whose submerged lands and riparian rights are owned by plaintiff's predecessor in interest where fact that it is not possible to use boatlift without going over those submerged lands creates reasonable presumption that owner conveyed easements to beneficial use of land necessary to travel to and from boatlift when he conveyed plat including boatyard and appurtenances to plaintiff**

LAUDERDALE BOAT YARD, LLC, a Florida Limited Liability Company, Plaintiff, v. STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE19 005032 (09). March 5, 2020. Jeffrey R. Levenson, Judge. Counsel: Charles Forman and Vanessa Thomas for Plaintiff. Clark N. Gates, Ryan S. Bourgoin, Thomas Michael Lynch IV, and William Foster, for Defendant.

## FINAL JUDGMENT

THIS CAUSE having come before the Court for trial commencing November 21, 2019 and concluding, November 22, 2019. On the evidence and argument presented the Court makes the following findings of facts and conclusions of law:

## INTRODUCTION

This is an action for declaratory judgment. Plaintiff, LAUDERDALE BOAT YARD, LLC (hereinafter referred to as LBY) sued Defendant, FLORIDA DEPARTMENT OF TRANSPORTATION (hereinafter referred to as FDOT), for a declaration that it retained riparian access rights to the South Fork of the New River after the condemnation of right of way for the construction of an interstate bridge in the early 1980s. In 2016, Plaintiff purchased its property ifor its continued operation as a boatyard. Sometime after the purchase, Plaintiff was notified by FDOT representatives that its rights of access from its boat lift to the New River had been condemned in the prior action and that it had no legal right to continue to utilize its boatlift for boats accessing its property from the New River. Additionally, FDOT indicated that it is reconstructing the bridge to add more travel lanes and the new bridge supports could restrict Plaintiff's access from the boatlift to the New River. These issues created a justiciable controversy vesting this Court with jurisdiction to render a declaratory judgment.

For trial, the parties narrowed the issue for this Court to decide:

> Whether the boatlift area has riparian rights of access to the South Fork of the New River. (Joint Pretrial Stipulation at 4).

## FINDINGS OF FACT

1. Plaintiff, LAUDERDALE BOAT YARD, LLC, is an existing Florida limited liability company that was chartered by Ronald C. Cameron, Julie K. Cameron, James T. Naugle and Carol-Lisa Phillips, to own and operate the boatyard.

2. Defendant is an agency of the state of Florida authorized to construct roadways for public transportation.

3. The boatlift is part of the property acquired and owned by Plaintiff. The property acquired by Plaintiff is described as Tract "A" of the Artmarine Plat together with all "appurtenances there unto belonging or in anywise appertaining thereto." (Ex. 12).

4. The Artmarine Plat is part of the original property transferred from the original developer, Striker Aluminum Yachts, Inc. (hereinafter referred to as Striker) to Arthur B. Choate, (hereinafter referred to as Choate) in 1976. (Ex. 10). Striker's original property will hereinafter be referred to as the "Parent Tract."

5. The legal description of the Parent Tract included uplands and submerged lands to the center of the South Fork of the New River. (Ex. 33a). Exhibit 33a shows the legal description projected on an aerial of the Parent Tract before it was fully developed. (T 287, Ln 14-19). Pursuant to its constitutional mandate, in Art. X Section 11, the state of Florida has asserted jurisdiction to the lands which were submerged before the site's development including the channel of the river itself. (T 242, Ln 24 - T 243, Ln 5 and Ex. 9a). These were sovereign submerged lands within the meaning of the Constitution and are owned by the Trustees of the Internal Improvement Trust Fund in trust for all of the people of Florida.

6. The uplands shown in the aerials were owned by Striker before they were sold to Choate. (T 287, Ln 14 and Ex. 10). The uplands had riparian access rights where they abutted the State's sovereign submerged lands. (T 292, Ln 24 - T 293, Ln 25 and Ex. 47 and 19).

7. As shown in the 1957 aerial (Ex. 34b and 47) the Parent Tract's uplands were being developed and a portion of the Parent Tract was cleared and filled. (T 125, Ln 10-21). The edge of the visible fill line was man made and smooth. Hereinafter this edge will be referred to as the "Original Bulkhead." The Original Bulkhead abutted sub-

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merged land that was dredged so that boats could dock along its boundary. Witnesses for both parties agree that there were riparian rights of access along this edge. (T 125, Ln 22 - T 126 Ln 3) (T 292, Ln 24 - T 293 Ln 25 and Ex. 9).

8. As shown on the aerials, the cleared and filled portion of the parent tract continued to be developed from 1957 to 1973. (Ex. 34 b-d). In 1973, the property still retained riparian rights across the entire river frontage. (T 127, Ln 2-23).

9. During this period it was known as the Striker Marina. (T 137, Ln 16 - T 138, Ln 15). Striker constructed aluminum yachts in Holland and brought them to the boatyard to finish and sell. (T 139, Ln 3-7). Repairs were also conducted on site. To best accomplish this, Striker dredged back from the Original Bulkhead to create a covered boat basin where the large boats could be moored and worked on. (Ex. 6 a-b). Striker also dredged back from the Original Bulkhead to create a boatlift so that it could get its 70-foot yachts in or out of the water as needed. (T 139, Ln 6-7). All of the filled property between the Original Bulkhead and the covered boat basin and boatlift was dredged out so that boats had access to and from the New River.

10. Striker sold the entire property to Choate on April 26, 1978 (Ex. 10). Choate continued to operate the property as a boatyard until transferred to Plaintiff's principals. (T 140, Ln 5-11).

11. Defendant, FDOT, determined that it needed to build a bridge over the South Fork of the New River as part of its 1-95 and 1-595 construction project. FDOT determined that it needed a corridor approximately 220 feet wide to construct the bridge. Based on its need Defendant, FDOT, sued Choate and obtained an Order of Taking on November 3, 1983 (Ex. 2). The property taken was identified as "Parcel 104" which was legally described in the Order of Taking. This was not a stipulated Order of Taking. The State of Florida, as the Trustees of the Internal Improvement Trust Fund, (TIITF) was not a party to the suit. (Ex. 2).

12. The legal description for Parcel 104 did not include any access rights at ground level. Witnesses for both parties testified that the Stipulated Final Judgment took no access rights at ground level. (Durrance, T 66, Ln 25 - T 67, Ln 4 and T 96, Ln 19) (Collins, T 214, Ln 11-21) (Maddox, T 309, Ln 5-9). It did contain a description of all access rights above a horizontal plane 10 feet below the centerline of the bridge to be constructed. (Ex. 2). In essence, all access rights, riparian or otherwise were taken above a plane starting about 40 feet above ground level at Choate's property. This is shown by the side view included as page 5 of FDOT's Right of Way map. (Ex. 17).

13. Thereafter, Choate and the FDOT settled the lawsuit and entered into a Stipulated Final Judgment on March 27, 1985. (Ex. 1). Hereinafter this will be referred to as the "SFJ." The SFJ ratified the taking of Parcel 104 and its legal contained in the Order of Taking. The SFJ provided for the "lump sum" payment of $1,200,000 for all of Defendant, Choate's claims, whether for the part taken, damages to Choate's remainder property or business damages. There is no itemization or allocation of the damages or what claims Choate was paid for. There is no mention of the boatlift or boatlift area or whether the parties agreed there would be any future limitation on their use as part of Choate's remaining property. (Ex. 1).

14. The taking eliminated the covered boat basin and some of the seawall where large boats previously docked. (Ex. 34b). Nevertheless, Choate continued to operate the remaining property as a boatlift for smaller boats less than 60 feet in length. (T 140, Ln 5-18). Boats continued to arrive from many south Florida and Bahamian locations via the New River. For these boats the river was the only practical means of access and the boat lift was essential to the boatyard's function. (T 141, Ln 3 - T 143, Ln 16). FDOT *never objected* to the continued use of the boatlift or access to or from the New River.

15. Much of the area needed for the construction of the bridge was sovereign lands owned by the State of Florida. (Ex. 6a). These lands were held in trust by the state of Florida. The lands were already devoted to public uses including navigation. Agencies, like the FDOT, are inferior to the State itself and cannot take lands from the sovereign especially where devoted to a prior public purpose. *Florida East Coast Railway Company v. City of Miami,* 372 So. 2d 152 (Fla. 3d DCA 1979). As a result, FDOT needed permission to use submerged lands held in trust by the State to construct the bridge. This was accomplished by the state giving a non-exclusive, temporary (30 years) Sovereign Submerged Land's Easement to its agency, FDOT, for the purpose of constructing the bridge. (Ex. 9 a). The submerged lands were described as Parcel 108 (Ex. 9a). Pursuant to paragraph 5 of the sovereign easement: ". . . no title to said land is confirmed by this instrument." (Ex. 9a).

16. The easement is dated January 26, 1984. The second paragraph of this easement grants "a right of way easement to construct the road. . ." ". . . on, under and across the following described sovereignty land in Broward County, Florida." Sovereignty land is the same thing as sovereign submerged land or SSL. The terms are interchangeable. (T 241, Ln 18 - T 242, Ln 1). The last page of the easement is a sketch showing the legal description which is referred to as Parcel 108. Immediately above the station number "370"[1] can be seen the boat lift piers and boat lift basin area that is actually defined in part by its border with the sovereignty lands described in the easement.

17. After the conclusion of the taking and the acquisition of the Sovereign Lands Easement FDOT prepared a right of way map depicting the parcels and the source of title for its lands in the bridge corridor. (Ex. 17). This map was received in evidence by stipulation. Page 4 of FDOT's right of way map shows the lands acquired in the taking as Parcel 104 in pink. It shows the sovereign submerged lands from the Parcel 108 easement in yellow. Parcel 108's northerly boundary is adjacent to the boatlift basin.

18. In its own official map, Defendant shows its ownership interest in the yellow area to be the sovereign submerged land easement, not the condemned Parcel 104 which is shown in pink. Above station number 370, in a similar yellow, can clearly be seen the boat lift area with the two travel piers for extracting and launching boats. As shown by the sketch of easement discussed above, Defendant's SSL easement forms the border of the boatlift area.

19. Vessels leaving the boat lift basin for the New River travel over Parcel 108 the entire way. Vessels leaving the New River for the boatlift basin similarly travel over Parcel 108 the same way. The vessels do not cross the lands shown in pink that FDOT claims it owns as Parcel 104. (Ex. 17, Page 4). According to its own right of way map and the easement, FDOT owns no interest in the land denoted as Parcel 108.

20. Approximately six years after the condemnation Choate decided to add some additional commercial buildings to the boatyard's uplands. The County required him to plat the property where the buildings were to be built. The result was the Artmarine Plat which was recorded in 1989. (Ex. 3). The plat included all of the remaining uplands and also included the boatlift piers. (Ex. 3). It did not include the submerged lands between the seawalls surrounding the boatlift basin and the boundary with Parcel 108. Since their development in the early 1970's these submerged lands were only used to provide access from the boatlift piers to the New River.

21. In 2011, Choate obtained a Sovereign Submerged Lands Lease from the State of Florida. (Ex. 41). Defendant agrees that the lease is of sovereign submerged lands and that Choate had riparian access rights emanating from the adjacent uplands. The adjoining uplands consist of the man-made linear seawalls constructed when the property was dredged and filled. The adjacent submerged lands along the seawalls were dredged to a sufficient depth to allow boats to dock

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parallel with the seawall, which was the purpose of the lease. (Ex. 40 page 8 and Ex. 41 page 8).

22. In 2011, Choate set up an operating entity, Artmarine, LLC (hereinafter "Artmarine"), Choate transferred to Artmarine all of Tract "A" of the Artmarine tract, together with "the appurtenances thereto belonging" in December of 2011. (Ex. 11).

23. Choate continued to operate the boatyard after the platting using the travel lift on the boatlift piers to take boats out of the water and to put them back in the water after servicing. Boats had to travel over the basin's unplatted submerged lands to do this. The use of this boatlift was essential to the operation of the boatyard and there was no other way to do it. (T 148, Ln 15-22). Like Striker before him, Choate continued to use the submerged lands between the boatlift pier and Parcel 108 for water access to and from the New River. The same operations continued for 25 years until Choate sold the property to Plaintiff's principals.

24. Choate's company, Artmarine, sold the boatyard to Plaintiff's principals on June 21, 2016. (Ex. 12). Thereafter the principals transferred the boatyard into the Lauderdale Boat Yard, LLC entity for operational purposes. (Ex. 13).

25. The principals' intent was to continue to operate the boatyard in the same fashion as Choate. All of the existing leases were assigned at closing. (Ex. 27). Many of the tenants worked on boats that they could take out of the water using the travel boat lift and boat lift piers. (T 148, Ln 15-22). It is also one of the few marinas where individuals were allowed to pull out their own boats and work on them with or without professional help. (T 148, Ln 23 - T 149, Ln 4). None of this was possible without access from the New River to the boatlift. (T 148, Ln 15 - T 149, Ln 18 and Ex. 9 at Pg. 5). Plaintiff continued to use the submerged lands between the boatlift piers and Parcel 108 for access to the New River.

26. The legal of the property sold to Plaintiff's principals was the upland boatyard, described as "Tract "A" of Artmarine. (Ex.12). The deed included "all appurtenances" to the described property. The tenant leases and the State's sovereign submerged lands lease were all assigned to Plaintiff. (Ex. 27).

27. Plaintiff kept the tenants and continued to operate the boatyard in the same fashion as Choate. (T 140, Ln 5-21). Plaintiff obtained a new sovereign submerged lands lease from the state of Florida that included a little additional width from Choate's lease. (Ex. 41). The lease was for the same purpose, the docking of boats parallel with the seawalls that were adjacent to sovereign submerged lands. (Ex. 41). The manmade linear seawalls were the mean high water line from which riparian access extended to the New River. (Ex. 41, Page 10).

28. Plaintiff has continued to use the boatlift uninterrupted since acquiring the boatyard from Choate. It is the only such lift in the area and Plaintiff has been using it to launch and load barges and equipment for FDOT's current contractor who is reconstructing the bridge to add additional travel lanes. (T 158, Ln 11-24). It is essential to the upland use of the boatyard. Navigating over the submerged lands between the boatlift and Parcel 108 is essential to the operation of the boatlift.

## CONCLUSIONS OF LAW

There are two options for determining the sovereign boundary line in this case. The first is the seawall surrounding the boatlift area of the plat that includes the boatlift piers. The Court credits the unrebutted testimony of Plaintiff's marine engineering witness Dallas Durrance establishing same.. Based upon Mr. Durrance's education as an ocean engineer, including forty (40) years of experience in Florida with marinas, boatyards, water bounded development projects and his site visits to locate this property's surveyed corners as they relate to the water, Mr. Durrance testified that the mean high water line was on the seawalls. (T 53, Ln 13 - T 54, Ln 1).

> Q. What was the purpose of the seawall?
>
> A. Typically, the way construction was performed back in the late '50s, '60s, early '70s, you would build a seawall and pump sand out of the river or your basin and pile it behind the seawall to create the upland. In this case the upland already existed, so they excavated the upland and piled it behind the seawall so you have a firm vertical edge to your up level water boundary which under current permitting would create the new mean high water line.

(T 52, Ln 15-24). This opinion was further buttressed by defense counsel's cross-examination during which Durrance testified that he had experience in determining mean high water lines and had done so on development projects. (T 85, Ln 1 - T 86, Ln 25).

Stuart Cunningham also testified that in 2019 the mean high water line was the bulkhead line. (T 123, Ln 18-25). Cunningham determined this based on his personal inspection and observations at the boatyard, including locating the property corners. (T 122, Ln. 10-16). Mr. Cunningham was both a practicing engineer and surveyor in Florida with over thirty-five (35) years of experience. (T 121, Ln 22 - T 123, Ln 3).

The inference from this weighty testimony is that the riparian line is located on the seawall surrounding the boatlift area. This result is reinforced by the location of the submerged sovereign land lease that was given by the Trustees to Plaintiff. (Ex. 25). According to the sketch of lease (Ex. 25 at page 11) the boundary between Plaintiff's uplands and the State's sovereign submerged lands is the arrow-straight seawall. It follows the seawall perfectly around a sharp 45 degree turn. It was dredged and filled behind the seawall so the vessels could dock alongside it. The seawall is the mean high water and sovereign line. It is distinctly different from the natural meandering upland (high water) line as show in the pre-development aerials. (Ex. 34 a and 33 a). This is consistent with Durrance's and Cunningham's testimony. It was man-made, long after Florida became a state. It is also the only official undisputed evidence in this case that actually locates a riparian line adjacent to the Artmarine Plat owned by Plaintiff.

Accepting the conclusion that the seawall around the boatlift area is the sovereign line, it then follows that Plaintiff has riparian access across the disputed area between the boatlift piers and the navigation channel of the New River. The reason for this is that all submerged land between the riparian line and the navigation channels are subject to Plaintiff's access rights. It does not matter whether the submerged land is owned by the State or privately. *5F, LLC v. Dresing,* 142 So. 3d 936, 946 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1473a]. This is part of Florida's common law of riparian rights and set forth by the Florida Supreme Court. *Hayes v. Bowman,* 91 So. 2d 795, 798 (Fla. 1957). Riparian access rights are held to be superior to the rights of the submerged land owners, public and private. *See Hayes v. Bowman,* 91 So. 2d 795, 798 (Fla. 1957); *5F, LLC v. Dresing,* 142 So. 3d 936, 946 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1473a].

A second option for determining the location of the riparian line is the boundary of Defendant's submerged land easement with the boatlift basin area. Exhibit 9a is the Sovereign Submerged Land Easement, Parcel 108, granted to FDOT to construct the existing bridge. The easement is dated January 26, 1984. The second paragraph of this easement grants "a easement to construct the road . . ." ". . . on, under and across the following described sovereignty land in Broward County, Florida." Sovereignty land is the same thing as sovereign submerged land or SSL. The terms are interchangeable. (T 241, Ln 18 - T 242, Ln 1). The last page of the easement is a sketch showing the legal description which is referred to as Parcel 108. Immediately above the station number "370" can be seen the boat lift piers and boat lift basin area that is actually defined in part by its border with the **sovereignty lands** described in the easement.

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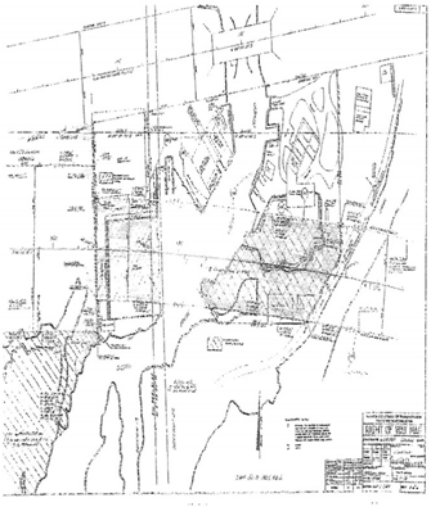
This easement was granted by the Board of Trustees of the Internal Improvement Trust Fund to the Florida Department of Transportation. Pursuant to the Florida Constitution:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. . .

*Fla. Const.* Art. X, §11. Stipulated evidence establishes sovereignty land bordering the boatlift area. Another stipulated exhibit, not considered by Defendant, is the Florida Department of Transportation's own right of way map. The right of way map was created after the acquisition of the various parcels necessary to construct the bridge. Each parcel number and station is tied to FDOT's title claim for that parcel. It was stipulated into evidence by the parties at the outset of the trial as Exhibit 17 pursuant to the Joint Pre-Trial Stipulation.

The fourth sheet of this exhibit is an enlargement that shows, in part, the area of the same project station number 370 discussed above. This part of the road is depicted as Parcel 108 and colored in yellow. In red handwriting above the bubble with the number "108" is the recording information: "OR 11540, Page 157" which references Exhibit 6-A (the original sovereignty land easement) as the source of FDOT's title for the area depicted in yellow. Official Records Book 11540, Page 157 is the public records recording information stamped on the first page of the sovereignty land easement.



