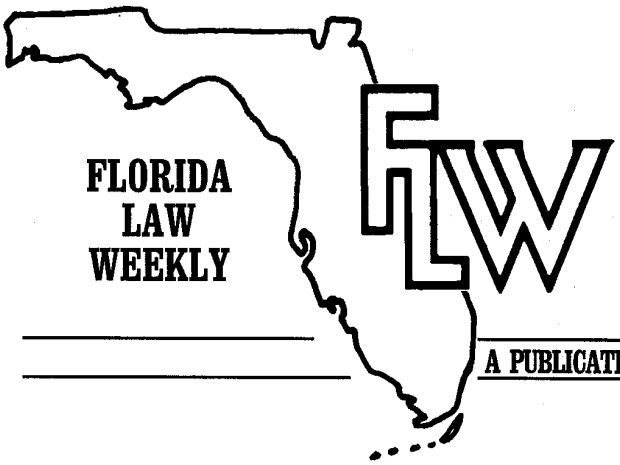
Volume 28, Number 10, February 26, 2021



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 869-966

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. Where a jury found that the medical provider's charge was not reasonable, but also found that a reasonable amount was more than the partial payment made by the insurer, the provider was entitled to a judgment in its favor for the unpaid charges plus interest and penalties. The court rejected the contention that the provider should be required to file a new claim for the reasonable amount found by the jury because the jury verdict was the first time the insurer was put on notice of the true reasonable charge.** *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. MARTINEZ HEALTH INC. Circuit Court, Eleventh Judicial Circuit (Appellate) in and for Miami-Dade County. Filed November 24, 2020. Full Opinion at Circuit Courts-Appellate Section, page 884a.*
- **INSURANCE—HOMEOWNERS—VENUE—FORUM SELECTION CLAUSE. The circuit court acting in its review capacity held that the trial court departed from the essential requirements of law by denying an insurer's motion to dismiss an assignee's action against it for improper venue where the policy contained a clause mandating venue in California and the insured's assignee did not show that enforcement of the clause would be unreasonable or unjust. Moreover, the facts overwhelmingly favored venue in California. The property, the assignee's office, and the insured's address were located in California; the policy was issued in California; and the services were provided in California. The court found no merit to the argument that the insurer waived the defense of improper venue by not contesting venue in a motion to dismiss the original complaint where the facts regarding the venue defense were not apparent in the original complaint.** *ALLSTATE INSURANCE COMPANY v. ALL INSURANCE RESTORATION SERVICES, INC. Circuit Court, Eleventh Judicial Circuit (Appellate) in and for Miami-Dade County. Filed November 22, 2020. Full Opinion at Circuit Courts-Appellate section, page 889a.*

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Bold denotes decision by circuit court in its appellate capacity.

ZONING

Variance—Setback—Hardship—Irregular lot **6CIR 869a**

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CIRCUIT COURTS—APPELLATE

Municipal corporations—Zoning—Variances—Certiorari challenge to special magistrate's order granting variance from front yard setback to allow construction of carport on irregular lot is denied—Order was supported by competent substantial evidence, and special magistrate did not depart from essential requirements of law in finding that denial of variance based on literal translation of code would work unnecessary hardship on property owner

NANCY HOWELL, et al., Petitioners, v. CITY OF MADEIRA BEACH, FLORIDA, et al., Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000022-AP-88B. UCN Case No. 522019AP000022XXXXCI. January 31, 2020.

ORDER AND OPINION

Petitioners challenge the City of Madeira Beach's Special Magistrate's Order Granting Variance. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

In February 2019, a residential variance application was filed to reduce the required R-1 front yard setback from 20 feet to 10 feet to allow for construction of a carport structure attached to the existing garage at the property adjacent to Petitioners' property. In March 2019, a public hearing was held on the variance. Prior to and at the public hearing, comments were submitted against and in support of the variance. At a public hearing, the Special Magistrate heard discussion against and in support of the variance. On April 4, 2019, the Special Magistrate entered an order granting the residential variance. Petitioners filed a timely petition for writ of certiorari, arguing that the Special Magistrate's order was not supported by competent, substantial evidence and was not in accordance with the essential requirements of the law.