In its own official map, Defendant shows its ownership interest in the yellow area to be the sovereign submerged land easement, not the condemned Parcel 104 which is shown in pink. Defendant described a fee simple taking at ground level in its Order of Taking. Nevertheless, it acquired no interest in the lands described as Parcel 108. These lands were owned by the State of Florida as sovereign submerged lands. (Ex. 9a). The State of Florida was not made a party defendant to the condemnation action. (Ex. 12). Furthermore, the state is the sovereign and FDOT is just an agency. It has no power to condemn state lands that are being used for a public purpose. *Florida East Coast Railway Company v. City of Miami,* 372 So. 2d 152 (Fla. 3d DCA 1979). In addition, the submerged land easement given to FDOT by the state expressly stated that it transferred no property rights. (Ex. 9a). It is clear from the right of way map that none of the lands between the boatlift and the New River are owned by FDOT. Above station number 370, in a similar yellow, can clearly be seen the boat lift area with the two travel piers for extracting and launching boats. As shown by the sketch of easement, discussed above, Defendant's sovereignty easement forms the border of the boatlift area. This is Defendant's own title document. It establishes that the boatlift area is bordered by sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund.[2]

Defendant's position is that since Plaintiff's predecessors in interest dredged uplands back from the property's original shoreline to construct the basin and boat lift, Plaintiff has no remaining access rights from the boat lift to the New River. Defendant bases its position on *Clement v. Watson,* 58 So. 25 (Fla. 1912). Defendant created a special demonstrative exhibit to explain Mr. Maddox's testimony about the meaning of the *Clement* case. As the riparian expert testified, when a "third party" dug out the sandbar blocking a cove, the "third party" obtained no riparian access rights.

Notwithstanding, the Court finds *Clement* distinguishable. In this case, all parties agree that when the property was first cleared and filled it had riparian rights of access along its entire boundary with the South Fork of the New River. One of the historical aerials relied on for this purpose was the 1957 aerial. (Exhibit 19 and 47 and T 292, Ln 24-T 293, Ln 25). That exhibit had a black line drawn along the property's upland border with the river.

Unlike *Clement,* in this case, Striker owned the entire original property or Parent Tract from which Plaintiff's property came. (T 287, Ln 14-18) (Ex. 33a). The Parent Tract was Striker's boatyard in the 1960's and 1970's as shown in the aerials during these years. (T 137, Ln 16 -T 138, Ln 15). It was during this time that Striker completed the development of the boatyard. (Ex. 6 a-o). Part of this work included dredging out the shoreline to make a boat basin and a separate boatlift area. (Ex. 6 a-o). This was dug back from the navigable water adjoining the property so that a seawall could be created. This was the sovereign line according to Durrance and Maddox, supra. So the owner of the entire property, including the upland sovereign line, dredged back into its property to make it easier to work on boats under the boat barn and to extract and launch boats using the boat lift. Accordingly, the owner of a parcel of land adjoining the river and who had rights of access to the river would not lose the access rights by constructing a means of launching and extracting boats within the boundaries of the owner's existing uplands.

Moreover, when confronted with a drawing of a property bordering a river that had a riparian line adjoining the river (Ex. 51), Mr. Maddox testified that the owner would not lose those access rights by digging out a place to make the handling of boats more convenient.

> MR. FORMAN: Judge, can I draw on this for demonstrative purposes?
>
> THE COURT: Sure.
>
> MR. FORMAN: Okay.
>
> BY MR. FORMAN:
>
> Q. If we have water going across here, that is a river like we have. Like I talked about before, let's say this is two acres. I own a two acre tract on the river. You with me so far?
>
> A. Yes.
>
> Q. Assuming the river was sovereign submerged lands, I would have projected riparian rights approximately here, and they would go between those two; correct?
>
> A. Correct.
>
> Q. Now, if I decided I wanted to dig out an area to keep my boats on so I could leave my house, have my boat moored there, and I dug that back, do I lose any of those riparian rights where I'm the one owner?
>
> A. Not to where the original shoreline is, no.
>
> Q. When you did the discussion about the case sort of like that, there was a sandbar?
>
> A. Yes.
>
> Q. If one person owned all of that around there and the sandbar, they would have had riparian rights in front; correct?
>
> A. Correct.

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Q. And if there was one owner with all this and they notched out that sandbar, they would still have the riparian rights, wouldn't they?

A. Sure.

(T 305, Ln 21 - T 307, Ln 3). That is exactly what Striker did in this case. This is not what happened in *Clement.* Accordingly, the Court finds *Clement* inapplicable.

Defendant also argues that Plaintiff has no express easement to cross from the boatlift piers to use the riparian boundary with Parcel 108. Defendant argues that the submerged land and riparian rights are privately owned by Mr. Choate.

The Artmarine Plat was created by Mr. Choate while he still individually owned the property. (Ex. 3). He was operating the property as a boatyard and continued to use the boatlift after the plat was recorded and before he sold the plat to Plaintiff's principals. (T 140, Ln 5-21). The plat is unusual in that instead of following the seawall around the boatlift basin it includes the boatlift piers as well. (Ex. 3). When Choate sold the platted property to Plaintiff's principals in 2016, the only reasonable inference is that he intended for them to be able to use the boatlift, the submerged lands and the riparian access rights to the New River, which they did. In 2016, the boatlift had been in continued use for forty-three (43) years. Under these circumstances, the law implies an easement.

Choate originally owned all of the land that was included in the Artmarine Plat, together with the submerged land and riparian line between the boatlift piers and Parcel 108, so there was unity of title. (Ex. 10). The boatlift had been an indispensable part of the boatyard's operations for many years before the Artmarine Plat was recorded, thereby separating the ownership. (T 138, Ln 6 - T 139, Ln 7). The boatlift piers were included in the Artmarine Plat showing that their continued use was intended to be permanent. Access across the Choate remnant to the New River was *absolutely essential* to the continued use of the boat launch piers and the boatyard itself. These are the essential elements to the creation of an implied easement. *Kirma v. Norton,* 102 So. 2d 653 (Fla. 2d DCA 1958). Choate's deed transferred the upland boatyard, including the boatlift piers, together with all appurtenances, including his riparian access.

It is not possible to use this boatlift without going over Choate's submerged lands adjoining Parcel 108. This creates the reasonable presumption that when Choate conveyed the Artmarine Plat and appurtenances to Defendant's principals he conveyed the easements necessary for the beneficial use of the platted land. These were any easements necessary to travel from the boatlift across his remnant to the New River and back.

Defendants argue that access to and use of the boatlift is not an absolute necessity. That contention is rejected by the Court. First, boats travel from the New River and can dock alongside the seawall in Plaintiff's submerged lands lease. While that is true, if that is the only boat access, it eliminates the use of Plaintiff's property for a boatyard. The same is true for vehicular access from SR 84. It is not economically feasible to haul 50 foot boats to the site over land. Choate's intent should be viewed in light of the type of access that was being provided. In this case, it was access up and onto the uplands from the New River. The boatlift was the only means of accomplishing that.

**Statute of Limitations**

This case began with Plaintiff's visit to Florida Department of Transportation's headquarters where he was told that FDOT had purchased the rights to the boat lift when it condemned the property back in the 1980's and he had no right to use the boat lift. (T 152, Ln 1-8). This occurred after the boatyard was acquired on June 21, 2016. This suit was filed on February 28, 2019, which is well within the four-year statute of limitations. *See Sarasota Welfare Home, Inc. v. City of Sarasota,* 666 So. 2d 171 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2642a].

**Worst Case Scenario**

Defendant asserts that the legal description in the Stipulated Final Judgment permitted it to construct a wall to support the bridge, thereby resulting in the worst case scenario, and that is how the case was determined. Its position is based on the fact that no construction plans were attached to the Stipulated Final Judgment. In Florida, an eminent domain case is typically tried based upon plans placed into evidence at the order of taking either during a hearing or by stipulation, not the plans attached after the fact to a final judgment. *Belvedere Dev. Corp. v. Department of Transportation,* 476 So. 2d 649 (Fla. 1985). When plans are attached to the final judgment, it is the result of changes from the plans upon which the order of taking is granted.

During the Condemnation Proceedings, the Department's appraiser, David A. Pederson, completed appraisal reports dated September 12, 1983, and May 1, 1984. Those appraisals assumed the following:

a. Physical use of the boat basin on the southerly side of the property will be completely lost due to the taking and the main 24′ lift west of the maintenance shop will be inaccessible owing to piers and the fender system to be constructed under the proposed bridge improvement. Before the taking, the property could legally and physically be used for building, servicing and repairing pleasure boats up to 100 feet in length. This is no longer possible in the after situation with the limited amount of water frontage.

b. There are no limited access rights being acquired at the surface. Pier placement for the elevated structure together with a fender system under the bridge will make physical access to the area by boats impossible, however.

It is clear from these assumptions that the appraiser was relying on the bridge support placements as shown in the construction plans to determine the impacts on the Subject's remainder to estimate the resulting severance damages. He was not assuming an impassable wall was being built. There was no trial based on a worst case scenario. The SFJ was silent in this regard.

Based upon the above-stated findings of facts and conclusions of law, it is hereby **ORDERED AND ADJUDGED**:

A. That this Court has jurisdiction to issue a declaratory judgment.

B. That the issues as set forth in the pleadings and Joint Pre-Trial Stipulation are sufficient to create a case in controversy.

C. That this matter is not barred by the statute of limitations.

D. That there was no trial of Choate's condemnation case based upon the "worst case scenario".

E. That the uplands of Plaintiff's property had riparian access rights where it abutted the State's sovereign submerged lands at the time of development.

F. That the Trustees of the Internal Improvement Fund of the state of Florida have asserted jurisdiction to the lands which were submerged before the Plaintiff's property was developed including the channel of the New Fork River.

G. That during development of Plaintiff's property by its predecessors in interest in 1957 a bulkhead was constructed which abutted submerged lands that was dredged for docking of boats along its boundary. Riparian rights of access along this edge remained. As of 1973 the Plaintiff's property still retained riparian rights across the river frontage.

H. That riparian rights emanate from the seawall or alternatively from the privately owned boundary with Parcel 108 (shown in yellow on page 4 of the FDOT right of way map—Exhibit 17).

I. That from the boundary of Parcel 108 waterward Plaintiff has the same right of navigation as the general public across these sovereign submerged lands.

J. That the mean high water line is located on the seawall of the

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Plaintiff's property.

K. That the seawall is part of the Artmarine Plat and is owned by Plaintiff. Plaintiff has the right to riparian access to all submerged lands whether owned privately, by the state of Florida or one of its agencies.

L. That if the riparian rights emanate from the boundary with Parcel 108, the uninterrupted use of the property and the boatlift including its piers being part of the Artmarine Plat, Plaintiff has implied easements of ingress and egress across the basin to the sovereign line on the boundary of Parcel 108 and to use the riparian right of access therefrom.

M. That the legal description for Parcel 104 in the Order of Taking in 1983 and subsequent Stipulated Final Judgment in 1985, at issue, did not include any access rights at ground level. The legal descriptions describe the taking of all access rights, riparian or otherwise, above a horizontal plane starting approximately 40 feet above ground level at the Plaintiff's property as illustrated by page 5 of FDOT's right of way map (Exhibit 17).

N. That the court reserves jurisdiction to award attorneys' fees, case costs and/or expert witness fees/costs in this matter as may be deemed applicable.

O. That the court reserves jurisdiction to award additional legal and/or equitable relief as may be necessary to enforce this Final Judgment.

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[1]Station numbers normally denote 100 foot intervals on sections of the project's center line survey. Once you determine the station numbers adjacent to a parcel of property you can identify the plan sheets that described the project adjacent to the parcel.

[2]Legal sketch from the sovereign land easement and the same FDOT map were still being used by the FDEP in its 2019 title determination of the boat lift area. (Exhibit 24 page 17 and 21).

* * *

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# COUNTY COURTS

**Attorney's fees Insurance Personal injury protection Claim or defense not supported by material facts or applicable law Where benefits had been paid in full before medical provider filed suit for additional benefits, insurer is entitled to attorney's fees and costs Insurer who timely and properly filed motion for section 57.105 sanctions was not required to file second motion regarding entitlement to attorney's fees pursuant to rule 1.525**

DODD CHIROPRACTIC CLINIC, P.A. a/a/o Tracy Davis, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16 2016 SC 000833, Division CC M. March 4, 2020. Mose L. Floyd, Judge. Counsel: Crystal L. Eiffert, Eiffert and Associates, P.A., Orlando, for Plaintiff. Christina Saad, Dutton Law Group, Jacksonville, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO TAX FEES AND COSTS

THIS CAUSE came before the Court on January 15, 2020, upon hearing Defendant's motion to tax attorney's fees and costs with regard to its Motion for Sanctions Pursuant to Florida Statute §57.105. Counsel for both parties appeared before the Court. After having heard arguments of counsel, considered all Motions and Responses, and being otherwise duly advised in the premises, the Court finds as follows:

On May 2, 2012, the assignor was involved in a motor vehicle accident. Defendant reviewed and adjusted Plaintiff's bills in accordance with the policy of insurance and the no-fault statute, however, duplicate payments were made in error. This resulted in Plaintiff being paid in full and overpaid. Defendant later received a purported pre-suit demand from Plaintiff. Prior to service of its purported pre-suit demand, Plaintiff was paid in full and, in fact, paid more than was due and owing. Despite this, Plaintiff filed suit.

Defendant asserted in its responsive pleadings that Plaintiff was paid in full, such that no amounts were due and owing. Defendant filed a properly served 57.105 Motion for Sanctions. In its motion, Defendant stated that Plaintiff had been paid in full and moved for this Court to tax attorney's fees and costs to Plaintiff.

This Court finds that Defendant's Motion for Sanctions regarding Plaintiff being paid in full, was filed properly and timely. This Motion served to put Plaintiff on notice that sanctions would be sought if it did not dismiss. Plaintiff did not timely dismiss the case; instead Plaintiff argued that a second motion regarding entitlement to attorney's fees must be filed pursuant to Fla. R. Civ. P. 1.525 in order for Defendant to prevail. This Court disagrees.

The plain language of the §57.105 is explicit that at any time during the preceding the court must award damages, to include attorney's fees, if the moving party prevails. Section 57.105(1-2) explicitly states:

> 57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.
>
> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then existing law to those material facts.
>
> (2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

This Court's reading of the §57.105 is contrary to Plaintiff's argument that there is a specific time frame for the filing such a motion. This Court reading of the §57.105 is that such motions can be filed at any time in any civil mater.

Furthermore, The Florida Supreme Court has analyzed the text of Fla. R. Civ. P. 1.525 in order to decide "whether the time requirement of rule 1.525 established only a narrow window of thirty days following the judgment in which to serve the motion for fees and costs or whether, instead, it prescribed only the latest point at which the motion may be served." *Barco v. Sch. Bd. of Pinellas Cty.,* 975 So. 2d 1116, 1119-20 (Fla. 2008) [33 Fla. L. Weekly S87b]. Based upon the Florida Supreme Court's that ruling in *Barco,* the Defendant's 57.105 motion would still be considered timely served and filed.

Defendant served its 57.105 Motion for Sanctions on August 11, 2017 and filed the motion on March 28, 2018. In its motion, Defendant moved for this court to tax attorney's fees and costs. Defendant's filing of its motion to tax attorney's fees and costs is timely because it was filed prior Plaintiff's dismissal.

This Court also makes the following finds of fact:

1. Plaintiff was in fact paid full prior to the commencement of this action

2. Plaintiff knew or should have known that it was paid in full prior to the commencement of this action, as Defendant asserted in its initial pleadings. It is not necessary for this Court to reach a specific conclusion as to whether the Defendant was aware of the specific means by which Plaintiff was considered paid in full. It is Plaintiff who lodged the complaint and it is Plaintiff who is responsible for ensuring that the case was supported by the facts.

3. Plaintiff knew or should have known that its claim for additional benefits was not supported by fact or law. All the facts and evidence needed to determine that Plaintiff had been paid in full under the theory of recoupment was available to Plaintiff at the outset of this case. When recoupment was raised in this case by Defendant, Plaintiff incorrectly argued that the defense was not applicable to this case. Nonetheless, Plaintiff later dismissed the claim against the Defendant.

4. Viewed in total, this Court considers Plaintiff's actions frivolous. However, for the inception of this case, the Court must allow that error of oversight may have led to a faulty filing. However, over the course of the four (4) year life span on this case, and this Court's recognition that recoupment is applicable in a PIP claim, this Court has reached the conclusion that the Plaintiff misconstrued facts and aspects of the applicable law. Plaintiff knew or should have known that this case should have been dismissed long before arriving at the eve of a hearing on Defendant's Motion for Summary Judgment.

5. Accordingly, this Court find that Plaintiff's action was frivolous upon the service of Defendant's 57.105 motion of sanctions. Defendant attached to its §57.105 motion all documents necessary for Plaintiff to determine that the action was frivolous. Also, the frivolous nature of the Plaintiff's claim became clearly evident upon Defendant's corporate representative's testimony at deposition on August

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24, 2017. This deposition revealed that double payments of bills related to the Plaintiff's treatment in this case resulted in full payment of Defendant's monetary obligations to the Plaintiff.

6. Plaintiff's claim was devoid of merit both on the facts and the law, such that the claim was untenable.

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that Defendant's Motion to Tax Fees and Costs is **GRANTED**. This Court reserves jurisdiction to determine the amount and allocation of the award of attorneys' fees and costs to be awarded to the Defendant.

* * *

**Insurance Personal injury protection Limitation of actions Motion for rehearing of order dismissing hospital's action against PIP insurer because complaint was filed after expiration of limitations period as measured from date of service is granted Critical date for determining whether statute of limitations has run is date on which insurer breached its duty to pay, not date of service Order granting motion to dismiss is set aside Complaint does not allege date on which hospital submitted bill to insurer, and hospital, unlike other medical providers, is not required to submit bill within 35 days of date of service**

MUNROE REGIONAL MEDICAL CENTER, INC. a/a/o Tarisha Johnson, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 5th Judicial Circuit in and for Marion County. Case No. 18 SC 3819. February 25, 2020. Sarah Ritterhoff Williams, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Mary M. Rychlik, Law Office of Robert J. Smith, Orlando, for Defendant.

***ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE DISMISSAL***

THIS CAUSE having come before the court on February 13, 2020, upon Plaintiff's Motion to Set Aside the Court's Order on Defendant's Motion to Dismiss, and the Court having considered the Plaintiff's motion, having heard argument of counsel and being otherwise fully advised, it is hereupon

ORDERED that Plaintiff's Motion to Set Aside Order of Dismissal is GRANTED, for the following reasons:

1. Plaintiff's complaint alleges, *inter alia,* that on or about March 21, 2010, Tarisha Johnson was injured in a motor vehicle accident, as a result of which she received treatment that day at Munroe Regional Medical Center (the "Hospital"), that the Hospital billed Allstate Insurance Company ("Allstate") for such treatment and that Allstate failed to pay all sums due.

2. Defendant's motion to dismiss asserts that "per the court docket, this action was filed on October 5, 2018, over eight years past the date of service alleged in the Complaint and after the expiration of the applicable statute of limitations."

3. At the November 20, 2018 pretrial conference, the Court granted Defendant's motion to dismiss, based upon Defendant's argument that the statute of limitations had run. On October 8, 2019, the Court entered its Order on Defendant's Motion to Dismiss.

4. On October 23, 2019, Plaintiff filed and served its Motion to Set Aside the October 8, 2019 Order granting Defendant's Motion to Dismiss. The Court treats that motion as a Rule 1.530, Fla.R.Civ.P. motion for rehearing, as the motion was served within 15 days of the Court's Order.

5. The critical date in determining whether the statute of limitations has run in this case is not Tarisha Johnson's date of service at the Hospital, but rather, the date on which Allstate breached its obligation to pay. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Lee,* 678 So.2d 818 (Fla. 1996) [21 Fla. L. Weekly S335a]

6. Allstate could not have breached its obligation to pay until Allstate had been presented with a bill, and the Hospital was under no requirement to submit a bill for services within 35 days of the rendition of the services, as would be the case with other medical providers. Sec. 627.736(5)(b)(2)(c), Fla. Stat.

7. Since the Complaint does not contain an allegation as to when the Hospital submitted a bill to Allstate and this Court is bound by the four corners of the Complaint in ruling upon a motion to dismiss, *Restorations Unlimited (a/a/o Gerlanda Lombardi) v. Safe Harbor Ins. Co.,* 22 Fla. L. Weekly Supp. 362b (5th Jud. Cir. in and for Marion County, 2014), the Court agrees that the October 8, 2019 Order on Defendant's Motion to Dismiss should be set aside.

8. Accordingly, the October 8, 2019 Order is hereby set aside and the clerk of the court is directed to re-open the court file.

* * *

**Garnishment Exemption Defendant who provides 100% of economic support for herself, spouse, and two minor children is entitled to head of family exemption and exemption of all withheld bank account funds that are traceable to wages and compensation of head of family Writ of garnishment is dissolved**

TARGET NATIONAL BANK, Plaintiff, v. KATHLEEN B. JONES, Defendant, and USAA FEDERAL SAVINGS BANK, Garnishee. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2010 21772 CONS. February 17, 2020. A. Christian Miller, Judge. Counsel: Flynn LaVrar, RAS LaVrar, LLC, for Plaintiff. Alex McClure, Law Office of Alex McClure, Lake Mary, for Defendant.

**ORDER ON DEFENDANT'S CLAIM OF EXEMPTION AND MOTION TO DISSOLVE WRIT OF GARNISHMENT**

This cause came to be heard on February 13, 2020 on Defendant's Claim of Exemption and Request for Hearing, Defendant's Motion to Dissolve Writ of Garnishment, and Plaintiff's Objection to Defendant's Claim of Exemption and Request for Hearing.

Having received the testimony of Defendant, having reviewed and considered all of the evidence submitted to the Court, and having the heard the argument of both Counsel for Plaintiff and Counsel for Defendant, the Court finds that:

1.) On December 9, 2019, a Writ of Garnishment was issued, directed toward USAA Federal Savings Bank. Said Writ was answered indicating that a total of $2,857.05 had been withheld from the Checking account of Defendant pursuant to the Writ of Garnishment.

2.) On January 19, 2020, Defendant filed a Claim of Exemption and Request for Hearing stating that she was entitled to the following exemptions under Florida and federal law:

a. An absolute exemption to all funds on deposit pursuant to §222.11 Fla. Stat.

b. $1,000.00 personal property exemption pursuant to Article X Section 4 Fla. Const.

c. $4,000.00 personal property Exemption pursuant to §222.25 Fla. Stat.

3.) Also on January 19, 2020, Defendant filed a Motion to Dissolve Garnishment pursuant to §77.055 Fla. Stat. and §77.07 Fla. Stat. alleging that the checking account which was garnished is held as tenants by the entireties between Defendant and her spouse, among other allegations.

4.) Defendant testified that she provides one hundred percent (100%) of the economic support for herself, her spouse, and their two minor children and that the monies in the account at the time of the garnishment originated from her employment income within the six (6) months prior to the date of the withholding by Garnishee.

5.) Counsel for Plaintiff asked additional questions to Defendant to determine the source of garnished funds in bank account and did not object to the facts and testimony of Defendant.

Upon consideration of the foregoing, **it is ORDERED that:**

1.) Defendant is Head of Family pursuant to §222.11 Fla. Stat.

2.) Defendant is entitled to an exemption of all funds withheld by USAA Federal Savings Bank as said funds are traceable to wages or

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compensation pursuant to §222.11 Fla. Stat.

3.) The Writ of Garnishment directed to USAA Federal Savings Bank, is dissolved in its entirety.

4.) Any and all funds currently held by Garnishee USAA Federal Savings Bank pursuant to the Writ of Garnishment shall be released to Defendant and her spouse, immediately.

* * *

**Criminal law Driving under influence Search and seizure Welfare check Where deputy responding to report of suspicious truck approached vehicle parked on side of road without activating emergency lights and did not give orders or take any action to keep defendant at that location, defendant was not subjected to show of authority amounting to seizure Deputy's contact with defendant was justified as welfare check Field sobriety exercises Defendant consented to performance of field sobriety exercises, and there is no evidence that consent was involuntary or mere acquiescence to authority Even absent consent, deputy had reasonable suspicion to compel performance of exercises where defendant had odor of alcohol, slurred and slow speech and confusion about his location and gave inconsistent accounts as to why he was stopped on side of road Arrest Where defendant was not advised of any adverse consequences for not completing field sobriety exercises, and he questioned necessity of exercises without actually refusing to perform them, defendant's non-completion of exercises should not be considered as consciousness of guilt in determining whether there was probable cause for his arrest Defendant's speech, strong odor of alcohol, confusion as to location, inconsistencies about reason for being on side of road, and loss of balance while retrieving his shirt from vehicle provided deputy with probable cause for DUI arrest Motion to suppress is denied**

STATE OF FLORIDA v. JOHN NED WEBBER, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2019 CT 005039. February 27, 2020. Jason J. Nimeth, Judge. Counsel: Barbara Harris, Tavares, for State. Joe Easton, Orlando, for Defendant.

## ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before this Court on Defendant's Motion to Suppress. An evidentiary hearing was held on January 13, 2020, where John Webber (hereinafter "Defendant") was present with counsel. This Court has weighed the admitted evidence, considered the testimony, heard and considered the arguments of the parties, reviewed the applicable law, and this Court now finds the following.

### FINDINGS OF FACT

On August 26, 2019, Deputy Chad Harmon of the Lake County Sheriff's Office was on duty as a road-patrol deputy assigned to zone five (5). This area is outside the municipal jurisdiction of Mount Dora in Lake County, Florida. At approximately 9:13 PM, Deputy Harmon came into contact with Defendant on Round Lake Road south of Wolf Branch Road in Mount Dora, Florida. There was a 911 call about a suspicious truck being parked in the caller's yard, and it had since moved down the road to a different location. The vehicle was described as a full-size Ford pick-up truck.

A vehicle was located on the eastside of Round Lake Road parked across a residential driveway with a closed gate. Located near the front of the vehicle was a mailbox, and Deputy Harmon parked approximately five (5) feet behind the truck. When stopping to investigate, Deputy Harmon activated the rear light-bar to notify oncoming traffic. This location was within a quarter mile of the original caller's home, and the caller's address could be seen from the location.

Deputy Harmon approached the driver's side window, and Defendant occupied the driver's seat. Defendant was wearing a pair of shorts, but no shirt, and Deputy Harmon was approximately one to two feet from Defendant. When Defendant responded to Deputy Harmon's inquiry as to whether everything was okay, Deputy Harmon noticed a strong smell of alcohol. Defendant indicated that his truck was broken down, but he later explained that he was looking for his girlfriend. During this interaction, Defendant believed he was in Volusia County and Deputy Harmon was a Volusia County Deputy. Defendant informed Deputy Harmon that he had departed New Smyrna Beach and was traveling to his home in Orlando. Deputy Harmon described Defendant's speech as slurred and slow. Deputy Harmon described slow speech to mean that Defendant thought about his answers before responding to questions so as to avoid slurring his words. During this encounter, Deputy Harmon requested Defendant's driver's license, and Defendant was able to produce it without difficulty.

Deputy Harmon requested Defendant to exit the vehicle. At this point, it was raining, and the ground was wet from earlier rain that day. Defendant exited the truck but asked to retrieve his shirt. While leaning into the truck, Defendant lost his balance. Defendant almost fell into the floorboard, but he caught himself using his arm and the front seat. After retrieving the shirt, Defendant agreed to participate in field sobriety exercises. While outside of the vehicle, Defendant did not sway or exhibit an inability to stand.

Deputy Harmon proceeded to instruct Defendant on the Horizontal Gaze Nystagmus (commonly referred to as "HGN") exercise. Defendant initially started the exercise before being instructed. When Deputy Harmon began the instructions again, Defendant proceeded to recite the instructions at the same time. Deputy Harmon asked Defendant to stop and to allow the complete instructions before starting at which point Defendant questioned the necessity of the exercises. Approximately four more times, Defendant continued to question the necessity of the exercises in response to Deputy Harmon's inquiries as to his willingness to perform the exercises. Deputy Harmon did not receive a clear answer, even after requesting a definitive yes or no. At this point, Deputy Harmon believed Defendant to be unwilling to perform field sobriety exercises, and Defendant was placed under arrest for Driving Under the Influence.

### ANALYSIS

Defendant moves this Court pursuant to Rule 3.190, Florida Rules of Criminal Procedure, to suppress the evidence obtained in this case for violations of the Fourth Amendment to the United States Constitution and Article I, Section XII, of the Florida Constitution, based upon Deputy Harmon's approach to Defendant, investigation by field sobriety exercises, and the eventual arrest of Defendant. Defendant further argues that the Court cannot consider Defendant's failure to complete field sobriety exercises based on the belief that his refusal was a safe harbor.

When a defendant is detained or searched outside the issuance of a search warrant, the State has the burden to establish that the evidence was legally obtained. *State v. Setzler,* 667 So. 2d 343, 345 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2418b]. "When a search [or arrest] warrant has issued, the defense has the burden of going forward, and the burden to establish grounds for suppression." *Id.* "As a practical matter, absence of a search warrant in the court file [suffices] to shift the burden of going forward to the prosecution." *Id.* (citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. Jeffers,* 342 U.S. 48 (1951); *Jones v. State,* 648 So. 2d 669, 674 (Fla. 1994)). The trial court's findings of fact relating to a motion to suppress must be "supported by competent, substantial evidence. . . ." *State v. Nowak,* 1 So. 3d 215, 217 (Fla. 5th DCA 2008) [34 Fla. L. Weekly D356c] (citing *Weiss v. State,* 965 So. 2d 842, 843 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2334c]).

#### I. DEPUTY HARMON'S INITIAL ENCOUNTER WITH DEFENDANT

"The United States Supreme Court has determined that the Fourth

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Amendment requires legal 'seizures' of a person to be based upon reasonable, objective justification, usually expressed in Fourth Amendment jurisprudence as a reasonable articulable suspicion that the individual seized is engaged in criminal activity." *G.M. v. State,* 19 So. 3d 973, 977 (Fla. 2009) [34 Fla. L. Weekly S568a] (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). "However, every encounter between law enforcement and a citizen does not automatically constitute a seizure in the constitutional context." *Id.* Whether a legal seizure has occurred is to be determined based upon "the totality of the circumstances surrounding the specific encounter," and the person must either "be physically subdued by a police officer or the person must submit to the officer's show of authority." *G.M. v. State,* 19 So. 3d at 978 (citing *United States v. Mendenhall,* 446 U.S. 544, 554 (1980); *United States v. Drayton,* 536 U.S. 194, 201 (2002) [15 Fla. L. Weekly Fed. S367a]; *Ohio v. Robinette,* 519 U.S. 33, 39 (1996); *Florida v. Bostick,* 501 U.S. 429, 439 (1991)); *California v. Hodari D.,* 499 U.S. 621, 626 (1991)). This determination is based upon an objective analysis of the circumstances. *G. M. v. State,* 19 So. 3d at 977 (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975)).

Deputy Harmon approached Defendant's vehicle on the side of the road without his emergency lights activated; instead, he activated his traffic signal bar for oncoming traffic. When Deputy Harmon approached, he simply asked whether everything was okay. Defendant argues that he was seized based upon *Harrelson v. State,* 662 So. 2d 400 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2478a]; *Taylor v. State,* 658 So. 2d 173 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1720b]; and *State v. Perez,* 16 Fla. L. Weekly Supp. 432a (Fla. 2d Cir. Ct. Mar. 14, 2008); however, these cases are distinguishable. In all three cases, law enforcement interacted with vehicles legally parked and issued an order upon contact with the driver subjecting the defendants to a show of authority. In the case at hand, Deputy Harmon issued no orders and took no action to keep Defendant at the location, so it cannot be said Defendant was subjected to a show of authority based on the facts of this case. *See also Santiago v. State,* 133 So.3d 1159, 1163 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a] (holding that where law enforcement parked on both sides of the defendant's vehicle on a dead-end street and approached the vehicle, law enforcement was engaging in a consensual encounter until law enforcement ordered the defendant out of the vehicle).

However, even if it could be said that Defendant submitted to a show of authority in this case, Deputy Harmon's contact was justified as a welfare check. "Welfare checks fall under the so-called 'community caretaking doctrine,' which is a judicial creation that carves out an exception to the Fourth Amendment's warrant requirement by allowing police officers to engage in a seizure or search of a person or property solely for safety reasons." *State v. Brumelow,* 44 Fla. L. Weekly D3025a (Fla. 1st DCA December 20, 2019) (citing *Tracy Batement Farrell, et. al.,* Exigent or Emergency Circumstances Exception for Warrantless Search, generally, 14A Fla. Jur 2d Criminal Law—Procedure § 771 (2019); *State v. Johnson,* 208 So. 3d 843 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D281b]). "Searches and seizures conducted under the community caretaker doctrine are solely for safety reasons and must be 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' " *Brumelow,* 44 Fla. L. Weekly D3025a (citing *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973); *Johnson,* 208 So. 3d at 844).

This case is analogous to *Dermio v. State,* 112 So. 3d 551 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]. In *Dermio,* a deputy pulled in front of the defendant's vehicle and activated the vehicle's emergency lights. The deputy's vehicle prohibited the defendant's vehicle from moving out of the parking space. The vehicle was legally parked in the parking lot of a local bar at 3:30 AM in the morning. When the deputy approached the driver's window, the defendant was asleep with his cellular telephone between his cheek and shoulder. In *Dermio,* the Second District Court of Appeals reversed the trial court's suppression of the evidence based upon the deputy's concern for the safety of the driver. In the case at hand, Defendant's vehicle was parked across a driveway on the side of the roadway at night in raining weather; therefore, the interaction was justified as a welfare check. *See also Greider v. State,* 977 So. 2d 789, 792 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D949b] (holding the initial welfare check to be valid where law enforcement observed towels over the windows of a legally parked vehicle at a park).

II. DEPUTY HARMON'S REQUEST FOR FIELD SOBRIETY EXERCISES

Once law enforcement's purpose for contact with an individual is satisfied to the point of either determining no criminal activity is occurring or the concern for the welfare of the individual is over, law enforcement must discontinue the encounter unless further justified. *See Id.* at 793; *see also State v. Boles,* 952 So. 2d 586, 588 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D719a] (citing *State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]). When law enforcement compels the completion of field sobriety exercises, such an order must stand upon a reasonable suspicion that the driver is driving under the influence. *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]).

Defendant argues that (1) a reasonable suspicion is necessary to merely request the completion of field sobriety exercises and (2) reasonable suspicion did not exist for Deputy Harmon to either request or compel the completion of field sobriety exercises based upon *Santiago v. State,* 133 So. 3d 1159 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a]; *State v. Quezada,* 26 Fla. L. Weekly Supp. 302a (Orange Cty. Ct. June 28, 2018); *State v. Lubin,* 11 Fla. L. Weekly Supp. 1050a (Fla. 17th Cir. Ct. August 10, 2004); and *State v. Smith,* FLWSUPP 2704ASMI [27 Fla. L. Weekly Supp. 386b] (Volusia Cty. Ct. May 28, 2019). In *Santiago,* the Fourth District Court of Appeals required reasonable suspicion to compel the completion of field sobriety exercises where the defendant was ordered from the vehicle. *Santiago,* 133 So. 3d at 1166. In the remaining cited cases, the trial courts held that the officer lacked the reasonable suspicion necessary to request field sobriety exercises founded upon the opinions of county and circuit court cases and the appellate opinions of *State v. Taylor,* 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]; *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]; *State v. Castaneda,* 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]; and *State v. Guthrie,* 662 So. 2d 404 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2480b]. None of these cases specifically address the issue of consent as it relates to the completion of field sobriety exercises; instead, the opinions correct the misapplied standard of law—a reasonable suspicion—to the analysis of the trial court's factual findings. This Court is unable to locate any appellate opinions specifically addressing the completion of field sobriety exercises based upon consent.

"However, [in looking to other search and seizure analysis, which would equally apply to this issue] 'during a valid traffic stop, or even if a valid traffic stop has had its lawful function completed and turns into a citizen encounter, there is no reason a law enforcement officer cannot ask for consent to' " continue impeding on the Fourth Amendment rights of a citizen. *Boles,* 952 So. 2d at 588 (quoting *State v.*

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*Cromatie,* 668 So. 2d 1075, 1077 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D565a]); *see also State v. Johns,* 920 So. 2d 1156, 1158 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D374b] ("[a]s a general rule, a law enforcement officer may validly ask for consent to search during a legal traffic stop" (citing *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973)); *Breed,* 917 So. 2d at 209 ("detention may, however, continue if the driver freely and voluntarily consents to a search of himself or the vehicle" (citing *State v. Kindle,* 782 So. 2d 971, 973 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1006c]). "The only relevant time period to determine if an individual has given voluntary consent is at the time of the search." *Johnson v. State,* 995 So. 2d 1011, 1014 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D2515a]. "Once consent is given, it can be withdrawn at any time for any reason[, and i]t can be withdrawn by an individual's words. . .or by an individual's actions." *Id.* at 1014 (Fla. 1st DCA 2008) (citing *Jackson v. State,* 730 So. 2d 364, 365 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D784b]; *Lowery v. State,* 894 So. 2d 1032, 1034 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D222b]; *Pierre v. State,* 732 So. 2d 376, 378 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D604a]).

In *State v. Breed,* 917 So. 2d 206 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a], the Fifth District Court of Appeals reversed the trial court's suppression of evidence because the defendant had consented to the extended detention for the purpose of searching the vehicle. The trial court suppressed the evidence when "it determined that the length of time necessary to issue a traffic citation was too long." *State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]. However, the Fifth District Court of Appeals reversed because the defendant had given consent, and the consent had not been obtained through undue delay or subterfuge. The Court explained that

> [o]nce the purpose of the initial stop and detention has been satisfied, the officer no longer has any legal ground to continue to detain a motorist absent a reasonable, articulable suspicion of illegal activity. The detention may, however, continue if the driver freely and voluntarily consents to a search of himself or the vehicle.

*Id.* at 209 (citing *Florida v. Royer,* 460 U.S. 491 (1983); *State v. Diaz,* 850 So. 2d 435 (Fla. 2003) [28 Fla. L. Weekly S397b]; *State v. Kindle,* 782 So. 2d 971, 973 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1006c]). The focus of the trial court in consent cases is the voluntariness of that consent. *Breed,* 917 So. 2d at 209 (citing *Kindle,* 782 So. 2d at 975).

Deputy Harmon indicated that Defendant agreed to participate in field sobriety exercises. There is no evidence to suggest that the request was involuntary or a mere acquiescence to Deputy Harmon's authority. Instead, Defendant's eventual questioning of the necessity of the field sobriety exercises supports a finding of consent. Furthermore, even if Deputy Harmon was not operating under consent, Deputy Harmon's compelling of field sobriety exercises would have been based upon a reasonable suspicion of Defendant operating a vehicle while impaired by the influence of alcohol given Defendant's odor of alcohol, slurred and slow speech, confusion about his location, and inconsistencies as to why his vehicle was on the side of the road.

III. PROBABLE CAUSE FOR DEFENDANT'S ARREST

Probable cause for arrest exists when "the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (citing *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]; *Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a]; *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]). Probable cause is evaluated under the totality of the circumstances. *State v. Walker,* 991 So. 2d 928, 931 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2014a] (citing *Revels v. State,* 666 So. 2d 213, 215 (Fla. 2d DCA 1995) [21 Fla. L. Weekly D70a]). Law enforcement is not required to "eliminate all possible defenses in order to establish probable cause." *Mathis v. Coats,* 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b] (citing *City of Clearwater v. Williamson,* 938 So. 2d 985, 990 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2005a]).

"Probable cause for a DUI arrest under section 316.193 is based upon a belief that the driver is under the influence of alcoholic beverages to the extent that his normal faculties are impaired." *State v. Kliphouse,* 771 So. 2d 16, 21 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. "Probable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *Id.* at 22. "Florida courts require that the underlying facts, circumstances, and information be sufficient to allow a person of reasonable caution to make the probable cause determination." *State v. Brown,* 725 So. 2d 441, 444 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a] (citing *State v. Cesaretti,* 632 So. 2d 1105 (Fla. 4th DCA 1994); *Dorman v. State,* 492 So. 2d 1160 (Fla. 1st DCA 1986)); *Jackson v. State,* 456 So. 2d 916 (Fla. 1st DCA 1984)). "While 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 23 (citing *Cesaretti,* 632 So. 2d at 1105; *State v. Silver,* 498 So. 2d 580 (Fla. 4th DCA 1986); *Brown,* 725 So. 2d at 441; *Keeton v. State,* 525 So. 2d 912 (Fla. 2d DCA 1988); *Jackson,* 456 So. 2d at 916; *Mendez v. State,* 678 So. 2d 388 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1592a]).

Defendant did not complete field sobriety exercises. Defendant argues that this non-completion should not be counted against him as a consciousness of guilt because he believed the refusal to be a safe harbor. Defendant is correct, and the Florida Supreme Court has indicated that a refusal to act is a reflection of consciousness of guilt "only when it can be said that the behavior is 'susceptible of no prima facie explanation except consciousness of guilt.' " *Menna v. State,* 846 So. 2d 502, 505 (Fla. 2003) [28 Fla. L. Weekly S340a] (quoting *Herring v. State,* 501 So. 2d 19, 20-21 (Fla. 3d DCA 1986)). Defendant was not advised of any potential consequences for not completing the exercises, and plausible reasons exist for his decision outside of the explanation of a consciousness of guilt such as not wanting further interaction with law enforcement. Additionally, Defendant did not refuse to complete the exercises; instead, he explained that he did not think they were necessary. The rationale supporting the safe harbor doctrine is

> that a defendant who is told he may refuse and is told of no conse quences which would attach to his refusal may quite plausibly refuse so as to disengage himself from further interaction with the police or simply decide not to volunteer to do anything he is not compelled to do. In contrast, if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible.