Standard of Review

"Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Discussion

Petitioners first argue that no competent, substantial evidence exists to support the variance criteria were met. Madeira Beach Code of Ordinances ("Code") section 2-507(a) states that "[t]he purpose of a variance is to ensure that no property, because of the special circumstances applicable to it, shall be deprived of privileges commonly enjoyed by other properties in the same zone and vicinity." Subsection (b) sets forth specific criteria:

> In order to authorize any variance from the terms of the city land development regulations, the special magistrate shall consider the following criteria and shall find that the criteria has been substantially satisfied and that a hardship exists:
>
> (1) Special conditions and circumstances exist which are peculiar to the land, building, or other structures for which the variance is sought and which do not apply generally to the lands, building, or other structures in the same district. Special conditions to be considered shall include, but are not limited to, the following circumstances:
>
> a. *Substandard or irregular-shaped lot.* If the site involves the utilization of an existing lot that has unique physical circumstances or conditions, including irregularity of shape, narrowness, shallowness, or the size of the lot is less than the minimum required in the district regulations;
>
> . . .
>
> (2) The special conditions and circumstances do not result from the actions of the applicant. A self-created hardship shall not justify a variance.
>
> (3) Granting the variance will not confer on the applicant any special privilege that is denied to other lands, buildings or structures in the same zoning district.
>
> (4) Literal interpretation would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the land development regulations . . . and would work unnecessary and undue hardship on the applicant.
>
> (5) The variance granted is the minimum variance that will make possible the reasonable use of the land.
>
> (6) The granting of the variance will be in harmony with the general intent and purpose of the city land development regulations, and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare.

§ 2-507(b), Code.

Here, the Special Magistrate found that Code section 2-507(b)(1)(a) was satisfied because the "property line of the lot is irregular due to right-of-way from the cul-de-sac," which was supported by the staff report submitted for the public hearing. The Special Magistrate also determined that the claimed hardship due to "the unusual shape of the lot" did not result from the property owner's actions and pre-existed ownership, satisfying Code section 2-507(b)(2). Additionally, the Special Magistrate found "[g]ranting the variance will not confer on the [property owner] special privilege denied to other lands, building or structures in the same zoning district" because any other property could seek to be granted a variance, and other properties already have garages extending to the length of the proposed carport. Moreover, the Special Magistrate found literal interpretation of the Code "would work unnecessary and undue hardship on the [Property Owner]" because it disallows "for construction of a carport which protrudes to the same extent" as other structures in the area. Relying upon the Code's variance criteria, the Special Magistrate found the variance is the minimum necessary to incorporate the carport, and "the proposed carport is in harmony with the general intent and purpose of the land development code." The Special Magistrate considered the evidence and testimony and based her findings on the existing property lines, aerial views of the surrounding area, and building plans submitted at the public hearing. Therefore, the Special Magistrate's order is supported by competent, substantial evidence.

Petitioners additionally argue that the Special Magistrate's determination of hardship was not in accordance with the essential requirements of the law on "unnecessary hardship." " 'Unnecessary hardship' has generally been defined as a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned." *Miami-Dade County v. Brennan*, 802 So. 2d 1154, 1155 n. 2 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2756b]. However, "[f]ailure to observe the essential requirements of law means . . . the commission of an error so fundamental in character as to fatally infect the judgment and render it void." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a] (quoting *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st DCA 1960)). Therefore, the Court will find that there has been a departure from the essential requirements of law only when there is "an inherent illegality or irregularity, an abuse of . . . power, [or] act of . . . tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage

of justice." *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially). Petitioners have failed to show that the Special Magistrate's ruling constituted a departure from the essential requirements of the law such that it amounts to " 'a violation of a clearly established principle of law resulting in a miscarriage of justice." *See Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983).