*Id.* Therefore, in considering whether probable cause existed for Defendant's arrest, the Court should not consider Defendant's non-completion of the field sobriety exercises as a consciousness of guilt.

Deputy Harmon smelled the odor of alcohol. Deputy Harmon

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described Defendant as confused about where he was located and inconsistent as to the reasons for his vehicle's location on the side of the road. Deputy Harmon further described Defendant's speech as slurred and slow. Deputy Harmon observed Defendant slip while retrieving his shirt from within the truck. However, Defendant was able to appropriately retrieve his driver's license, Defendant had no difficulty exiting the vehicle; and Defendant had no difficulty standing outside of the truck.

When considering the impairment of normal faculties, "normal faculties include, but are not limited to, the ability to see, hear, walk, *talk*, judge distances, drive an automobile, make judgments, act in emergencies, and, in general, normally perform the many *mental* and physical acts of daily life." § 316.1934(1), Fla. Stat. (emphasis added). The observation of slurred and slow speech, confusion as to his location, and inconsistencies as to the reason for being on the side of the road while emitting the odor of alcohol would lead a reasonably cautious person to believe that an individual is probably under the influence of alcohol. These facts coupled with Deputy Harmon's knowledge that Defendant was coming from the beach, and observation of Defendant losing his balance, or, at the least, demonstrating poor dexterity provided probable cause for Defendant's arrest given the totality of the circumstances taken as a whole instead of each variable in isolation.

CONCLUSION

On August 26, 2019, Deputy Harmon walked up to the driver's side window of a truck located on the side of Round Lake Road parked across a residential driveway. Deputy Harmon's vehicle was located behind the truck with an activated traffic bar to warn oncoming traffic. Defendant was the driver of this vehicle. Deputy Harmon asked Defendant whether everything was okay. During this interaction, Deputy Harmon noticed the strong odor of alcohol. Deputy Harmon further described Defendant's speech as slurred and slow, as if to prevent the slurring of his words. Deputy Harmon described Defendant as confused about where he was and inconsistent about his reasons for being on the side of the road. Defendant consented to the performance of field sobriety exercises, but he revoked that consent while Deputy Harmon was attempting the HGN exercise. Although Deputy Harmon did not observe any difficulty in Defendant exiting the vehicle or standing outside of his vehicle, Deputy Harmon observed Defendant slip while retrieving his t-shirt. Based on the totality of the circumstances, a reasonable person would think Defendant was probably under the influence of alcohol based upon his slurred and slow speech, confusion as to his location, his inconsistencies for being on the side of the road, his loss of balance while retrieving his shirt, and the strong odor of alcohol.

IT IS THEREFORE ORDERED and ADJUDGED that Defendant's Motion to Suppress is DENIED.

* * *

**Insurance Application Misrepresentations Summary judgment Evidence Hearsay Exceptions Unsworn, unsigned telephonic statement of insured regarding residents of his household at time he completed insurance application is not admissible as summary judgment evidence under either business records exception or former testimony exception to hearsay rule To extent affidavits filed by insurer in support of summary judgment based on material misrepresentation defense rely on or quote from insured's statement, statements are stricken from record Insurer may not use insured's statement for any purpose at trial or summary judgment**

MANUEL V. FEIJOO (MD) , a/a/o Francisco Gonzalez, Plaintiff, v. BRISTOL WEST INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami Dade County. Case No. 2014 001360 SP 25, Section CG01. February 20, 2020. Linda Diaz, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Katherine Ellis, for Defendant.

**ORDER ON PLAINTIFF'S MOTION IN LIMINE AND/OR TO STRIKE HEARSAY AFFIDAVITS**

This matter having come before the Court on January 23, 2020 at 2:00 p.m. on Plaintiff's Motion in Limine and/or Motion to Strike the Affidavits of Geraldine Burroughs, Rachel Leutjes, and Brian Bower, and the Court having reviewed Plaintiff's motion; having reviewed the legal authorities referenced therein; having heard the arguments of counsel, and noting that Defendant did not file a response to Plaintiff's motion, and the Court being otherwise fully advised therein, this Court finds as follows:

On December 15, 2009, Defendant issued a policy of automobile insurance to Francisco Gonzalez as its named insured. The policy term ran for a period of 6 months and expired on June 15, 2010. On March 9, 2010, during the policy term, Gonzalez was apparently injured in a motor vehicle accident and sought medical treatment from the Plaintiff for his accident-related injuries. Plaintiff submitted its bills to Defendant, but Defendant refused to remit any payment on the basis of an alleged material misrepresentation.

When Defendant refused to remit payment, Plaintiff filed this action. In response to the lawsuit, Defendant asserted an affirmative defense indicating that Plaintiff's claim was barred based on an alleged material misrepresentation on the insurance policy application.

Defendant contends that on December 15, 2009, the named insured, Gonzalez, completed an insurance policy application and when asked to identify the members of his household over the age of 15, Gonzalez listed his wife but failed to list his son. Defendant contends that Gonzalez lived with both his wife and his son at the time of policy inception and that the failure to list his son was a material misrepresentation.

On April 17, 2019, Defendant filed a Motion for Summary Judgment based on its material misrepresentation defense. On December 27, 2019, Defendant filed an Amended Motion for Summary Judgment. In support of its motions for summary judgment, Defendant attached affidavits of various claims representatives and records custodians including Mr. Brian Bower (Defendant's Med/PIP claims representative), Ms. Rachel Leutjes (Defendant's personal lines account underwriting specialist) and Ms. Geraldine Burroughs (Defendant's Med/PIP claims specialist).

Each of the affidavits referenced above relies heavily on a pre-suit statement obtained by Defendant from the insured Gonzalez, which was unsworn, unsigned and taken via telephone. Defendant incorporated the unsworn, unsigned telephonic statement into the affidavits of its claim adjusters referenced above in the hope of using the statement to establish its material misrepresentation defense. Defendant claims it is entitled to use the unsworn, unsigned telephonic statement as summary judgment evidence because it qualifies as a business record under the business records exception to the hearsay rule, F. S. 90.803(6). Defendant contends that the statement supports its position that the insured resided with his wife and his son at the time of policy inception.

To the contrary, Plaintiff contends that Defendant should not be permitted to rely on the unsworn, unsigned telephonic statement because is not proper summary judgment evidence; that it is hearsay upon hearsay; that it is untrustworthy, unreliable and created solely for use in this lawsuit; that it does not qualify as a business record under F. S. 90.803(6); and that the statement and the affidavits which rely on the statement must also be stricken and their use prohibited for any purpose.

The issue for the Court to decide is whether or not the unsworn, unsigned telephonic statement qualifies as a business record under the business records exception to the hearsay rule, F. S. 90.803(6), thereby making it admissible as summary judgment evidence.

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Pursuant to FRCP 1.510, affidavits / statements in support of a motion for summary judgment must be made on personal knowledge. "The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment. . . and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." *Fl. Dept. of Financial Services v. Associated Industries Ins. Co., Inc*., 868 So.2d 600 (Fla. 1st DCA, 2004) [29 Fla. L. Weekly D568a]. Citing, *Pawlik v. Barnett Bank of Columbia County*, 528 So.2d 965, 966 (Fla. 1st DCA 1988).

An affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law. *Fl. Dept. of Financial Services v. Associated Industries Ins. Co., Inc*., 868 So.2d 600 (Fla 1st DCA 2004) [29 Fla. L. Weekly D568a]. Citing, *Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc.,* 793 So.2d 978, 979 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D356c].

To determine if the statement satisfies the business records exception of the hearsay rule, we must look at Florida Statute 90.803(6), which provides:

> 90.803 Hearsay exceptions; availability of declarant immaterial:
>
> **(6) Records of regularly conducted business activity.**
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and *s. 90.902(11),* unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> (b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under *ss. 90.701 90.705* if the person whose opinion is recorded were to testify to the opinion directly.
>
> (c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

As indicated above, the statement allegedly taken by Defendant of the insured declarant was unsworn, unsigned, and telephonic (taken in the absence of a notary public or other person capable of administering an oath and/or confirming the identity of the declarant). The statement was originally taken in Spanish. Then, nine (9) years after the statement was obtained by Defendant, and five (5) years into this litigation, Defendant had the statement translated into English and transcribed solely for use in this case.

The deposition testimony of Defendant's corporate representative establishes that the statement proffered by Defendant was created solely for purposes of this litigation and, but for the pending lawsuit, Defendant would not have created the proffered statement.

It is undisputed that the content of the statement did not come from anyone within Defendant's business organization, and no one within Defendant's business organization has any personal knowledge regarding the accuracy of the information contained within the statement. Furthermore, the proffered statement was not made at or near the time of the event, nor was it made by a person within Defendant's business organization with information or knowledge of the facts contained in the statement.

As an initial matter, this Court has previously held that a transcript of a sworn in-person examination under oath is unreliable and cannot be used as summary judgment evidence. See, Order dated October 22, 2018 in the matter of *Gables MRA a/a/o Jose Villarroel v. State Farm*, 2012-25944 SP (25); 26 FLW Supp 766a (J. Diaz; Miami-Dade Oct 22, 2018). If an in-person sworn EUO transcript does not rise to the level of admissible summary judgment evidence, then it follows that an unsworn, unsigned telephonic statement of an unidentified non-party witness is equally inadmissible as summary judgment evidence.

The unsworn, unsigned telephonic statement of the insured in this case is not admissible under Fla. Stat. 90.803(6) because it was allegedly taken pre-suit pursuant to an insurance contract; it was not a deposition; there was no opportunity for anyone to cross-examine the witness nor to object; and it was not obtained in the course of a judicial proceeding. The statement was also never signed or acknowledged by the declarant and the declarant never saw a transcribed copy of the statement nor had the opportunity to listen to the audio recording. The declarant was never given an opportunity to acknowledge, confirm or deny whether the transcript accurately reflected his words. Finally, the non-party witness will not testify at trial because it is believed he has passed away.

In contrast, a witness in a deposition taken pursuant to the civil procedural rules is always given an opportunity to read his or her testimony to confirm the accuracy of the transcribed testimony and he or she can even submit an errata sheet to correct any errors in the transcribed testimony. See, Rule 1.310(e), 'Witness Review.' The 'witness review' safeguards are not available in a pre-suit unsigned, unsworn telephonic statement making it inherently untrustworthy. It is worth noting that the subject insurance policy contained a provision requiring Defendant to secure the insured's signature on a statement, which it failed to accomplish rendering the statement suspect and violative of Defendant's policy requirements.

"The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon to do so, the great weight and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness, in any subsequent suit between the same parties." *Putnal v. State*, 56 Fla. 86, 47 So. 864 (1908).

A. **STATEMENT IS NOT ADMISSIBLE AS FORMER TESTIMONY**

Florida Statute 90.804(2) reads: Hearsay Exceptions—The following are not excluded under section 90.802, provided that the declarant is unavailable as a witness:

> a. *Former testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceed ing, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportu nity and similar motive to develop the testimony by direct, cross, or redirect examination.

The "former testimony" rule found in section 90.804(2)(a) is the counterpart of Federal Rule of Evidence 804(b)(1) and it basically

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codifies the common law rule of evidence previously recognized. Florida has long permitted the use of former testimony. *Putnal v. State*, 56 Fla. 86, 47 So. 864 (1908); *Habig v. Bastian*, 117 Fla. 864, 158 So. 508 (1935).

However, the rule only applies if the following requirements are met: (a) the former testimony was taken in the course of a judicial proceeding in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. See, *Johns-Manville Sales Com. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984).

In the instant case, the Gonzalez statement was allegedly taken as part of the requirements of an insurance policy; it was taken prior to this lawsuit being filed; it was not taken in connection with a judicial proceeding; there was no opportunity for cross examination or objection; and, it was not a deposition. See, *Goldman v. State Farm,* 660 So. 2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes). Defendant's proffered statement does not even rise to the level of testimony because it is not sworn.

Accordingly, Fla. Stat. 90.804(2) excludes the non-party pre-suit statement of the insured as summary judgment evidence.

B **STATEMENT IS NOT ADMISSIBLE AS A BUSINESS RECORD**

In order to qualify for the business record exception to the hearsay rule, a 'business record' must satisfy these criteria: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. See F. S. 90.803(6) and See also, *M.S. v. Dept. of Children and Families,* 6 So. 3d 102 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D679a] citing to *See Quinn v. State,* 662 So.2d 947, 953 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1633c]; § 90.803(6)(a), Fla. Stat. (2002).

In the instant case, the unsworn, unsigned telephonic statement was not created by Defendant and it is not Defendant's record and therefore it cannot be deemed its business record, as a matter of law. A record is not a business record simply because it appears in the proponent's file. It must be generated by the business. The proffered statement in this case was not created by Defendant nor by anyone within Defendant's business organization. See, *Reichenberg v. Davis* 846 So. 2d 1233 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1355a], (father in a paternity action sought to introduce investigative reports from the Dep't of Children and Families over the mother's hearsay objections and the court found that reports of DCF investigators which contained witness interviews were not admissible under the business or public records exception to the hearsay rule because the statements in the reports were not based upon the personal knowledge of an agent of DCF). See, *Van Zant v. State,* 372 So.2d 502 (Fla. 1st DCA 1979) and *Harris v. Game & Fresh Water Fish Comm'n,* 495 So.2d 806, 809 (Fla. 1st DCA 1986) (quoting Charles Ehrhardt, Florida Evidence § 90.805, (2d ed. 1984) "For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity.").

The problem in *Reichenberg* was that the author of the reports simply related the substance of what the witnesses had told the author. Those witness statements, even though contained within the business records of DCF, do not fall within the exception, because they were not based upon the personal knowledge of an agent of the "business" (DCF). The *Reichenberg* court went on to hold that to be admissible under these circumstances, the hearsay statements made to the authors must themselves fall within an exception to the hearsay rule." § 90.803, Fla. Stat. (2002); *Harris,* 495 So.2d at 809. Here, no such exceptions apply.

In order to be admissible under the business record exception, the record must be regularly kept by the business. See, *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008) [33 Fla. L. Weekly S131a] (Letter written by Department of Corrections employee to prosecutor concerning prisoner's release date was not written as a part of a regularly conducted business activity but was drafted at prosecutor's request). See also, *Simmons v. State*, 697 So. 2d 985, 986 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1908a] (Error to admit list of items stolen from truck by business employees under section 90.803(6) because the testimony of company president did not establish "that the itemized list was kept in the course of its regularly conducted business activity or that it was the regular practice of the business to keep such a list").

Section 90.803(6) requires that the record of an act or event be kept in the course of a regularly conducted business activity. It further requires that the making of the report be a regular practice of that business activity. If it is not in the regular course of the business to make a particular type of record, then the record is not admissible under this exception. Conversely, not all records regularly made by a business are admissible. See, *Clark Well Drilling, Inc. v. North-South Supply, Inc.*, 44 So. 3d 149, 152 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1833a]. The 'business record which Defendant seeks to use in this case was created 9+ years after the fact; created solely for use in this litigation; and would not have been created but for the existence of this litigation.

In *Eichholz v. Pepo Petroleum Co.,* 465 So. 2d 1244 (Fla. 1st DCA 1985), the court reiterated that Section 90.803(6), Florida Statutes (1983), allows admission of records kept in the course of regularly conducted business activity when it is the regular practice of the business to make such a record. The information in the report must be from a person with knowledge who was acting within the course of the business activity. If the initial supplier of the information is not acting within the course of the business, the record cannot qualify for admission. See also, Ehrhardt, Florida Evidence 2d ed., § 803.6, p. 491, citing *Van Zant v. State,* 372 So.2d 502, 503-4 (Fla. 1st DCA 1979). The initial supplier of the information in *Van Zant* was not acting in the course of the business whose record the document purportedly was, but was an unidentified employee of a different business altogether. Therefore, the court found that it was error to admit the document as a business record. In the instant case, the initial supplier of the information was Gonzalez, who is not a part of Defendant's business organization.

To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. *See Quinn,* 662 So.2d at 953; *Van Zant v. State,* 372 So.2d 502, 503 (Fla. 1st DCA 1979). If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. *See Quinn,* 662 So.2d at 953-54; *see also Hill v. State,* 549 So.2d 179, 181 (Fla.1989); *Johnson v. Dep't of Health & Rehab. Servs.,* 546 So.2d 741, 743 (Fla. 1st DCA 1989); *Harris v. Game & Fresh Water Fish Comm'n,* 495 So.2d 806, 809 (Fla. 1st DCA 1986) ("The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception."); *Van Zant,* 372 So.2d at 503. The informa-

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tion in the statement proffered by Defendant was not supplied by someone within Defendant's business organization who had knowledge of the facts & data contained in the statement.

A requirement of minimum reliability of a record is contained in section 90.803(6) which states that when the "sources of information or other circumstances show lack of trustworthiness" business records are not admissible. Whenever a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized. On January 16, 2020, Defendant's corporate designee testified that the proffered statement was created solely for purposes of this litigation, making it inherently untrustworthy. See, *Coates v. State*, 217 So. 3d 1048 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1001a]. See also, *Masci Corp. v. Fortiline, Inc.*, 202 So. 3d 434, 435 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2045a] (Document created for use in litigation is untrustworthy and inadmissible). See, *Stambor v. One Hundred Seventy-Second Collins Corp*., 465 So 2d 1296, 1298 (Fla. 3d DCA 1985) (Accident report prepared by defendant after slip and fall is inadmissible). See also, *Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 1994) (notes made in anticipation of litigation are not made in the ordinary course of business and are therefore inadmissible). *Beckerman v. Greenbaum*, 439 So. 2d 233 (Fla. 2d DCA 1983) (records prepared in anticipation of trial are inadmissible under 90.803(6)). *Chadwell v. Koch Refining Co., L.P.*, 251 F.3d 727, 732 (8th Cir. 2001) ("[R]ecords kept in anticipation of a lawsuit. . . do not qualify for the Rule 803(6) [business records] hearsay exception."); *Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995) ("It is well established that one who prepares a document in anticipation of litigation is not acting in the regular course of business."); *Campos v. State*, 317 S.W.3d 768, 778 (Tex. App. Houston 1st Dist. 2010) ("Records prepared in anticipation of litigation are excluded under the trustworthiness criterion of Rule 803(6)."). *McElroy v. Perry*, 753 So. 2d 121, 125 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D111a] (Reports of IME physicians were "more properly characterized as forensic or advocacy reports. Thus, even if they fall within the literal definition of a business record, they also fall within the provision of the rule that excludes those records in which 'the sources of information or other circumstances show lack of trustworthiness.' ").

The entry on a business record must be made at or near the time of an act or event. *Yisrael*, supra. That did not happen in the instant case. The requirement of contemporaneity ensures that the entry was made while the matter was fresh in the mind of the participant. If the record is made at a more remote time, the reliability of the entry decreases. See *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 660 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D874a].

Not every document that appears in Defendant's claim file can be deemed a business record. For example, the Plaintiff's medical records, which are contained in Defendant's claim file, were not created by Defendant and Defendant would not be able to authenticate those records. The information contained within the medical records did not come from anyone within Defendant's business organization, and there is no one within Defendant's business organization that would be able to attest to the accuracy of those records. Similarly, surveillance reports, surveillance videos or photographs obtained by Defendant's investigator (if any) cannot be authenticated by Defendant's claim adjuster as a business record. Those records could only become admissible through the testimony of the investigator upon proper predicate and foundation.

The statement proffered by Defendant fails to satisfy the 803(6) contemporaneity test because it was created 9 years after the underlying statement was allegedly obtained by Defendant, and it cannot be deemed a business record because it was created solely for the instant litigation and but for the instant litigation, Defendant would not have any reason to advance the proffered statement.

The same is not true for depositions because depositions can serve as summary judgment evidence as a matter of law. In the instant case, the proffered statement does not even rise to the level of an affidavit because it is not signed, sworn nor acknowledged by the declarant. And the proffered statement is not an EUO because it was not contemporaneously and stenographically recorded by a court reporter via a certified translator, nor was it taken under oath. Even if the statement rose to the level of an EUO, it would nevertheless still be inadmissible for the reasons expressed in *Villarroel*, supra.