Conclusion

Because the Special Magistrate's order is supported by competent, substantial evidence, and did not depart from the essential requirements of law, it is

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

* * *

Licensing—Driver's license—Revocation—10-year revocation—Three prior DUI convictions—Department of Highway Safety and Motor Vehicles was authorized to revoke license based solely on three prior convictions that occurred in another state—No merit to arguments that revocation violates prohibitions against double jeopardy or ex post facto laws because those principles apply only to criminal penalties—No merit to argument that revocation violates Sixth Amendment because licensee was not represented by counsel in one out-of-state case

MICHAEL MOLITERNO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-0068AP-88B. UCN Case No. 522019AP000068XXXXCI. October 26, 2020. Counsel: Mark L. Mason, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles ("DHSMV") sustaining the revocation of his driving privilege. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

Petitioner has three prior convictions involving substance-related impaired driving since 2000. All three are from New York. On April 10, 2019, Petitioner received an order from the DHSMV informing him that his Florida driver's license was revoked, effective January 16, 2019, for a period of six months. The order referenced only one of the New York convictions. Petitioner did not seek review of that revocation. Subsequently, Petitioner received a separate order of revocation dated July 11, 2019, still with an effective date of January 16, informing him of the revocation of his driver's license for a period of 10 years, based on all three New York convictions. Petitioner asked for review of that decision, and after a hearing, the revocation was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Discussion

Petitioner asserts several arguments on appeal, none of which were raised at the hearing below. Except in instances of fundamental error, "an issue will not be considered on appeal unless the precise legal argument forwarded in the appellate court was presented to the lower tribunal." *Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc. v. Dep't of Corrs.*, 988 So. 2d 1148, 1150 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1909a]. Fundamental errors are those which go "to the foundation of the case or . . . to the merits of the cause of action." *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970).

Petitioner's main argument is that "[a]ny reasonable interpretation of [Florida Statutes] § 322.28 regarding mandatory suspensions and revocations makes it clear that such action MUST be triggered by a Florida conviction." Assuming arguendo that this would rise to the level of fundamental error, Petitioner's argument still fails. The statute states in pertinent part:

> 3. Upon a third conviction for an offense that occurs within a period of 10 years after the date of a prior conviction for the violation of the provisions of s. 316.193 . . . the driver license or driving privilege shall be revoked for at least 10 years.
>
> For the purposes of this paragraph, a ***previous*** conviction outside this state for driving under the influence, driving while intoxicated, driving with an unlawful blood-alcohol level, or any other alcohol-related or drug-related traffic offense similar to the offense of driving under the influence as proscribed by s. 316.193 will be considered a ***previous*** conviction for violation of s. 316.193 . . .

§322.28, Fla. Stat. (Emphasis added). Petitioner insists that a plain reading of the statute mandates that out-of-state convictions can only be used as one of the previous convictions that enhance the penalty; therefore, a recent Florida conviction was required in order to revoke Petitioner's license. However, Florida Statutes section 322.24 states that "[t]he department is authorized to suspend or revoke the license of any resident of the state, upon receiving notice of the conviction of such person in another state . . . of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of his or her license." Accordingly, the DHSMV could revoke Petitioner's license based on only the New York convictions.

Petitioner next asserts that the two revocations violate his constitutional protection from being punished twice for the same offense. "A double jeopardy violation constitutes fundamental error, which may be raised for the first time on appeal." *Stowe v. State*, 66 So. 3d 1015, 1016 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1503a] (citation omitted). However, double jeopardy applies only to criminal punishments. *See Hudson v. United States*, 522 U.S. 93, 99 (1997) ("The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." (Emphasis in original)). Consequently, there can be no double jeopardy violation in this case. *See Dep't Of Highway Safety And Motor Vehicles v. Brandenburg*, 891 So. 2d 1071, 1075 (Fla. 5th DCA 2004) [30 Fla. L. Weekly D358c] ("Sections 322.28 and 322.2616 are purely administrative provisions, and the requirements they impose fall within the Legislature's constitutional power to insure public safety on the highways.").

Next, Petitioner maintains the revocation violates the ex post facto clause "because the earliest conviction occurred on April 20, 2000, and the statute in effect until July 1, 2001, required that the three conditions all be within 10 years." As with double jeopardy, "the prohibition on ex post facto laws applies only to criminal or penal provisions." *Lescher v. Florida Dept. of Highway Safety & Motor Vehicles*, 985 So. 2d 1078, 1081 (Fla. 2008) [33 Fla. L. Weekly S434a]. Therefore, the ex post facto clause is inapplicable here.

Finally, Petitioner contends the ten-year revocation "violates the Petitioner's protection pursuant to the sixth amendment of the United States Constitution and article 1 section 9 of the Florida Constitution since, in the 2011 [New York] action, . . . Petitioner was not [represented] by an attorney but rather by a paralegal." This argument is without merit.

Conclusion

Based on the facts and analysis set forth above, it is

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

* * *

Insurance—Personal injury protection—Where, during pendency of appeal, district court of appeal resolved dispositive issue by holding in *Irizarry* that language of PIP statute does not preclude a PIP insurer from limiting its reimbursement to 80% of the total billed amount when amount billed is less than statutory fee schedule, circuit court remands matter to trial court with instructions to enter judgment consistent with *Irizarry*

GEICO INDEMNITY COMPANY, Appellant, v. INJURY HEALTH CENTER, LLC a/a/o Ashley Smith, Appellee. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2018 10072 APCC. L.T. Case No. 2018 10471 CODL. November 4, 2020. Appeal from the County Court, Volusia County. Counsel: Michael A. Rosenberg, Cole, Scott & Kissane, P.A., Plantation, for Appellant. Kimberly P. Simoes, Simoes Davila, PLLC, Ocala; and Douglas H. Stein, Coral Gables, for Appellee.

OPINION OF THE COURT

This matter came before the Court in its appellate capacity for review of the "Order Granting Plaintiff's Motion for Summary Disposition, Denying Defendant's Motion for Final Summary Disposition and Final Judgment in Favor of Plaintiff" ("Final Judgment") rendered by the County Court on September 13, 2018 in favor of Plaintiff/Appellee, Injury Health Center, LLC a/a/o Ashley Smith. While this matter was pending on appeal before this Court, the Fifth District Court of Appeal definitively resolved the dispositive issue presented by this appeal in favor of Appellee, GEICO Indemnity Company. *See GEICO Indemnity Co. v. Accident & Injury Clinic a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b]. The Fifth District's decision in *Irizarry* is binding on this Court and mandates a reversal of the trial court's judgment.

Accordingly, the trial court's Final Judgment is REVERSED, and this matter is REMANDED with instructions that the trial court vacate said Final Judgment and enter a judgment consistent with the decision of the Fifth District Court of Appeal in *Irizarry.* Appellee's Motion for Attorney's Fees is hereby DENIED. (MICHAEL S. ORFINGER, and KATHRYN D. WESTON, JJ.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Odor of alcohol and red bloodshot eyes were insufficient to establish probable cause for DUI arrest—Petition for writ of certiorari is granted

GERALD CARTER MCCORMICK, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2020 10430 CIDL. October 25, 2020.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(KATHRYN D. WESTON, J.) On January 16, 2020, Petitioner was arrested without a warrant and his driving privileges were suspended for one year for refusal to submit to a breath test under Section 322.2615, Fla. Stat. This court has carefully considered the record including the body camera footage, the pleadings in this cause and oral arguments of the parties and finds as follows:

STANDARD OF REVIEW

In *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a] the Supreme Court of Florida explained the applicable standards of review:

> It is crucial to recognize that there is a true and important distinction between the standards of review conducted by circuit courts upon first-tier certiorari review and that of district courts upon second-tier certiorari review. This Court has repeatedly explained that upon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. In presenting this three-part standard of review for the circuit court, this Court has further emphasized that as a case travels up the judicial ladder, review should consistently become narrower, not broader.