For the reasons set forth above, the proffered statement of Francisco Gonzalez is not admissible as summary judgment evidence under Fla. Stat. 90.803(6) because it is not Defendant's business record; it was not made in the course of Defendant's regularly conducted business activity; it was created solely for purposes of the instant litigation; it was not created at or near the time of the occurrence of the event; it is inherently untrustworthy; it is unsigned; it is unsworn; it is not a deposition taken during the course of this action; it was created in a manner that violates Defendant's own policy terms; there was no opportunity for cross examination; no one within Defendant's business organization has any knowledge regarding the content of that statement; no one inside Defendant's business organization or outside Defendant's organization can confirm the identity of the declarant; the proffered statement is hearsay upon hearsay; and Defendant's claims adjusters cannot authenticate a hearsay document which was neither created nor generated by the Defendant simply by signing an affidavit containing the 'magic words' to create a business record exception to the hearsay rule.

The Court acknowledges that at the outset of the hearing on January 23, 2020, Defendant agreed to withdraw the affidavit of Geraldine Burroughs, and indicated that it may amend and/or replace it. Notwithstanding, to the extent that the affidavits of Geraldine Burroughs, Rachel Luetjes and Brian Bowers rely on or quote from the Gonzalez statement, these statements are inadmissible hearsay and are stricken from the record. Defendant is prohibited from using the hearsay statement of Gonzalez for any purpose at trial or summary judgment.

* * *

**Insurance Personal injury protection Application Misrepresentations Although PIP policy states that insurer has right to recompute premium based on subsequently obtained information and allow policy to continue, there is nothing in policy that requires insurer to exercise that right rather than rescind the policy Nothing in policy required insurer to afford insured an opportunity to pay additional premium before it could rescind policy for material misrepresentation that occurred when insured failed to disclose existence of licensed household resident**

CEDA HEALTH OF SOUTH MIAMI, LLC., as assignee of Carmen Tavia, Plaintiff, v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami Dade County. Case Nos. 14 7056 SP 23 (2) and 14 7057 SP 23, Consolidated Cases. February 14, 2020. Natalie Moore, Judge. Counsel: Lisa Hasselmann Arana, Landau & Associates, Sunrise, for Plaintiff. Charles L. Vaccaro, The Vaccaro Law Firm, P.A., Davie, for Defendant.

## ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND FINAL JUDGMENT FOR DEFENDANT

This cause, having come before the Court for hearing on November 6, 2019, on the Plaintiffs' Motion for Summary Judgment Regarding Affirmative Defense of No Coverage Due to Material Misrepresentation and the Defendant's Motion for Summary Judgment, and the Court having reviewed the motions and affidavits and the evidence and case law filed by the parties is support of their respective motions, and having heard the argument of counsel and

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being otherwise advised in the premises, it is hereby ORDERED AND ADJUDGED:

This action is a claim for PIP benefits. This case (Case No. 14-7056) was consolidated with case number 14-7057 SP23(02) by order dated December 18, 2014. The only pending issue in both cases is coverage.

The underlying facts of the matter are undisputed. The subject policy of insurance was initially issued to Carmen Tavia by RESPONSIVE AUTO INSURANCE COMPANY (hereinafter "RESPONSIVE") pursuant to an application for insurance signed by Carmen Tavia on December 14, 2012. On page 1 of the application, Carmen Tavia was asked to "*List all persons 14 years or older, licensed or not, residing with the applicant(s), whether or not they drive/operate the listed vehicle. ... Failure to provide this information may constitute a material misrepresentation, which may result in all insurance coverage being void.*" In response to this question, Carmen Tavia listed only herself. Additionally, on page 3 of the application, Carmen Tavia was asked the following questions:

> *Are there any residents of your household that are 14 years or older that have NOT been disclosed on this application.*
>
> *Have you failed to list any drivers such as children away from home or in college, who operate your vehicle(s) at any time. This includes anyone who may be away for military service.*

Carmen Tavia answered "No" in response to both questions and signed the following declaration attesting to the truthfulness of her answers:

> I have read each of the questions (numbered 1 12) above and an swered all questions truthfully. I realized that any incorrect informa tion may constitute a material misrepresentation, which may result in my insurance coverage being voided or my claim denied.

Immediately after the questions on page 3 of the application, Carmen Tavia signed the following declaration stating:

> I understand this application is not a binder unless indicated as such on this form by the brokering agent. I acknowledge my responsibility to inform the company, by signed endorsement, of anyone in the future that becomes eligible as an operator described above and of any change or use of my vehicle from personal use to business use. I further acknowledge my responsibility to inform the company by signed endorsement of anyone in the future that becomes a resident of my household and eligible for benefits if involved in an accident. I understand that a resident of my household includes but is not limited to anyone who lives in my home, including relatives, friends, tenants, or anyone else who lives at my place of residence, whether licensed to drive or not. I acknowledge my obligation to notify the company of any changes identified in this paragraph within 30 days of such change.

Finally, at the time of the application, Carmen Tavia signed an Additional Resident Verification Form certifying that Jessica L. Mendez "does not reside in [her] household" and further, that her statement and certification was "accurate and true" with the acknowledgement that if the information was incorrect, "it may constitute a material misrepresentation which may result in all insurance coverage being void."

Following the subject accident, Carmen Tavia admitted for the first time that Jessica L. Mendez did in fact did reside with her on the date of the application. It was also discovered that Jessica Mendez had an active driver's license on the date of the application for which Jessica L. Mendez had listed her home address as the same address as Carmen Tavia, which was 2528 W 65th Street, Hialeah, Florida 33016. Had RESPONSIVE known that Jessica L. Mendez lived with Carmen Tavia at the time of policy inception, the policy would have increased by $1,919.00. It is undisputed that the failure to disclose Jessica L. Mendez on the application was a material misrepresentation. As a result of the material misrepresentation, RESPONSIVE rescinded the policy and returned all premiums to Carmen Tavia.

Plaintiff argues Defendant's Policy requires the insured to be given notice of, and an opportunity to cure, any misrepresentations before any cancellation or rescission of the policy occurs. Plaintiff further argues RESPONSIVE was required to provide Carmen Tavia an opportunity to pay the additional premium before it could rescind the policy. In support of its argument, Plaintiff cited to a number of cases which involved the interpretation of a policy of insurance and application issued by Windhaven Insurance Company. The Court finds that the Windhaven Insurance Company policy and application are substantially different than RESPONSIVE'S policy, and therefore, those cases are inapplicable to this matter.

Plaintiff also argues that the language in RESPONSIVE's policy supports their argument. Plaintiff points to two provisions in the policy as a basis for their claim.

The first provision is found on page 18 of the policy under the section titled **"OUR" RIGHT TO RECOMPUTE PREMIUM**, and states in relevant part:

> *The premium for this policy has been established in the reliance upon the statements made by "you" in the application for insurance. "We" shall have the right to recompute the premium payable for this policy if information material to the development of the final premium is subsequently obtained.*

The second provision relied upon by Plaintiffs is found on page 19, paragraph 3 under the sub-heading "**Termination; A. "Cancellation"**, which states:

> In the event "we" determine that "you" have been charged an incorrect premium for coverage requested in "your" application for insurance, "we" shall immediately mail "you" notice of any additional premium due "us." If within 10 days of the notice of additional premium due (or a longer time period as specified in the notice), "you" fail to either:
>
> a. Pay the additional premium and maintain this policy in full force under its original terms; or
>
> b. Cancel this policy and demand a refund of any unearned premium;
>
> Then this policy shall be canceled effective fourteen days from the date of the notice (or a longer time period as specified in the notice).

The Claimant confirmed at her deposition that she was not aware of any request for an additional premium.

Defendant asserts the policy was rescinded pursuant to F.S. 627.409 and section on page 17 of RESPONSIVE'S Insurance Policy which states:

> MISREPRESENTATION AND FRAUD.
>
> Any claim may be denied or this policy may be void if an "insured":
>
> . . .
>
> A. Conceals or misrepresents any material facts or circumstances concerning this insurance or the subject thereof.

Plaintiff argues that the policy provisions, when read together, either require RESPONSIVE to provide the insured an opportunity to cure a material misrepresentation or result in an ambiguity that should be resolved in favor of the insured.

The Court finds Plaintiffs' arguments unpersuasive. Although RESPONSIVE does have a right to re-compute the premium and allow the policy to continue, there is nothing in the policy that requires RESPONSIVE to exercise that right. Instead, RESPONSIVE chose to rescind the policy.

The terms "cancellation" and "rescission" refer to two separate and distinct actions that operate to create different legal consequences. *United Auto Insurance Company v. Salgado,* 22 So.3d 594, 603 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a]. The term "cancellation" has been defined to mean "the termination by the insured or by the

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insurer or both of insurance in accordance with the specific terms of a policy." The term "rescission," however, has been defined to mean "[a]nnulling or abrogation or unmaking of [a] contract and the placing of the parties to it in status quo." *Id*. at 604.

As the policy was not cancelled but rather was rescinded, the policy language relied upon by Plaintiff set out in the Cancellation provisions on page 18-19 of the policy do not apply. An insurance company's alleged failure to rescind a policy in accordance with any cancellation procedures does not preclude or abrogate an insurer's ability to void the policy ab initio. *United Automobile v. Salgado, supra* at 602.

The rescission provision in RESPONSIVE'S policy is clear and unambiguous, and is line with the language of F.S. 627.409. After having discovered Carmen Tavia made a material misrepresentation in the application, there is nothing in that section of the policy that required RESPONSIVE to provide her an opportunity to pay the additional premium before RESPONSIVE could rescind the policy. It is well-settled that a Court is powerless to re-write a contract to make it more reasonable or advantageous for one of the contracting parties. *Hill v. Deering Bay Marina Ass'n, Inc.,* 985 So.2d 1162, 1166 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1654d]; *Fernandez v. Homestar at Miller Cove, Inc.,* 935 So. 2d 547, 551 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1756a]. Therefore, pursuant to F.S. 627.409 and the terms of the policy itself, RESPONSIVE was within its right to rescind the subject policy based upon the incorrect and false statements made by Carmen Tavia.

Accordingly, it is hereby ***ORDERED*** and ***ADJUDGED*** that Plaintiffs' Motion for Summary Judgment Regarding Affirmative Defense of No Coverage Due to Material Misrepresentation is hereby ***DENIED***. It is further hereby ***ORDERED*** and ***ADJUDGED*** that Defendant's Motion for Final Summary Judgment is hereby ***GRANTED***.

**FINAL JUDGMENT FOR DEFENDANT**

It is hereby ***ORDERED*** that ***FINAL JUDGMENT*** be entered in favor of Defendant, THE RESPONSIVE AUTO INSURANCE COMPANY and against the Plaintiffs, CEDA HEALTH OF SOUTH MIAMI, LLC, as assignee of Carmen Tavia and CEDA HEALTH OF HIALEAH, LLC., as assignee of Carmen Tavia, that Plaintiffs take nothing by this action, and that Defendant shall go hence without day.

The Court retains jurisdiction over this matter to hear all appropriate post judgment motions including Defendant's Motion(s) for Attorneys' Fees and Costs.

* * *

**Criminal law Driving under influence Evidence Statements of defendant Pre-*Miranda* statements Where state failed to produce any evidence to place defendant behind wheel of car abandoned in ditch other than defendant's own pre-*Miranda* statement against interest, corpus delicti was not established and defendant's statement is inadmissible Circumstantial evidence that one of registered owners of abandoned vehicle, defendant, was within vicinity where vehicle was abandoned is not substantial enough to establish corpus delicti**

STATE OF FLORIDA, Plaintiff, v. SEAN L. MCDONALD, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2018 CT 11885 NC. January 6, 2020. Dana Moss, Judge. Counsel: Deanna Cipriano, Assistant State Attorney, Sarasota, for Plaintiff. Anthony G. Ryan, Sarasota, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

This matter came before the Court on the Defendant's motion to suppress, wherein the Defendant requested the Court to suppress all evidence obtained as a result of law enforcement illegally stopping the vehicle in which he was a passenger and subjecting him to an unlawful interrogation and DUI investigation. The Defendant is charged with one count of driving under the influence after a prior conviction and one count of refusing to submit to testing. Prior to beginning the hearing on the motion to suppress, defense counsel narrowed the issue to whether the Defendant's statement against interest to law enforcement should be suppressed under the corpus delicti rule. The Defendant argued that there is no circumstantial evidence to establish the body of the crimes for which he is charged other than his own statement against interest. The Court conducted an evidentiary hearing and therefrom made the following finding of facts and conclusion of law.

FINDING OF FACTS

On the night of August 1, 2018, Deputy Baker and Deputy Kostyal responded to the report of a car in the ditch off of Proctor Road near Las Vegas Drive in Sarasota County. The car was abandoned and there were no eye witnesses on scene. The car did not block the roadway and appeared to have caused no property damage; however, the airbags were deployed.

Deputy Baker arrived at the scene before Deputy Kostyal. Deputy Baker, while on his way to the scene, stopped a man walking in the vicinity along the road away westbound from the abandoned car [unknown how far away]. Deputy Baker asked the man if he knew anything about the car in the ditch. The man denied knowing anything and was freed to leave. Minutes later, Deputy Kostyal was en route and saw the same man walking westbound on Proctor Road and thought it suspicious that the man would be walking late at night on a road with no sidewalks. Deputy Kostyal conferred over the radio with Deputy Baker about the man and learned that Deputy Baker had already cleared him.

Deputy Kostyal drove past the man but saw in his rearview mirror that a car stopped to pick up the man. Deputy Kostyal did a U-turn and accelerated to catch up to the car. The car was a Jeep driven by Jack Woolweaver. Deputy Kostyal stopped the Jeep for speeding and admittedly to talk to the man who had been picked up. Deputy Kostyal did not know how fast the Jeep was traveling, but he visually estimated that it traveled above the 40mph posted zone. Deputy Kostyal could not remember what his visual estimate of speed was but, having been employed with the Sheriff's Office for five years as a traffic unit and being radar certified, he determined based on his training and experience that the Jeep was traveling above the speed limit. Deputy Kostyal had a Stalker radar unit in his patrol car, but was unable to activate it in time. There is no audio recording of the transaction between Deputy Kostyal and the Jeep's occupants because Deputy Kostyal's body microphone was on the charger in his patrol car.

Deputy Kostyal recalled there was a female passenger in the front of the Jeep and the man who had been walking along the road was alone in the backseat. Deputy Kostyal asked the man in the backseat, later identified as the Defendant, if he had anything to do with the car in the ditch. The Defendant again denied involvement. Mr. Woolweaver told Deputy Kostyal that he did not know the Defendant but gave him a ride when the Defendant flagged him down. Deputy Kostyal alleged that the Defendant blurted out that he [Defendant] was the driver of the car in the ditch while Deputy Kostyal continued to question the occupants of the Jeep. Mr. Woolweaver and his female passenger were immediately released without a speeding ticket, and the Defendant was detained for further investigation. Deputy Kostyal advised the Defendant of *Miranda*[1] warnings and the Defendant invoked his right to remain silent. Deputy Kostyal suspected the Defendant was impaired based on his observations. Deputy Kostyal placed the Defendant under arrest for DUI, refusing to submit to testing and leaving the scene of an accident [which the State chose not to pursue]. Upon further investigation, the deputies determined that the abandoned car was registered to the Defendant and his wife and the keys to the car were found in the Defendant's pocket search incident to the arrest.

The parties admitted into evidence the transcript of the 911 call

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related to this incident. The unidentified caller reported a car in the ditch saying, "I have no clue [what happened], I just drove by and there was lights flashing and a car in the ditch, and this young couple drives up to me, and they're like the guy just ran. He said not to call for help, to leave him alone, which makes me think he's drunk and he just ditched his car in the ditch." The caller denied seeing the driver of the car or did not have any independent information about the incident other than what the unidentified couple had conveyed before leaving.

ANALYSIS

The *corpus delicti,* which is a latin term meaning "body of the crime," consists of proof that a crime has been committed and that someone is criminally responsible. The *corpus delicti* must be established as a foundation before an accused's statements may be introduced against him or her at trial. *Burks v. State,* 613 So. 2d 441 (Fla. 1993) (holding the State may not offer an admission against interest to establish one of the elements of the charged offense in the absence of an independently established *corpus delicti*; rather, the *corpus delicti* must first be established before the introduction of an admission or confession). The burden is on the State to show by "substantial evidence" the existence of each element of a crime. The State may establish the elements by circumstantial evidence. Furthermore, the *corpus delicti* for DUI offenses requires the State to produce evidence that indicates the defendant was operating the vehicle while the defendant was under the influence. *See State v. Allen,* 335 So. 2d 823 (Fla. 1976); *Farley v. City of Tallahassee,* 243 So. 2d 161 (Fla. 1st DCA 1971); *State v. Hepburn,* 460 So. 2d 422 (Fla. 5th DCA 1984).

In *State v. Hepburn,* the defendant was charged with leaving the scene of an accident involving injuries and DUI. The Fifth District Court of Appeal affirmed the suppression of the defendant's admission to driving "since there were no eye witnesses to the accident and since the accident and since the pedestrians did not know what hit them, there is no evidence which places appellee behind the wheel of the automobile which struck the pedestrians at the time the accident occurred." *Hepburn,* 460 So. 2d at 426. The Fifth District reached this conclusion in spite of the evidence showing the car was registered to the defendant's ex-husband and the defendant possessed the car the day after the accident. *Id.*

In the instant case, like in *Hepburn,* the State has failed to produce any evidence that placed the Defendant behind the wheel of the abandoned car, other than the Defendant's own statement against interest. There are no known witnesses who saw the Defendant exit the car or could otherwise establish that he was in actual physical control of the car that night. At most the State is able to present circumstantial evidence that one of the registered owners was within the vicinity of where the car was abandoned, but the Court concludes this is not substantial enough to establish the *corpus delicit.* There was no testimony as to how much time had passed from when the car was abandoned to when the Defendant was first stopped, nor was there any testimony how far away the Defendant was from the scene. The Defendant obviously was not at the scene or in close proximity, as evidenced by the fact that he was placed under arrest for leaving the scene of a crash. The Court finds the facts of this case akin to *Hepburn* and consequently reaches the same conclusion as in *Hepburn.* Without evidence of a wheel witness, the State is missing a crucial element necessary to prove the corpus delicit for DUI. Because the corpus delicti must be established as a foundation before an accused's statements may be introduced against him at trial, the Court concludes the Defendant's pre-*Miranda* statement is inadmissible. *See Burks,* 613 So. 2d 441. Having reached this conclusion, the Court finds it unnecessary to address the constitutional validity of the vehicle stop and subsequent arrest of the Defendant.

CONCLUSION

For the above stated reasons, the Court concludes that Defendant Sean McDonald's are inadmissible for trial purposes because the State cannot establish the corpus delicti absent the Defendant's statement. It is hereby,

ORDERED and ADJUDGED that the Defendant's Motion to Suppress is granted, to the extent that the Defendant's statements against interest are not admissible.

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[1]*Miranda v. Arizona,* 384 U.S. 436 (1966).

* * *

**Insurance Personal injury protection Coverage Medical expenses Nurse practitioners PIP insurer is not entitled to rely upon Medicare's 15% reduction to calculate amount of PIP benefits payable for non-hospital non-emergency health care services provided by nurse practitioner 2012 amendment to statute did not in any way alter or amend substantive requirements of first and second sentences of section 627.736(5)(a)(3) Question certified whether a PIP insurer is authorized to rely upon Medicare's "Nurse Practitioner (NP) and Clinical Nurse Specialist (CNS) Services Payment Methodology" to calculate amount of PIP benefits payable for health care services provided by a nurse practitioner to a PIP insured**

CRESPO & ASSOCIATES, P.A., as assignee of D. McCulley, Plaintiff, v. USAA SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, General Civil Division. Case No. 17 CC 012137, Division U. May 1, 2020. Frances M. Perrone, Judge. Counsel: David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa; Anthony T. Prieto, Morgan & Morgan, Tampa; and Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, P.A., Tampa, for Plaintiff. Scott W. Dutton, and Jesse C. Groves, Dutton Law Group, P.A., Tampa, for Defendant.

**FINAL JUDGMENT ON COMPETING MOTIONS FOR SUMMARY JUDGMENT**

**THIS CAUSE** came before this Court on January 23, 2020, concerning: (1) "Defendant's Motion for Final Summary Judgment" dated August 12, 2019, and (2) "Plaintiff's Motion for Final Summary Judgment, or Partial Summary Judgment, Concerning Nurse Practitioner Payment Guidelines" dated January 2, 2020. The Court, having considered the parties' respective motions, arguments at the hearing, supplemental authorities, and proposed orders, as well as the record, and being otherwise advised in the premises,

**ORDERS AND ADJUDGES** as follows:

1. The parties agree that the material facts of this case are undisputed, and the only remaining legal issue is whether the Defendant is authorized to rely upon Medicare's "Nurse Practitioner (NP) and Clinical Nurse Specialist (CNS) Services Payment Methodology" to calculate the amount of personal injury protection ("**PIP**") benefits payable for health care services provided by a nurse practitioner to a PIP insured. *See,* "Defendant's Motion for Final Summary Judgment," Exh. 1 ("Medicare Claims Processing Manual," Ch. 12 at §120); and Exh. 2 ("Medicare Information for Advanced Practice Registered Nurses, Anesthesiologist Assistants, and Physicians Assistants").