Wiggins, 209 So.3d at 1174 (internal citations and emphases omitted).

Here the key question is whether the administrative findings and judgment were supported by competent, substantial evidence.

COMPETENT SUBSTANTIAL EVIDENCE STANDARD

Petitioner argued that *Wiggins* clarified the correct manner of applying the competent, substantial evidence standard. In this regard *Wiggins* notes:

> [F]irst-tier review under this particular statute demands a close review of the factual record to determine whether the hearing officer's findings were supported by competent, substantial evidence and whether the essential requirements of the law were applied. Some consideration of the evidence is inescapable in the competent, substantial evidence determination. These are legal questions that call for an unbiased review, rather than being solely left to the discretion of a hearing officer who is actually employed by the Department. While a policy that provides deference to the agency fact-finder may be appropriate in special areas such as zoning or policy decisions, which involve concepts that require a certain level of expertise that can be provided by a nonlawyer, the same does not hold true for the questions of constitutional law that arise under section 322.2615. It is no wonder, then, that the Legislature created a statute to tailor review for this narrow situation.
>
> *Wiggins,* 209 So.3d at 1172 (internal citations omitted).

The Court finds that *Wiggins* does indeed clarify that a "close review of the factual record" is appropriate. Further, *Wiggins* requires that the deference due a Department hearing officer on issues of constitutional law on first tier review is distinguishable from that in certain other certiorari situations, such as zoning issues. The Florida Supreme Court also stated;

> Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent, substantial evidence must be reasonable and logical. It follows that a competent, substantial evidence analysis demands an honest look at the evidence available. Otherwise, we are asking judges to simply parrot the findings of the hearing officer, thus reducing the task of a constitutional judge to providing a predetermined stamp of approval. To hold that a judge on first-tier certiorari review must accept testimony that, as here, is clearly contradicted and totally refuted by objective video evidence, would be an injustice to Florida drivers. The law under section 322.2615 is not designed to protect the decision of the hearing officer, but to preserve due process and justice. The Legislature clearly intended that the circuit court conduct a meaningful review of the record. Whether a right or a privilege, driving is no doubt an important facet in the lives of Florida citizens. The law is designed and intended to protect that significant interest, not exploit it.
>
> *Wiggins,* 209 So. 3d at 1172 (internal citations omitted).

The *Wiggins* Court noted that there was difference between the weight and sufficiency of the evidence stating, "sufficiency tests the adequacy and credibility of the evidence, whereas weight refers to the balance of the evidence". *Wiggins* is the most recent opinion of the Florida Supreme Court discussing the standards of review applicable to the pending issues. In a prior case, *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a], the First District Court of Appeals noted that "the circuit court is not permitted to reweigh the evidence." That court found that evidence that gives equal support to inconsistent

inferences is not sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached. This Court is cognizant that it is not permitted to reweigh the evidence.

THE RECORD

The relevant portion of the Findings of Fact by the Department Hearing Officer succinctly states:

> I find that the following facts are supported by a preponderance of the evidence: On January 16, 2020, Deputy James of Volusia County Sheriff's Office, responded for a traffic crash investigation. Deputy James made a contact with the Petitioner, who admitted that he was the driver. Deputy James noted the smell of an alcoholic beverage coming from the Petitioner. Deputy James also noted that the Petitioner's eyes were slightly bloodshot and red. The Petitioner refused to cooperate with Deputy James and was subsequently arrested for DUI.

The findings of the Hearing Officer are consistent with the Arrest Report. The Arrest Report prepared by Deputy James refers to the Crash Report which was prepared by an officer with the Deland Police Department. The Crash Report was not, however, submitted for inclusion in the record as authorized by Section 322.2615(2)(b), Fla. Stat. A DUI Report completed by Deputy James and submitted as evidence states that the Petitioner refused a Horizontal Gaze Nystagmus exercise, a Walk and Turn exercise, and a One Leg Stand Exercise. As set forth below this statement is inconsistent with the videotape evidence.

Petitioner subpoenaed the arresting officer Deputy James to testify at the formal review. Deputy James testified that he did not personally do the crash investigation. Deputy James testified that McCormick's speech was "pretty good" and not slurred. Deputy James also testified that McCormick had no noticeable balance problems. Deputy James initially testified that McCormick refused the Field Sobriety Tests. Upon further questioning, Deputy James conceded that he had not "directly" asked McCormick if he would participate in any Field Sobriety Tests because the Petitioner had refused to answer any questions after being read his Miranda rights.

The body camera footage was submitted by the Petitioner at the Formal Review and filed as part of the record on certiorari review. As noted by this Court, the footage establishes that some of the statements that Deputy James attributed to witnesses were misleading. When Deputy James read McCormick his Miranda rights, McCormick did choose to not respond to Deputy James' questions. Despite this, Deputy James continued to question McCormick and deemed McCormick's invocation of his rights to be a lack of cooperation.

LEGAL DISCUSSION

Petitioner argued that a close, honest review of the record consistent with *Wiggins* establishes a lack of substantial, competent evidence to support a legal conclusion that there was objective probable cause to arrest. Probable cause to arrest must be determined upon objective facts available to police officers at the time of arrest *Esposito v. Williamson,* 854 So.2d 694,695 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1735b]. The officer's legal conclusion on the issue of probable cause or reasonable suspicion is not binding on the Hearing Officer or this Court, *Hernandez v. State,* 784 So.2d 1124,1128 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1633b]. The constitutionality of a seizure under the Fourth Amendment must be determined by applying an objective standard, see *Hernandez*; *Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles,* 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a] (reinstating a circuit ruling invalidating a suspension based upon a lack of competent, substantial evidence to support a traffic stop on an objective basis). This Court must apply an objective standard consistent with *Dobrin* and *Wiggins.* The Petitioner has cited many decisions supporting the position that an odor of alcoholic beverage combined with slightly, red blood shot eyes may indicate alcohol consumption but do not establish probable cause of alcohol impairment absent additional factors not present in this record. *See, e.g., State v. Kliphouse,* 771 So.2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. In this case, too, the two indicia (odor of alcohol and red, bloodshot eyes) are insufficient to satisfy the competent, substantial evidence standard.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. The Petition for Writ of Certiorari is **GRANTED**;

2. The Order sustaining/affirming the suspension of Petitioner's driving privilege entered by Respondent is **QUASHED**;

3. This cause is remanded with directions to the Respondent to invalidate the suspension at issue; see *Dep't of Highway Safety & Motor Vehicles v. Azbell,* 154 So.3d 461, 462 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D108c].

* * *

Criminal law—Driving under influence—Evidence—Blood test—Trial court erred in finding that urine or breath test was not impractical or impossible for defendant who was transported to hospital following crash—Breath or urine test was impractical where defendant was bleeding profusely from his head and had swollen leg, officer was advised that defendant would be receiving CT scan, officer did not have Intoxilyzer with him and had never known a hospital to have one, and urine test would not have accurately detected defendant's blood alcohol content—Trial court further erred in suppressing blood test results for failure to comply with requirements of implied consent law where law did not apply to defendant who voluntarily consented to blood draw

STATE OF FLORIDA, Appellant, v. RORY AMOS JOSHUA JACOBS, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2020-AP-l-AO. L.T. Case No. 2019-CT-630-AE. December 14, 2020. Appeal from the County Court, for Orange County, Florida, Andrew Cameron, County Judge. Counsel: Merrilyn Elise Hoenemeyer, Assistant State Attorney, for Appellant Jerry Jenkins, for Appellee.