2. This Court previously decided this same legal issue in *Crespo & Associates, P.A., a.a.o. Ben Scoi v. Geico Gen. Ins. Co.*, 24 Fla. L. Weekly Supp. 721a (Fla. Hillsborough Cnty. Ct. Nov. 23, 2016). In *Scoi*, this Court held that insurers must calculate benefits payable for health care services provided by a nurse practitioner at the amount set forth in Section 627.736(5)(a)1.f(I), Florida Statutes for "all other" non-hospital non-emergency services, which is 80% of 200% of the participating physicians fee schedule of Medicare Part B.

3. Like the defendant insurance company in *Scoi*, the Defendant in this case paid 80% of 85% of 200% of the participating physicians fee schedule amount for the services rendered by the Plaintiff's nurse practitioner, which is 15% less than the amount payable under Section 627.736(5)(a)1.f(I). As in *Scoi*, the Defendant contends this 15%

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reduction is used by Medicare, and is therefore, authorized by the last sentence of Section 627.736(5)(a)3, Florida Statutes. As in *Scoi*, this Court disagrees, and concludes that a PIP insurer is not authorized to rely upon Medicare's 15% reduction to calculate the amount of PIP benefits payable for non-hospital non-emergency health care services provided by a nurse practitioner to a PIP insured. *See also, Coastal Wellness Centers, Inc. v. Progressive American Ins. Co.*, 309 F. Supp.3d 1216, 1221 (S.D. Fla. 2018) (PIP insurers are not authorized to rely on Medicare's 2% reduction from participating physicians fee schedule to reimburse chiropractic manipulation claims); *Coastal Wellness Centers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 3089321, *4 (S.D. Fla. 2018) (same).

4. As in *Scoi*, this Court acknowledges that Section 627.736(5)(a)3 was amended in 2012, to insert a new third sentence. The amendment was as follows:

> 3.~~4.~~ Subparagraph 1. ~~2~~ [of Section 627.736(5)(a)] does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 1.~~2.~~, must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider is ~~would be~~ entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes. However, 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, supplies, or care if the coding policy or payment methodology does not constitute a utilization limit.

Ch. 2012-197, §10, Laws of Fla. (2012) (strike-through and underline in original). In summary, the 2012 amendment to subsection (5)(a)3 added a new third sentence, but left the first and second sentences unchanged in all material respects (except for renumbering the cross-references and a minor grammatical change). So, it is incontrovertible that the 2012 amendment did not in any way alter or amend the substantive requirements of the first and second sentences of subsection (5)(a)3.

5. As explained in *Scoi*, the Defendant's argument incorrectly gives no meaning or effect to the second sentence of Section 627.736(5)(a)3, and no meaning or effect to the entire schedule of maximum charges method provisions of Section 627.736(5)(a)1 and 2. "Statutory language is not to be assumed superfluous; a statute must be construed so as to give meaning to all words and phrases contained within that statute." *Scoi,* 24 Fla. L. Weekly Supp. 721a at ¶12-13, citing, *Terrinoni v. Westward Ho!*, 418 So.2d 1143, 1146 (Fla. 1st DCA 1982); *Atl. Coast Line R. Co. v. Boyd,* 102 So. 2d 709, 712 (Fla. 1958); *Hechtman v. Nations Title Ins. of N.Y.,* 840 So.2d 993, 996 (Fla.2003) [28 Fla. L. Weekly S119a]; *Unruh v. State*, 669 So.2d 242 (Fla.1996) [21 Fla. L. Weekly S104a]; *State v. Goode*, 830 So.2d 817, 824 (Fla.2002) [27 Fla. L. Weekly S860a]; *Finlayson v. Broward County*, 471 So.2d 67, 68 (Fla. 4th DCA 1985). *See also, Coastal Wellness*, 309 F. Supp.3d at 1221 (PIP statute must be given its plain and obvious meaning); *Coastal Wellness*, 2018 WL 3089321 at *4 (same). Therefore, subsection (5)(a)3 does not expressly (and cannot be interpreted to) allow PIP insurers to pay even lower benefits than the "minimum amount" indicated by the fee schedules listed in subsection (5)(a)1.a through f or the 2007 versions of those fee schedules under subsection (5)(a)2. *See, Nationwide Mut. Ins. Co. v. AFO Imaging, Inc.*, 71 So.3d 134, 137-138 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1463b] (the fee schedule method is "to be utilized in computing the minimum amount" that PIP insurers are statutorily allowed to remit). Otherwise, the result would be the total evisceration of subsections (5)(a)1.a through f and (5)(a)2, and the second sentence of subsection (5)(a)3.

6. As explained in *Scoi,* if the new third sentence of subsection (5)(a)3 is truly intended to allow a PIP insurer to apply any Medicare coding policy or payment methodology, that would mean a PIP insurer can step into the shoes of Medicare, act like Medicare, by-pass subsections (5)(a)1.a through f and (5)(a)2 altogether, and simply pay 80% of 100% (instead of 80% of 200%) of the Medicare participating physicians fee schedule amount, because that is obviously a Medicare payment methodology; or a PIP insurer could pay 80% of 95% of the Medicare physicians fee schedule amount to non-participating physicians, because that is also a Medicare payment methodology. Similarly, a PIP insurer could also rely on the Medicare payment methodology which imposes a 2% reduction on chiropractic manipulation claims. Those results would be directly contrary to subsections (5)(a)1.a through f and (5)(a)2, and would render them meaningless. *See, Coastal Wellness*, 309 F.Supp.3d at 1221; *Coastal Wellness*, 2018 WL 3089321 at *4. Paying a lower amount for services rendered by a nurse practitioner would also violate the second sentence of subsection (5)(a)3, which expressly requires PIP insurers to "reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider is entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes." In this case, the Defendant does not contend that the Plaintiff's nurse practitioner provided any services that were beyond those scope of her license.

7. The only way to give meaning and effect to all requirements of subsections (5)(a)1, 2 and 3, is to hold that subsections (5)(a)1 and 2 establish the minimum amount payable under the schedule of maximum charges method, but under subsection (5)(a)3, a PIP insurer is also permitted to rely on Medicare coding policies and payment methodologies, including applicable modifiers, as long as such coding policies, payment methodologies, and applicable modifiers are not "utilization limits," and as long as they do not otherwise result in reimbursement that is less than the minimum amount otherwise payable under (5)(a)1, (5)(a)2, and the second sentence of (5)(a)3. *See, Scoi*, 24 Fla. L. Weekly Supp. 721a at ¶13.

8. Notably, each subparagraph of (5)(a)1.a through f corresponds to different types of services provided by different types of health care providers. Subparagraph (5)(a)1.a applies only to emergency transport and treatment providers, and they are entitled to reimbursement of 80% of 200% "of Medicare"—without any reference to a particular Medicare fee schedule or other specific payment limitation. In contrast, however, subparagraphs (5)(a)1.b and c identify a fixed percentage of the "usual and customary" charges for emergency services provided at hospitals, and subparagraphs (5)(a)1.d, e, and f each identify a fixed percentage of a particular Medicare fee schedule for the particular types of the health care providers and services described therein. Because (5)(a)1.a contemplates that emergency transport and treatment providers must be paid 80% of 200% of whatever Medicare would pay, then (5)(a)3 clearly allows the PIP insurer to apply any and all Medicare coding policies, payment methodologies, and applicable modifiers that Medicare would apply to services rendered by emergency transport and treatment providers. In contrast, however, the other types of health care providers described in (5)(a)1.d, e, and f are entitled to payment of 80% of 200% of the particular Medicare fee schedules specifically identified in (5)(a)1.d, e, and f, respectively.[1] Nurse practitioners who provide non-hospital non-emergency services fall under the "all other" category of (5)(a)1.f(I), and therefore, under that subsection, a PIP insurer must

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pay them 80% of 200% of the "participating physicians fee schedule of Medicare Part B,"—not 80% of 200% of whatever Medicare would pay.

9. Under the last sentence of (5)(a)3, Medicare coding policies, payment methodologies, and applicable modifiers *can* be used for services rendered by the nurse practitioner for purposes of identifying "the appropriate amount of reimbursement for medical services, supplies, or care," but that "appropriate amount of reimbursement" must clearly correspond to the particular fee schedule and percentages listed in the schedule of maximum charges for the particular type of "medical services, supplies, or case" listed in (5)(a)1.a through f. In this case, the Medicare coding policies, payment methodologies, and applicable modifiers cannot be used to reduce the amount of reimbursement below the fixed minimum fee schedule amount listed in (5)(a)1.f(I), because that would nullify the plain meaning of (5)(a)1.f(I), (5)(a)2, and the second sentence of (5)(a)3.[2] The end result of such an interpretation would be that PIP insurers would be able to reimburse *all* health care providers using the same exact (5)(a)1.a standard that applies *only* to emergency transport and treatment providers, who must be paid 80% of 200% of whatever Medicare would pay. Clearly, that is not what the Florida Legislature intended when it carefully selected different payment limitations, fee schedules, and percentages for each of the different types of health care providers and medical services which are separately enumerated in subsections (5)(a)1.a through f.

10. In this case, the Defendant did not comply with its own interpretation of Section 627.736(5)(a)3. Like the defendant insurance company in *Scoi*, the Defendant in this case did not simply use the same payment methodology that Medicare would have used for a nurse practitioner's services and did not pay the same amount that Medicare would have paid (i.e., 80% of 85% of the participating physicians fee schedule amount). Instead, the Defendant paid 80% of 85% of *200%* of the participating physicians fee schedule amount. Thus, the Defendant's own actions confirm the Defendant does not interpret subsection (5)(a)3 to allow PIP insurers to pay whatever amount that Medicare would have paid, irrespective of Section 627.736(5)(a)1.f(I), (5)(a)2, and the second sentence of (5)(a)3. Instead, the Defendant apparently recognized the incongruency of such an approach, and constructed its own payment scheme which reimbursed the Plaintiff at *double* the amount that Medicare would have paid, which is the standard that applies *only* to emergency transport and treatment providers under subsection (5)(a)1.a. Reading all provisions of subsections (5)(a)1.a through f, (5)(a)2, and (5)(a)3 in harmony with each other and giving meaning to all of those subsections, avoids an absurd result which would allow PIP insurers to pay all health care providers less than the minimum amount required by those subsections, by using the standard that applies *only* to emergency transport and treatment providers under subsection (5)(a)1.a.

11. Based on the foregoing, "Defendant's Motion for Final Summary Judgment" is **DENIED**, and the "Plaintiff's Motion for Final Summary Judgment, or Partial Summary Judgment, Concerning Nurse Practitioner Payment Guidelines" is **GRANTED**.

12. The Court has been advised the parties agree the amount of the 15% reduction applied by the Defendant is $39.79. Accordingly, final judgment is hereby entered in favor of the Plaintiff and against the Defendant. The Plaintiff is hereby awarded and shall recover from the Defendant the sum of $39.79, plus prejudgment interest accruing since September 15, 2016 through the date of this final judgment, plus post-judgment interest, at the applicable interest rates set by the State of Florida's Chief Financial Officer pursuant to Section 55.03, Florida Statutes, until the judgment is paid. For which sum, let execution issue.

13. Pursuant to Florida Rule of Appellate Procedure 9.160 and Section 34.017, Florida Statutes, this Court hereby certifies to the Florida Second District Court of Appeal that this final order and the legal question decided herein (i.e., whether a PIP insurer is authorized to rely upon Medicare's "Nurse Practitioner (NP) and Clinical Nurse Specialist (CNS) Services Payment Methodology" to calculate the amount of PIP benefits payable for health care services provided by a nurse practitioner to a PIP insured) have statewide application, are matters of great public importance, and will affect the uniform administration of justice.

14. The Court hereby reserves jurisdiction to determine claims for reasonable attorneys' fees and costs.

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[1]Under (5)(a)1.a, emergency transport and treatment providers must be paid 80% of 200% "of Medicare." In stark contrast, under (5)(a)1.d, non emergency hospital inpatient services must be paid 80% of 200% "of the Medicare Part A prospective payment applicable to the specific hospital" not 80% of 200% of whatever Medicare would pay. Similarly, under (5)(a)1.e, non emergency hospital outpatient services must be paid 80% of 200% of "the Medicare Part A Ambulatory Payment Classification for the specific hospital" not 80% of 200% of whatever Medicare would pay.

[2]Because nurse practitioners fall under the "all other" services category of (5)(a)1.f(I), they must be paid 80% of 200% of the "participating physicians fee schedule of Medicare Part B" not 80% of 200% of whatever Medicare would pay (like emergency transport and treatment providers). Under (5)(a)2, that fee schedule amount cannot be less than it was in 2007. Under the second sentence of (5)(a)3, the nurse practitioner must be reimbursed regardless of Medicare "restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes." All of these interwoven provisions must be read in harmony and given meaning not ignored and given no meaning.

* * *

**Insurance Personal injury protection Affirmative defenses Amendment Motion to amend affirmative defenses to assert defense regarding invalidity of demand letter is granted Argument that insurer waived demand letter defense by failing to raise issue before suit was filed is not ripe for consideration and is not supported by any record evidence**

CAROL AXE, an insured individual by and through his/her assignee, FRED L. LESLIE, D.O., P.L., Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 17 CC 028032, Division M. March 27, 2020. Miriam Valkenburg, Judge. Counsel: James R. Collins, FL Legal Group, Tampa, for Plaintiff. J. Chris Abercrombie, The Law Offices of David S. Dougherty, Tampa, for Defendant.

**ORDER ON DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER, AFFIRMATIVE DEFENSES AND DEMAND FOR JURY TRIAL**

**THIS CAUSE** having come before the Court on Defendant's Motion for Leave to File Amended Answer, Affirmative Defenses and Demand for Jury Trial, filed and served June 14, 2019 ("Motion for Leave"), and the Court, having heard the arguments of the respective parties, having reviewed the authorities presented, and being otherwise fully advised in the premises, finds as follows:

Pursuant to Fla. R. Civ. Pro. 1.190(a) and "absent exceptional circumstances, requests for leave to amend pleadings should be granted." *Thompson v. Jared Kane Co.*, 872 So. 2d 356, 360 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1020b]. "Public policy favors the liberal amendment of pleadings, and courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merits." *Laurencio v. Deutsche Bank National Trust Company*, 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1600b]; *Sorenson v. Bank of N.Y.*, 261 So. 3d 660, 663 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2559a]; *Reyes v. BAC Home Loans Servicing, LP*, 226 So. 3d 354, 356 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1962a]; *Thompson*, 872 So. 2d 360.

"A trial court's refusal to permit an amendment of a pleading is an abuse of discretion unless it is clear that: (1) the amendment would

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prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile. . . . Courts should be especially liberal when leave to amend is sought at or before a hearing on a motion for summary judgment." *Laurencio*, 65 So. 3d at 1193 (citations omitted) (internal quotations omitted).

Plaintiff argues that the Defendant waived its defense regarding the invalidity of the presuit demand letter by its failure to raise that issue presuit. However, this argument is not ripe for consideration before this Court. "As a matter of law, waiver . . . [is an] affirmative defense[ ] *that must be pleaded*." *Derouin v. Universal American Mortgage Company, Ltd.*, 254 So. 3d 595, 600-01 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1939a] (citation omitted) (alterations and emphasis in original). "If an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance." Fla. R. Civ. P. 1.100(a); *see, e.g., Reno v. Adventist Health System/Sun-Belt, Inc.*, 516 So. 2d 63, 64-65 (Fla. 2d DCA 1987); *Kitchen v. Kitchen*, 404 So. 2d 203, 205 (Fla. 2d DCA 1981); *Lazar v. Allen*, 347 So. 2d 457, 458 (Fla. 2d DCA 1977). Furthermore, even if this Court was to find that this argument could be properly considered at this procedural posture, Plaintiff failed to provide any record evidence to support the argument that the Defendant waived this defense by virtue of its presuit actions. Instead, Plaintiff argues that the failure of Defendant to warn Plaintiff, at the pre-suit stage, of Defendant's intention to challenge the sufficiency of the Plaintiff's pre-suit demand letter constitutes a waiver of the right to raise the same challenge post-suit.

Defendant's proposed amended Affirmative Defense #2 is not futile when taken as true. However, this Court declines to consider at this stage whether Defendant will ultimately be able to prove this defense. *Reyes*, 226 So. 3d at 357 (" 'Any doubt with respect to futility should be resolved in favor of allowing the amendment. . .' ") (citation omitted). Furthermore, Plaintiff would not be prejudiced by allowing Defendant to raise its conditions precedent related defense, as § 627.736(10) Fla. Stat. requires strict compliance. *See Chambers v. Medical Group, Inc. v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. Ct. (App.) Dec. 1, 2006).

At this stage in the proceeding, the Court notes that Defendant has filed the only motion for summary judgment pending in this case, that there is no final hearing set at this time, and that no discovery deadline is imminent.

Accordingly, this Court hereby ORDERS AND ADJUDGES, as follows:

1. That Defendant's Motion for Leave is GRANTED in PART, and DENIED in PART. Defendant's Motion for Leave is GRANTED as to Amended Affirmative Defense #2 ***only*** and is DENIED as to Amended Affirmative Defenses #1, #3, and #4, as moot, in that they were withdrawn by Defendant's Counsel at the hearing on the Motion for Leave;

2. That Defendant's Amended Answer, Affirmative Defenses and Demand for Jury Trial (C.o.S. 6/14/2019) is hereby deemed filed, except as stated above;

3. That Plaintiff's Motion to Strike (C.o.S. 1/25/2018) is denied as moot; and

4. That Plaintiff shall have twenty (20) days to file a response to the Amended Answer, Affirmative Defenses and Demand for Jury Trial, if any.

5. This Court reserves jurisdiction to enter an order that includes reasonably appropriate measures to ensure that Plaintiff is not prejudiced by the delay associated with the Defendant's delay in seeking to amend its defenses.

* * *

**Insurance Personal injury protection Coverage Medical expenses Condition precedent Examination under oath Where both PIP statute and policy provide that EUO is condition precedent to receipt of benefits and insured failed to appear at three scheduled EUOs, medical provider is not entitled to PIP benefits Insurer that scheduled EUOs to occur more than thirty days after receipt of provider's bills did not thereby waive right to notice EUO Further, where PIP policy contains "no action clause" that states that lawsuit against insurer is precluded until insured fully complies with all provisions of policy, policy bars suit until EUO requirement is met**

OCEANS BREEZE CHIROPRACTIC OF PLANTATION (a/a/o Jonathan Pierre) , Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE 19 009260. February 20, 2020. Phoebee R. Francois, Judge. Counsel: Michael Cohen, Cohen Legal Group, P.A., Fort Lauderdale, for Plaintiff. Kristina Davis Forst, ROIG Lawyers, Deerfield Beach, for Defendant.

**ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON CLAIMANT'S FAILURE TO COMPLY WITH A CONDITION PRECEDENT AND ATTEND EXAMINATIONS UNDER OATH**

THIS CAUSE having come before the Court on February 3, 2020 for a hearing on Defendant's Motion for Final Summary Judgment Based on Mr. Jonathan Pierre's Failure to Comply with a Condition Precedent and Attend Examinations Under Oath and the Court having reviewed the entire Court file, the relevant legal authority, the affidavits, evidence, pleadings and having heard argument of counsel for the parties, the Court hereby finds as follows:

ANALYSIS AND FINDINGS OF FACT

1. Ocean Breeze Chiropractic of Plantation (*hereinafter the Plaintiff*) as an assignee of Jonathan Pierre (*hereinafter Mr. Pierre*), sued State Farm Mutual Automobile Insurance Company (*hereinafter the Defendant*) for breach of a contract of Personal Injury Protection benefits under Florida's No Fault Law. Mr. Pierre was involved in a motor vehicle accident and made a claim for injuries sustained on March 11, 2018. He received treatment from the Plaintiff from March 20, 2018 through September 14, 2018.

2. The Defendant, through its counsel, requested in writing that Mr. Pierre submit to a EUO on three (3) separate occasions: August 8, 2018, September 5, 2018 and October 4, 2018. For each EUO appointment, a letter requesting that Mr. Pierre submit to the EUO was sent to his counsel, Mr. Geoff Pelosi.

3. The Defendant did not pay all of the Plaintiff's bills and this action was filed on July 9, 2019.

4. Plaintiff is not entitled to any recovery under the subject policy of insurance where its alleged assignor, Jonathan Pierre, failed to comply with a condition precedent thereby breaching the subject policy of insurance. Pursuant to Florida Statute 627.736 (6)(g): An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath.

5. The parties stipulate that the Assignor did not appear for the Examination Under Oath. This was further proven by way of the Certificate of Non-Appearance which was placed into evidence and attached to the affidavit of Christa Reinwall.

6. The Plaintiff did not present any conflicting evidence to show that Mr. Pierre did not receive notice. As such, this Court finds that Mr. Pierre received proper notice for the Examinations Under Oath.

7. Where the facts are such that, if established there could be no recovery, or where the undisputed facts are such as would preclude recovery, then the question becomes one of law for determination by the Court and a proper matter for disposition by Summary Judgment. See *Florida Bar v. Greene,* 926 So.2d 1195 (Fla. 2006) [31 Fla. L.

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Weekly S171a]; see also *Yost v. Miami Transit Company,* 66 So.2d 214 (Fla. 1953).

8. Plaintiff argued that *Amador v. United Auto Ins. Co.*, 748 So. 2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a] applies to the case at hand and that, despite Mr. Pierre's failure to attend the EUO, Insurers are barred from denying the bills that occurred prior to failure to attend the Examination Under Oath if Defendant did not request the EUO within thirty (30) days of receiving the bills. This Court disagrees for the following reasons and based upon the following authority.

9. Since the ruling in *Amador v. United Auto Ins. Co,* the No-Fault statute has undergone several revisions. This case is controlled by the version §627.736 of the Florida Statutes that went into effect on January 1, 2018. Specifically sub-section (6)(g) was added, and reads:

> a. (g) An insured seeking benefits under ss. 627.730 627.7405, including an omnibus insured, ***must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath.*** The scope of questioning during the examination under oath is limited to relevant information or informa tion that could reasonably be expected to lead to relevant information. ***Compliance with this paragraph is a condition precedent to receiving benefits.*** An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to s. 626.9541 (emphasis added).

10. The Defendant incorporated the above statutory language into the applicable insurance policy. More specifically, the policy reads:

> INSURED'S DUTIES
>
> 5. Questioning Under Oath
>
> a. No Fault Coverage, each insured making claim or seeking payment, must at our option:
>
> (1) Submit to an examination under oath;
>
> . . .Compliance with Questioning under Oath is a condition precedent to receiving benefits.
>
> The Exclusions section of the policy reads: "THERE IS NO COVERAGE FOR: (3) ANY INSURED PERSON: (d) WHO REFUSES TO: (1) SUBMIT TO, COMPLETE, OR FAILS TO APPEAR AT AN EXAMINATION UNDER OATH."
>
> The policy also incorporates a no action clause "LEGAL ACTION AGAINST US" "Legal action may not be brought against us until there has been full compliance with all provisions of the policy".

11. The Fourth District Court of Appeals held in *Wright v. Life Ins. Comp.,* 762 So. 2d 992, 993 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1527b], "a no action clause in an insurance contract operates as a condition precedent that bars suit against the insurer until the insured complies with the relevant policy provisions."

12. The Plaintiff contends §627.736(4)(b) of Florida Statutes imposes a thirty day time limit for the Defendant to complete its investigation of the claim. Plaintiff relies on *Amador v. United Automobile Ins. Co.*, 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a]. However, the *Amador* court dealt with a different version of §627.736 of Florida Statutes than the 2018 version at issue here. First and foremost, sub-section (6)(g) now exists and makes attendance at an EUO a statutory **condition precedent** to receiving benefits. Sub-section (4)(b) is also different. It is now titled "Payment of Benefits" instead of "Benefits; When Due".

13. The Plaintiff's reading of the statute imposes a thirty (30) day time frame for an Insurer to notice an EUO or waive its right to seek it. Such a reading would run afoul of subsection (4)(b)(6) which came into effect in 2001, after *Amador,* and provides:

> This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). Such assertion may be made at any time, **including after payment of the claim** *or after the 30 day period for payment set forth in this paragraph.*

14. The Florida Supreme Court in *United Automobile Ins. Co., v. Rodriguez,* 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a] puts this issue to rest; holding that "the insurer's failure to pay PIP benefits within thirty days after receiving written notice of a covered loss does not forever bar it from contesting a claim. Additionally, the Court found that statutory sanctions are the ***only*** penalties approved by the legislature. (Emphasis added).

15. Florida Law is clear that the courts will give a statute its plain and ordinary meaning and that any inquiry into the legislative history may only begin ***if*** the court finds that the statue is ambiguous. *Weber v. Dobbins,* 616 So. 2d 956 (Fla. 1993) (emphasis added). Further, in applying principals of statutory construction courts must begin with the actual language used in the statute and when considering the meaning of terms used in a statute, Court must first look to the terms ordinary definitions. *Raymond James Fin. Servs. Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) [38 Fla. L. Weekly S809a] citing *Borden v. East-European Ins. Co.,* 921 So. 2d 587, 595 (Fla. 2006) [31 Fla. L. Weekly S34a]. When the language of a statue 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. (Emphasis added). *See also State v. Warren*, 796 So. 2d 489 (Fla. 2001) [26 Fla. L. Weekly S434b]. Florida Statute § 627.736 subsection (6)(g) is clear and unambiguous in that it makes sitting for an Examination Under Oath a condition precedent to receiving benefits, as such this Court finds there is no reason to look outside the statute for interpretation.

16. In *USI Insurance Services of Florida v. Pettineo,* 987 So. 2d 763 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1788a] the Court found that one cannot rely on case law that predates the amendment to a statute as that would completely take out any intent the legislature had to amend the law or change the law as they see fit. The Court in this case found that it was error for the lower court to apply prior standards to the case at bar when the statute had been amended.

17. When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment. *Arnold v. Shumpert,* 217 So. 2d 116 (Fla. 1968) citing to *Sharer v. Hotel Corp. of America,* 144 So. 2d 813, 817 (Fla. 1962) and *Webb v. Hill,* 75 So. 2d 596, 603 (Fla. 1954).

18. Because the wording of the No-Fault Statute is clear and amendable to logical and reasonable interpretation, this Court is without power to diverge from the intent of the legislature expressed in the plain language of the statute. *Allstate v. Holy Cross Hospital*, 961 So. 2d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]. A court should avoid construing a statute in a manner that renders a portion of that language meaningless. *See Winn-Dixie Stores v. Reddick,* 954 So. 2d 723 (Fla. 1st DCA 2005) [32 Fla. L. Weekly D1089c].

19. While the Court is required to read statutes in their entirety, the Court is not free to add provisions to parts of a statue under the guise of such reading. The Plaintiff's reading of the statute imposing that bills which pre-date the EUO should be paid is inconsistent with the applicable statute at issue. Even the Court in *Nunez v. Geico*, 117 So. 3d 388 (Fla. 2013) [38 Fla. L. Weekly S440a], found that "the 2012 Amendment substantively changed, not just legislatively clarified, section 627.736." As such, this Court cannot read in a thirty (30) day requirement, as requested by Plaintiff, into 627.736(6)(g).

20. In *Caribbean Rehabilitation Center, Inc., a/a/o Reynier Cordoves v. State Farm Mutual Automobile Insurance Company,* 24 Fla. L. Weekly Supp. 844a (Fla. 11th Jud. Cir. 2016) (*aff'd per curiam Caribbean Rehabilitation Center, Inc., a/a/o Reynier Cordoves v. State Farm Mutual Automobile Insurance Company,* 2017-000217-

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AP-01), the Court held that submission to an EUO was a condition precedent to receipt of benefits. The Court further held that an insurer that schedules a EUO to occur more than thirty days after receipt of the provider's bills did not waive the right to notice the EUO.

21. In *Fidel S. Goldson D.C. P.A. a/a/o Cecilia Williams-Brown, Plaintiff, v. State Farm Mut. Auto. Inc. Co.* 27 Fla. L. Weekly Supp. 418a (Broward Cty. Ct. June 1, 2009) (Hon. Fry) the court held that Fla. Stat. 627.736(6)(g) (2016) makes submission to an Examination Under Oath a condition precedent to receiving benefits. The insurance policy at issue incorporated that statutory provision and, therefore, the Assignor/insured was put on notice of this requirement. Bills cannot be overdue if they are not due in the first place. Prior to the Plaintiff filing suit, the Defendant scheduled, and properly noticed, an Examination Under Oath to Mr. Pierre. As he failed to appear, he failed to satisfy and comply with a condition precedent and is not entitled to benefits. Additionally, the policy at issue also states that failure to submit for an Examination Under Oath is an exclusion to coverage. As such, this Court finds that benefits cannot be overdue when a condition precedent to receiving benefits or obtaining coverage has not been met.

22. This court agrees with the Eleventh Judicial Circuit in its appellate capacity in *Caribbean Rehabilitation Center, Inc., a/a/o Reynier Cordoves v. State Farm Mutual Automobile Insurance Company,* 2017-000217-AP-01 and its sister court in *Fidel S. Goldson D.C. P.A. a/a/o Cecilia Williams-Brown, Plaintiff, v. State Farm Mut. Auto. Inc. Co.* 27 Fla. L. Weekly Supp. 418a (Broward Cty. Ct. June 1, 2009) (Hon. Fry).

Accordingly, it is hereby

ORDERED and ADJUDGED that the Defendant's Motion for Final Summary Judgment is hereby GRANTED.

* * *

**Insurance Personal injury protection Coverage Emergency medical condition Summary disposition is entered in favor of insurer where medical provider's proposed witness on sole remaining issue of whether insurer received emergency medical condition determination from provider has been stricken**

MCBP ORTHOPEDICS & NEUROSURGERY, PLLC a/a/o Natashia Perez Ortiz, Plaintiff, v. CENTURY NATIONAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19021988, Division 54. March 9, 2020. Florence Barner, Judge. Counsel: Landau & Associates, P.A., Sunrise, for Plaintiff. Alejandra Jay, McFarlane Dolan & Prince, Coral Springs, for Defendant.

## ORDER ON DEFENDANT'S ORE TENUS MOTION FOR FINAL SUMMARY DISPOSITION

**THIS CAUSE** having come before the Court on February 17, 2020, upon the Defendant's Ore Tenus Motion for Final Summary Disposition, and the Court having reviewed the entire Court file, having heard argument of counsel, and being otherwise advised in the premises, the Court finds as follows:

1. Pursuant to the parties' filed stipulations and this Court's prior rulings, the only issue left to be determined is whether the Defendant received an emergency medical condition determination from St. Joseph's Hospital and/or Injury Centers of Central Tampa.

2. The Court finds that there are no triable issues left as the Plaintiff does not have a witness to testify in its case in chief, as to whether or not the hospital submitted an emergency medical condition determination to the Defendant, and the only remaining witness of record is Defendant's witness. The Plaintiff's proposed witness, Anicia Vicente, who was to testify as to the timely mailing of the EMC determination made by Injury Centers of Central Tampa was stricken at the Hearing held on February 14, 2020.

3. Therefore, Defendant's Ore Tenus Motion for Final Summary Disposition is hereby **GRANTED**. The Plaintiff shall take nothing by this action and the Defendant shall go hence without day. The Court reserves jurisdiction to determine attorneys' fees and costs owed to Defendant.

* * *

**Insurance Personal injury protection Coverage Medical expenses Exhaustion of policy limits Gratuitous payments Where PIP insurer paid claim to another medical provider in excess of what was required by policy and PIP statute, payment was gratuitous payment that did not exhaust PIP benefits Insurer owes payment for plaintiff provider's claim**

FLORIDA SPINE & JOINT INSTITUTE LLC, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19005536, Division 60. February 3, 2020. Michael Davis, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Holly wood, for Plaintiff. Tamar Hoo Pagan, for Defendant.

## ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

**This cause** having come before the Court on Plaintiff's Motion for Partial Summary Judgment, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED, as follows:

That Plaintiff's Motion for Partial Summary Judgment is hereby **Granted**. The Court finds that the service (99213) provided by the Plaintiff on December 28, 2019 was related and necessary; that reasonableness is not an issue as the at-issue policy adopts the fee schedule and therefore the at-issue service should be paid based upon 80% of 200% of the applicable Medicare rate; and that the bill for said service was timely received. These findings were based upon the affidavits filed by the Plaintiff. The Defendant did not dispute the foregoing during the hearing. The Defendant, additionally, confirmed during the hearing that the instant bill had not been paid.

Having found that the Plaintiff established a prima facie case the Court turns to the Defendant's remaining affirmative defense that benefits are exhausted. The Defendant claims to have made benefit payments totaling $10,526.91. The Defendant claims to have made $526.91 in benefit payments above that called for by the policy.

The Court finds that the Defendant has not exhausted the $10,000.00 in policy benefits in the payment of valid claims. The Court finds that the Defendant made a payment to another provider that was in excess of that called for by the instant policy and Florida Law. When the deductible was properly applied and the proper percentage of the billed amount by West Boca Medical Center was allowed the Court found that the Defendant paid West Boca Medical Center $674.51 in excess of the amount the at-issue policy and Florida Law required the Defendant to pay. The Court finds that this excess payment was not provided for by the policy and Florida Law, was not a valid payment under the policy and Florida Law and constituted a gratuitous payment that cannot be counted against the available benefits. *See Coral Imaging v. Geico,* 955 So.2d 11 where the Court held that making a payment not provided for in the statute and policy cannot be counted against the available PIP benefits—"the provision [of 627.736] must be read as prohibiting Geico from paying the untimely and improperly-billed charges . . . as violative of the provisions of 627.736(5)(b)." *See also Santiago v. Orr Indus., Inc.,* 407 So. 2d 1026, 1029 (Fla. 1st DCA 1981) ("An overpayment of compensation is presumed to be a gratuity unless there is a specific finding that some other reasonable basis exists for the overpayment."). *See also Northwoods Sports Medicine v. State Farm,* 137 So.3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] where the Court held that exhaustion only exists with the payment of valid claims—"once the PIP benefits are exhausted through the payment of valid claims, an

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insurer has no further liability. . .” *See also Ocean Harbor Casualty Insurance Company v. Medical Specialists of Tampa Bay,* 26 Fla. L. Weekly Supp. 534a (Fla. 6th Cir. Ct. App. 2013) holding “anything Ocean Harbor paid over the amounts calculated under the safe harbor provisions was voluntary or gratuitous and, to the extent that they exceeded the safe harbor provisions, Ocean Harbor should not be given credit for them.”

After subtracting $674.51 from the amount the Defendant claimed had been paid, $10,526.91, the Court finds that there are still benefits remaining of $147.60 ($10,526.91 - $674.51). The unpaid code, 99213, under the instant policy should be paid at 80% of 200% of the applicable Medicare rate of $76.61. The Court finds that the Defendant owes the Plaintiff $122.58.

* * *

ASSOCIATES IN FAMILY PRACTICE OF BROWARD LLC a/a/o Stephen Grasso, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE18006861, Division 53. January 23, 2020. Robert Lee, Judge. Counsel: Jeremy Dover, Demesmin & Dover Law Firm, Fort Lauderdale; and Matthew Barber, Daly & Barber, P.A., Fort Lauderdale, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

**ORDER GRANTING DEFENDANT’S CROSS-MOTION FOR SUMMARY DISPOSITION AS TO COMPENSABILITY OF CPT CODE 95832**

THIS CAUSE came before the Court on January 22, 2020, for hearing of the Defendant’s Cross-Motion for Summary Disposition, etc., 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 all “summary judgment evidence” filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

The Court GRANTS the Motion for the same reasons set forth on Section (A) on pages 2-5 of the Order Granting Defendant’s Motion to Summary Disposition Regarding CPT Code 95832 entered in *Associates in Family Practice of Broward, L.L.C. v. Allstate Fire & Cas. Ins. Co.,* Case No. COCE 18-006840 (56) by the Honorable Betsy Benson on October 3, 2019 [27 Fla. L. Weekly Supp. 761a]. The Court notes that in the instant case, the Plaintiff concedes there is no “separate report” as required by CPT guidance. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant’s Motion for Summary Disposition, etc. is GRANTED.

* * *

**Insurance Personal injury protection Discovery Failure to comply Sanctions Where insurer that asserted exhaustion of benefits defense failed to produce requested PIP log that would reveal whether gratuitous payments had been made, sanctions are awarded in favor of medical provider notwithstanding fact that, once produced, log showed that benefits had been properly exhausted without any gratuitous payments**

SOUTH BROWARD HOSPITAL DISTRICT a/a/o Amanda Gooch, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19000380, Division 48. March 9,2020. Jennifer Hilal, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff.

**ORDER AWARDING SANCTIONS AGAINST DEFENDANT**

THIS CAUSE having come before the Court on February 27, 2020, upon Plaintiff’s Motion for Defendant’s Bad Faith and Egregious Conduct in Failing to Timely Provide a PIP Log, and the Court having considered the motions, having heard argument of counsel and being otherwise fully advised, it is hereupon ORDERED that Plaintiff’s Motion for Sanctions is GRANTED, for the following reasons:

On January 3, 2019, Plaintiff filed its Complaint for Breach of Contract. In its Answer to the Complaint (served March 18, 2019), Defendant asserted that the PIP policy limits had been exhausted, as a result of which Defendant would not be liable for payment of any additional amount.

Once PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on an unresolved, pending claim. *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So.3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. However, Sec. 627.736(5)(b), Fla. Stat. provides that a medical provider’s statement of charges for treatment or services rendered to the insured may not include charges for treatment or services rendered more than 30 days before the date the statement of charges is sent to the insurer, and that the insurer is not required to pay charges for treatment or services which were rendered more than 30 days before the statement of charges is sent to the insurer. Accordingly, any payment to a medical provider for charges submitted in violation of the 30-day time requirement is treated as gratuitous and is not considered as having been made against the limits of the PIP policy. *Coral Imaging Services a/a/o Virgilio Reyes v. Geico Indemnity Ins. Co.*, 955 So.2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a].

On April 1, 2019, Plaintiff served its Request to Produce to Defendant, request no. 4 of which requested production of Defendant’s PIP Log. Since the PIP Log is a list of all medical providers who have submitted bills, the dates on which those bills were received and the dates of service for each bill submitted, the PIP Log requested would reveal whether a medical provider’s bill potentially includes charges for treatment or services rendered more than 30 days before the bill was sent to Defendant, in which case payment by Defendant would have been gratuitous and benefits would not have been properly exhausted.

As of July 10, 2019, Defendant having failed to produce a PIP Log and having failed to respond to Plaintiff’s Request to Produce, Plaintiff served its Motion to Compel. As of August 9, 2019, Defendant having still failed to produce a PIP Log and having still failed to respond to Plaintiff’s Request to Produce, Plaintiff coordinated the deposition of Defendant’s corporate representative, scheduling the deposition to occur on January 14, 2020. As of October 1, 2019, Defendant having still failed to produce a PIP Log and having still failed to respond to Plaintiff’s Request to Produce, Plaintiff served its Ex Parte Motion to Compel. On October 14, 2019, this Court granted Plaintiff’s Ex Parte Motion to Compel Discovery, requiring Defendant to comply with the original discovery demand within ten (10) days, failing which the Order provides that “sanctions may be imposed.”

Defendant failed to produce the PIP Log that had been requested on April 1, 2019 until January 13, 2020, the day prior to the scheduled deposition of its corporate representative. The PIP Log produced by Defendant on January 13, 2020 shows that the medical providers’ statements of charges did not include charges for treatment or services rendered more than 30 days before the date the statements of charges were sent to Defendant, that none of the payments made by Defendant were gratuitous and that benefits had been properly exhausted.