(Before ADAMS, CRANER, and LEBLANC, JJ.)

AMENDED [1] ORDER REVERSING TRIAL COURT

(PER CURIAM .) Appellant, the State of Florida appeals the Order Granting Defendant's Motion to Suppress the results of Appellee/Defendant' s blood test entered on January 13, 2020. This Court has jurisdiction under section 26.012(1), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(l)(B).

Facts

The trial court made the following findings of fact after the hearing on Appellee's Motion to Suppress:

On April 21, 2019, a vehicle crash occurred on State Road 414 and Maitland Summit Ave, in Maitland, Florida, between Appellee, who was driving a pickup truck, and a driver of a Jeep. Officer Kevin Liebknecht of the Maitland Police Department responded to the crash and noticed that both vehicles had severe damage. Officer Liebknecht spoke to witnesses of the crash and conducted an inventory search of Appellee's vehicle, which revealed a six-pack of Coors Light with one empty bottle and two bottles cold to the touch.

A "wheel witness" placed Appellee behind the wheel of his vehicle at the time of the crash. Paramedics told Officer Liebknecht that Appellee "reeked" of alcohol and they believed him to be intoxicated. The officer concluded that Appellee was not at fault for the crash and issued a citation to the other driver.

Appellee was then transported to the hospital due to the injuries from the crash. Officer Liebknecht went to the hospital to conduct a crash and a DUI investigation. The parties did not dispute that Appellee appeared for treatment at a hospital for injuries sustained in the crash. While at the hospital, Officer Liebknecht entered Appellee's room and observed Appellee to have a bandage on his forehead,

blood on his shirt and face, and appeared to have a swollen left leg. The officer also noticed that Appellee had bloodshot and glassy eyes, slurred speech, and the odor of alcohol on his breath. Officer Liebknecht read Appellee *Miranda*[2] rights, after which Appellee admitted to drinking a few Miller Light beers.

Hospital staff advised Officer Liebknecht that a head CT scan on Appellee had been ordered. The officer did not inquire how long it would take to complete the scan, nor how long it would be until Appellee was released, but testified that he believed Appellee would not be released any time soon. Officer Liebknecht also did not request that Appellee perform field sobriety exercises, nor did he request that Appellee submit to a breath or urine test.

Officer Liebknecht then read Appellee the first four lines from an agency-issued Implied Consent card to obtain a blood draw. He could not recall the exact words from the card. Appellee consented to the blood draw. Because Appellee consented, the officer read no further, per the card's instructions.

Officer Liebknecht then requested hospital staff to conduct a blood draw from an agency-issued blood kit provided to the officer by his supervisor. The officer watched while an unidentified hospital staff member, whom he believed to be a registered nurse, took a blood sample from Appellee using only the items from the kit. Officer Liebknecht could not identify the name of the individual nor his or her training or experience. He could only recall that she had a hospital nametag with a badge bearing the letters, "RN."

Arguments on Appeal

First, Appellant argues that the lower court' s finding that a urine or breath test was not impractical or impossible was not supported by the facts introduced at the hearing and case law. Appellant indicates that because Officer Liebknecht only suspected that Appellee was under the influence of alcohol, a urine test was not practical or relevant.

Appellant further asserts that absolute certainty of how long a defendant is going to be in the hospital or what treatment he is going to receive is not a requirement imposed by most courts. Appellant contends testimony that a defendant is merely going to need some kind of additional treatment before being discharged has been found to be enough to show a breath or urine test was impractical or impossible.