Although Defendant advised that benefits had been exhausted in its answer to the complaint, Plaintiff was entitled to production of the PIP Log in order to confirm that benefits had been properly exhausted and that Defendant had not made a gratuitous payment. There is no reasonable explanation for Defendant’s failure to produce a PIP Log until 288 days after it had been requested. Defendant’s bad faith and egregious conduct in failing produce the PIP Log in a timely fashion

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has caused an unnecessary waste of the Court's time and an unnecessary waste of the Plaintiff's time. Plaintiff has unnecessarily incurred attorneys' fees and costs, for which the Court awards sanctions in favor of the Plaintiff in the amount of $800.00. See *Summit Radiology, LLC a/a/o Charlotte Mardo v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 479a (Broward County, Sept. 2, 2015) (insurer ordered to pay attorney's fees and costs incurred by medical provider after ignoring provider's requests for PIP log and ignoring court order to provide PIP log)

* * *

**Criminal law Discovery Medical records Investigative subpoena Motion for issuance of investigative subpoena for records of treatment or attention given to defendant by fire department at scene of crash is granted Probable cause affidavit of officer who responded to crash scene is admissible to establish nexus between records and pending criminal investigation No merit to argument that officer violated defendant's rights by calling fire department to medically clear him**

STATE OF FLORIDA, Plaintiff, v. ADAM SCOTT FELDMAN, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020 CT 3 A. February 26, 2020. John J. Woodard, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

## CORRECTED ORDER GRANTING STATE'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

This cause came to be heard on February 19, 2020 on the State's Motion for Issuance of Subpoena Duces Tecum filed January 21, 2020, and the Defense's Objection thereto. The Court having considered the evidence and argument of counsel and being otherwise fully advised in the premises, hereby finds as follows:

The Court finds that based on *Hunter v. State,* 639 So.2d 72 (Fla. 5th DCA), *rev. denied,* 649 So.2d 233 (Fla.1994) and *McAlevy v. State,* 947 So.2d 525 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c], Officer Taylor's probable cause affidavit is admissible in this hearing for purposes of establishing the required nexus between the records sought from the Lake Mary Fire Department and a pending criminal investigation. The Court rejects the Defense's argument that Officer Taylor violated the Defendant's rights by requesting the Lake Mary Police Department respond to the scene of the crash to have the Defendant medically cleared for further police investigation.

Accordingly, it is hereby ORDERED and ADJUDGED that the State's Motion for Issuance of Subpoena Duces Tecum is hereby GRANTED, without prejudice to rehear the issue of the nature of the records once they are received.

It is further ORDERED and ADJUDGED that the records to be obtained shall be limited to treatment or attention given by the Lake Mary Fire Department to Adam Scott Feldman in their determination to medically clear Mr. Feldman for further police investigation on January 1, 2020.

It is further ORDERED and ADJUDGED that the State shall seal the records obtained so that they are not made a part of the public record, and that upon receipt of said records, the State shall show the records to counsel for Defendant to ensure the records do not contain any matters beyond what the Court has determined to be relevant.

* * *

**Criminal law Driving under influence Search and seizure Vehicle stop Officer acting outside jurisdiction Off-duty university police officer had authority to make off-campus stop of defendant under mutual aid agreement between university and county Further, officer had authority, either as lay citizen or as off-duty officer, to stop and detain defendant he reasonably suspected to be breaching peace by driving under influence Arrest Probable cause Fellow officer rule Where testimony of stopping officer was inconsistent with his reports and with video of defendant, allegations of stopping officer relayed to arresting deputy are insufficient to substantiate DUI investigation and arrest Although defendant admitted drinking two beers three hours earlier and exhibited questionable driving pattern, deputy has no probable cause for arrest where defendant showed no signs of impairment during DUI investigation Motion to suppress is granted in part**

STATE OF FLORIDA, Plaintiff, v. KAREN ALVAREZ, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019 MM 007891 A. March 4, 2020. Frederic M. Schott, Judge. Counsel: Roger Walker, Assistant State Attorney, Sanford, for Plaintiff. Joel N. Leppard, Leppard Law, Orlando, for Defendant.

## ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S AMENDED MOTION TO SUPPRESS

THIS CAUSE came on to be heard for Hearing before the undersigned County Court Judge on the 3rd day of March, 2020, upon the Defendant's Amended Motion to Suppress. After carefully reviewing the Motion, 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 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 Amended Motion to Suppress is hereby GRANTED IN PART AND DENIED IN PART. At the outset of the Hearing, the Defendant withdrew her suppression requests concerning the lawfulness of the urine test. Additionally, at the outset of the Hearing, the State conceded that Officer Nelson was not a Drug Recognition Expert and, therefore, the observations of Officer Nelson pursuant to the HGN exercise would be limited to the ability or inability of the Defendant to follow instructions and movement(s) of the Defendant's head.

The Court need not address each of the remaining arguments raised by the Defendant. The Court entered into evidence, over the objections of the Defendant, the "2017-2021 Inter-Local Voluntary Cooperation Operational Assistance Combined Mutual Aid Agreement" between, inter alia, the University of Central Florida and the Sheriff of Seminole County. Based on this evidence, the Court finds that Officer Nelson had the authority to act beyond the confines of his immediate jurisdiction of the University of Central Florida campus and to engage the assistance of the Seminole County Sheriff's Office subsequent thereto. Furthermore, the Court finds that Officer Nelson, even while acting outside of his official duties as he was going home after ending his shift on the morning of September 14, 2019, had authority to stop any motorist who he reasonably believed might have been driving under the influence of drugs or alcohol. This Court finds, consistent with established precedent, that driving under the influence constitutes a breach of the peace and that, as such, either a lay citizen or Officer Nelson in his off-duty capacity had the authority to stop and detain an individual who reasonably was suspected of driving under the influence even if no other motor vehicle or individual had been threatened or impacted up to that point. *State v. Furr*, 723 So. 2d 842 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2514a].

However, this Court is constrained by the facts at hand to find competent evidence lacking to support the further actions of Officer Nelson. The testimony of Officer Nelson was inconsistent with his own written report and inconsistent with the observations of the Defendant on video as entered into evidence. Consequently, the allegations made by Officer Nelson as relayed to Deputy Caffey, standing alone, are insufficient to substantiate the DUI investigation

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by Deputy Caffey or the arrest of the Defendant in this case.

The above findings require the Court to base the DUI investigation and subsequent arrest of the Defendant on Deputy Caffey's observations during his brief encounter with the Defendant. The Court was able to view this entire encounter as it was viewed and experienced by Deputy Caffey during the video from his body camera. Although the Defendant indicated she had consumed beer three hours earlier and taken headache medication she exhibited no signs of impairment in her movements or actions or speech. Indeed, all of the movements made by the Defendant were fluid, there was no slurring of her words or speech, and her answers were clear and consistent, albeit incomplete as there was uncontroverted evidence that she had very recently moved to this area. Indeed, there were no objective signs of impairment or indicia of the Defendant's normal faculties being impaired during her encounter with Deputy Caffey prior to her arrest. A questionable driving pattern and consumption of two beers, without competent evidence of some type of impairment, does not support probable cause for an arrest under the facts of this case.

As a consequence of the foregoing, the Court suppresses the arrest of the Defendant on September 14, 2019. The Court need not further address the remaining issues as raised by the Defendant in her Amended Motion to Suppress.

* * *

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# MISCELLANEOUS REPORTS

**Judges Judicial Ethics Advisory Committee Fundraising Receiving awards A judge may attend an event honoring black female judges as long as the event is not a fundraiser for a non-profit organization**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020 4. Date of Issue: March 4, 2020.

## ISSUE

Whether a judge may attend an event honoring black female judges.

**ANSWER:** To the extent that the inquiring judge can confirm this event is not also a fundraiser for a non-profit organization where the judge will be specially honored, yes.

## FACTS

The inquiring judge has been invited to attend an event hosted by the National Congress of Black Women, Broward County Chapter, for the purpose of celebrating Women's Month and honoring black female judges of Broward County. According to the national website, the National Congress of Black Women (NCBW), is a nonprofit that serves as "a voice of advocacy on issues affecting the appointment of women at all levels of government with a goal to increase the participation of women of color in the educational, political, economic and social arenas."

Information posted online about the event indicates that tickets will be sold for $55. The judge's invitation stated that the organization would be "celebrating your achievement and look forward to your presence to accept your award."

The inquiring judge wishes to know whether attendance at the event would be prohibited by the Code of Judicial Conduct.

## DISCUSSION

This inquiry is remarkably similar to Fla. JEAC Op. 20-02 [27 Fla. L. Weekly Supp. 1055b] just recently published. In that opinion we responded in the negative to a judge asking if it is appropriate under the Code to attend an event hosted by advocacy group, Florida's Children First, honoring "champions for children" (none of whom were a judge). That opinion provides a road map for responding here in that the present matter also triggers Fla. Code Jud. Conduct, Canon 5C(3)(b)(iii) that states in relevant part "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." As well as Fla. Code Jud. Conduct, Canon 4D(2)(b), that 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 and the funds raised will be used for a law related purpose**." (emphasis added).

Simply stated, under these circumstances two questions must be asked. First, is the event a fundraiser? Second, is the organization one devoted to the law, legal system, or the administration of justice? Again, Fla. JEAC Op. 20-02 [27 Fla. L. Weekly Supp. 1055b] is instructive in determining the answers. Like the NCBW, Florida's Children First was a nonprofit advocacy group whose invitation did not label the event as a fundraiser, but sold tickets. The opinion noted that:

> 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. [. . . . . .] 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.

The NCBW invitation similarly does not use the word "fundraiser" but the inquiring judge advises the ticket price is to cover the cost of the event with excess funds going back to the organization. This information is more than most judges would likely receive prior to events like this and must, therefore, be on guard as the possibility that such gatherings may not always be clearly recognized as a fundraiser. In the past, some "red flags" have been identified. In Fla. JEAC Op. 10-33 a judge was advised not to attend an event not advertised as a fundraiser but tickets sold covered expenses in addition to ads sold for a program and a silent auction for a scholarship fund. Conversely, a judge was allowed to be featured at a Girl Scout event to honor scouts where there was no admission charge. Fla. JEAC Op. 12-24 [19 Fla. L. Weekly Supp. 957b]. With the limited information at hand, it is difficult to conclude whether this particular event should be deemed a fundraiser. Any time ticket sales generate excess funds going to the organization, common sense and caution should be exercised. The fact that ticket sales for the event may result in the organization making an incidental profit does not necessarily make it a fundraiser, unless the purpose of the event was to raise funds. Fla. JEAC Op. 04-27 [11 Fla. L. Weekly Supp. 860a]. It is always each judge's responsibility to confirm whether a non-law related event is a fundraiser, with the guidance of Fla. Code Jud. Conduct, Canon 5C(3)(b) in mind. Certainly, if a judge is able to make reasonably certain that the event is not a fundraiser as contemplated by the rules and is still in keeping with the prestige of the office, then attendance is allowed.

Should, however, the judge determine that the event is or could be seen as a fundraiser, the second question becomes relevant. Again, it is helpful to revisit Fla. JEAC Op. 20-02 [27 Fla. L. Weekly Supp. 1055b] which contains lengthy and instructive cites as to the many variations and nuanced comparisons of both events and organizations to determine whether they qualify as one "devoted to the law" under Fla. Code Jud. Conduct, Canon 4D(2)(b). These include, 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 Fla. Code Jud. Conduct, 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 fundraising 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

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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 Fla. Code Jud. Conduct, 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 Fla. Code Jud. Conduct, 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, . .".)

As noted above, the NCBW describes itself as an advocacy group seeking to increase the participation and appointments of women of color to a variety of positions in several areas of society. Although not specifically listing the law, it would presumably fall under the general category of "government" for purposes of a stated goal of the organization. However, neither the authority cited in Fla. JEAC Op. 20-02 [27 Fla. L. Weekly Supp. 1055b], nor the NCBW's self-description could lead us to conclude that it is a law related organization as envisioned in the Canons. Nor does it appear any proceeds of ticket sales would be used for a law related purpose. Again, this second part of the analysis is relevant only if the event is determined by the judge to be a fundraiser. If that were the case, then attendance would not be recommended.

Admittedly, and as often recognized by this Committee, the price of being a judge can be high. The cautious and conservative interpretation of the aforementioned ethical guidelines is purposeful and not without results that often prevent recognition of judges by groups seeking only to honor and appreciate them. However, given the information at hand the inquiring judge should confirm if the event is, or is not, a fundraiser. If it is **not**, she is free to attend. If, however, the gathering **is** a fundraiser, then the stated purpose of this organization would not appear to bring it within the category of events that a judge may attend under the rules.

**REFERENCES**

*In re Amendments to the Code of Judicial Conduct - Limitations on Judges' Participation in Fundraising Activities*, 983 So. 2d 550 (Fla. 2008) [33 Fla. L. Weekly S328a]
Fla. Code Jud. Conduct, Canons 5C(3)(b)(iii); 4D(2)(b); 2
Fla. JEAC Ops. 20-02 ***19-07***; ***16-20***; ***14-07***; ***11-15***; ***11-06***; ***10-32***; ***10-31***; ***09-15***; ***09-07***; ***08-23***; ***05-02; 12-24***; ***10-33***

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**Judges Judicial Ethics Advisory Committee Work habits The Canons of Ethics do not prohibit a judge from meeting with an attorney to discuss administrative or procedural matters including docket management, scheduling issues and expectations for motion practice, as long as the judge does not discuss any pending or impending cases thereby violating rules against ex parte communication, and does not create any doubt as to judge's impartiality**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020 5. Date of Issue: March 11, 2020.

**ISSUE**

Whether it would violate the Canons of Ethics for a judge presiding over a Dependency/Delinquency docket to meet with the attorneys working for Children's Legal Services to discuss docket management, scheduling issues and expectations for motion practice, without also inviting other stakeholders including attorneys for the Guardian Ad Litem Program, the Office of the Regional Counsel, the office of Public Defender, the office of the State Attorney, the Department of Juvenile Justice, and private attorneys who have appeared in active cases before the presiding judge.

**ANSWER:** No, as long as the judge does not discuss any pending or impending cases thereby violating the rules against ex parte communication and does not create any doubt as to the judge's impartiality.

**FACTS**

The inquiring judge was recently assigned to a Dependency/Delinquency Docket. The presiding judge has instituted several changes designed to make final hearings more efficient. Attorneys representing Children's Legal Services have voiced their objections in open court. The supervising attorney for Children's Legal Services has approached the inquiring judge and asked to meet to discuss "general procedural matters." Subsequent to submitting the inquiry to this Committee, the inquiring judge advises that yet another stakeholder has requested a one-on-one meeting. Neither of the parties requesting the meeting with the judge has advised the judge of exactly what they want to discuss.

**DISCUSSION**

The Canons do not prohibit a judge from meeting individually or collectively with stakeholders to discuss ways to improve courtroom procedure or make more efficient courtroom proceedings.[1] Fla. Code Jud. Conduct, Canon 4 generally encourages each judge to engage in activities that will improve the administration of justice. *See also* Fla. Code Jud. Conduct, Canon 5A(1-6). Fla. Code Jud. Conduct, Canon 3B(8) encourages judges to "dispose of all judicial matters promptly, efficiently, and fairly." The Commentary to Canon 3B(8) encourages judges to "monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs[.]"In JEAC Op. 19-23 [27 Fla. L. Weekly Supp. 661a], we opined that it was appropriate for a judge to contact the elected State Attorney, Public Defender or their designee to discuss judicial concerns about their attorneys that adversely affect the administration of justice. There is no ethical impediment to meeting solely for the stated purpose. Thus, the issue is not whether it is appropriate to have a discussion with an individual stakeholder about administrative or procedural matters. The inquiring judge agrees that the actual issue and concern surrounds exactly what will be discussed and if those

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discussions have the potential of becoming ex parte communications on pending or impending matters.

Fla. Code Jud. Conduct, Canon 3B(7) states, "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding[.]" Fla. Code Jud. Conduct, Canon 3B(9) directs that a judge "shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." The Commentary to Canon 4A advises that while participating in activities designed to improve the administration of justice, a judge must avoid making statements that "may cast reasonable doubt on the judge's capacity to act impartially and may undermine the independence and integrity of the judiciary."

As a part of the inquiry, the Committee was provided with additional information that suggests the reason for the requested meeting is borne out of disagreement with the new procedures the inquiring judge has put into place. Since submitting the inquiry to this Committee, the inquiring judge advises that another stakeholder has requested a meeting. The inquiring judge has not been advised as to what, in particular, will be the topic(s) of discussion but the judge is of the impression that whatever will be discussed will relate to matters that have occurred in the courtroom. At least one member of this Committee is concerned that the meeting will devolve into something more than issues related solely to "scheduling" and "docket management."

If, as the inquiring judge suspects, the purpose for the meeting is to discuss the effect of the new rules on future cases as evidenced by what occurred in past cases, that would make the upcoming discussions about pending or impending cases and would violate the Canons. While it is possible that specific cases or fact patterns will not be mentioned, it is difficult to see how such a discussion relating to newly initiated courtroom procedures could take place without reference to how the modified procedures have affected past cases or will affect future cases. Though we answer the question presented in the negative, we think, considering the circumstances presented here, it would be prudent for the inquiring judge to decline the meetings or invite all of the stakeholders to be present. A "judicial roundtable" or "brown bag lunch" where all of the interested parties are invited to be present are possible suggestions. At the very least, before accepting a meeting with any stakeholder we would suggest that the judge first inquire as to exactly what topic(s) will be the subject of discussion to help the judge determine whether the one-on-one meeting and/or discussion will violate the Canons.

Should the inquiring judge choose to meet with any stakeholders one-on-one, we recommend that the inquiring judge advise the stakeholders requesting a meeting of the intent to alert all other stakeholders of the meeting and the intent to allow those stakeholders to attend if requested. We also recommend that each of the stakeholders requesting a meeting or attending the meeting should be provided with a copy of Fla. Code. Jud. Conduct, Canons 3B(7)-(8)&(10) so that counsel will be mindful of what the proper boundaries are for any discussion. Finally, the judge should remain cognizant of the guidance provided in the Commentary to Canon 3B(8). There it is explained that when disposing of matters "promptly, efficiently, and fairly" judges must show "due regard for the rights of the parties to be heard" and the "parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."

**REFERENCES**

*Ford v. State*, 374 So. 2d 496, 498 (Fla. 1979)
*Fisher v. State*, 248 So. 2d 479, 487 (Fla. 1971)
Fla. Code Jud. Conduct, Canons 3B(7)(8)&(9), 4, 5A(1-6)
Commentary to Canons 3B(8), 4A
JEAC Op. 2019-23

[1]Trial judges have considerable latitude in deciding whether to alter orderly courtroom procedure. *Ford v. State*, 374 So. 2d 496, 498 (Fla. 1979). The purpose of such rule is to clothe the trial court with full and complete power to enforce all rules of procedure and the conduct of all parties in the trial of the cases or hearings before him or her. It is an essential power and one necessary to the orderly functioning of the courts and the fair and efficient administration of justice. *Fisher v. State*, 248 So. 2d 479, 487 (Fla. 1971).

* * *

**Judges Judicial Ethics Advisory Committee Elections Endorsements A judicial candidate may accept an endorsement from an elected official who is currently seeking re-election during the same cycle once it is clear that no one has filed to run against the elected official**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020 6. Date of Issue: March 19, 2020.

**ISSUE**

May a judicial candidate accept an endorsement from an elected official who is currently seeking re-election during the same cycle?

ANSWER: Yes, once it is clear that no one has filed to run against the elected official.

**FACTS**

The inquiring candidate seeks clarification of Fla. JEAC Op. 16-09 [24 Fla. L. Weekly Supp. 395a], one of several opinions in which this Committee tackled the issue of endorsements by non-judicial elected officials. The candidate understands that any such endorsement must come from the official as an individual, and not from any political party to which that official may belong. Much like 16-09, the present inquiry focuses on a phrase we have constantly employed, specifically "not campaigning for election." We have imposed the requirement that the endorsing official must not also be running for office at the same time, lest it be perceived that the official and the judicial candidate are running as part of a "slate." The wrinkle in this case is that it is presently unknown whether or not the official will draw opposition.

**DISCUSSION**

In 16-09 the official wishing to endorse the judicial candidate was not up for re-election in 2016 but had already filed to run during the next cycle, *i.e.,* 2018. Thus the official and the judicial candidate would not appear on the same ballot. This Committee perceived no violation of Fla. Code Jud. Conduct, Canon 7A(2)(b) under these unusual facts. In the present case, however, both the official and the judicial candidate are running in 2020. As of the date of the inquiry the would-be endorser has not yet attracted an opponent. The inquiring candidate understands that an endorsement would not be appropriate at the present time, but only asks whether the candidate may accept an endorsement when and if the official is the only person to qualify for his or her position, after which time the official would be deemed unopposed and would no longer need to "campaign."

Much the same question was addressed in Fla. JEAC Op. 12-18 [19 Fla. L. Weekly Supp. 900b], wherein we determined that an official who remained unopposed after qualifying would no longer be campaigning during the same election cycle and thus the judicial candidate could accept an endorsement from that official once qualifying ended.

**REFERENCES**

Fla. Code Jud. Conduct, Canon 7A(2)(b)
Fla. JEAC Ops. 16-09 and 12-18

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