In addition, Appellant claims pursuant to *Lemell v. State,* 15 Fla. L. Weekly Supp. 791a (Fla. 17th Cir. Ct. May 19, 2008), courts allow reasonable assumptions to be made by the officer regarding the length of time a defendant is going to be in the hospital. Appellant argues that if a breath or urine test is skipped for mere convenience, then courts will not find them to be impractical or impossible, as found in *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988).

Appellant argues that in the present case, there is evidence from the testimony of Officer Liebknecht to establish that a breath test would be impractical or impossible. First, there was testimony regarding the severity of Appellee's injuries, including that he had extensive bleeding from his head and was taken in an ambulance to the hospital. Once Appellee arrived at the hospital, he was placed in a private room. Appellant asserts that Appellee's location in a private hospital room not only shows that a significant passage of time between when Appellee arrived at the hospital and when the officer arrived, but it also shows that Appellee was going to receive more than just cursory treatment. Appellant contends that when Officer Liebknecht was at the hospital, he learned that there was at least one additional test Appellee was going to receive, which was a CT scan, and he also noticed one of Appellee's legs was swollen. Appellee needed additional treatment before he could be released, and the officer testified that based on his experience and the hospital failing to provide a timeline, Appellee was not going to be discharged any time soon. Appellant argues that if it reasonably appears from the circumstances that the defendant is likely to be at the medical facility for some time, and there is no practical way to take a breath test at the hospital, a blood sample may be secured because a breath test is impractical or impossible .

Appellant asserts that in the present case, the officer also testified that he had never heard of a hospital with an Intoxilyzer and he did not have one with him, and moreover, there was no readily available Intoxilyzer or a certified technician. Appellant further contends that the blood test in the present case was not done for mere convenience and was not done without any knowledge of Appellee's condition. Appellant concludes that based on the totality of the circumstances, including Appellee's swollen leg, his head injury, the lack of an Intoxilyzer, and the need for additional treatment with no timeframe of when treatment would begin, the trial court's finding that there were no facts to support Officer Liebknecht's conclusion that a breath test was impractical or impossible was not supported by competent, substantial evidence and therefore should be overturned.

In contrast, Appellee argues that the trial court's finding that a breath or urine test was not impractical or impossible was supported by competent, substantial evidence. Appellee also disagrees with Appellant's assertion that a urine test is only applicable if a defendant is suspected of using controlled substances, and maintains that such an assertion is not supported by section 316.1932(1)(c), Florida Statutes (2019), or case law.

Appellee asserts that Officer Liebknecht did not have professional knowledge regarding how long a CT scan would take, that he only relied on his personal knowledge in coming to the conclusion that a CT scan would take "awhile," and that he failed to inquire as to how long the CT scan would take. Appellee also maintains that he was awake, alert, answering Officer Liebknecht's questions, was ambulatory, and was not restrained in the hospital room. Appellee had a leg that was a "little swollen." Appellee also relies on *Frazier v. State,* 530 So. 2d 986 (Fla. 1st DCA 1988), for the proposition that a breath test administered five hours after the offense was done in a reasonable time.

Appellee further contends that Appellant failed to show that an Intoxilyzer was not present at the hospital. He argues that Officer Liebknecht did not inquire whether there was an Intoxilyzer, but instead "practiced willful blindness as to whether it was possible to collect a sample at the hospital . . . [and] by not inquiring into the Appellee's . . . treatment and release status." Appellee maintains that Appellant failed to present sufficient evidence that a breath or urine test was impractical or impossible. Thus, he argues, the trial court's finding that a breath or urine test was not impractical or impossible should be affirmed.

Appellant's next argument on appeal is that the trial court applied the wrong legal standard when it held that for a blood test to be considered voluntary, the defendant must be told that it is offered as an alternative to a breath or urine test. Appellant claims that if a defendant voluntarily consents to the blood test, "then the blood test falls wholly outside the scope of implied consent law ." *Robertson v. State,* 604 So. 2d 783, 790 (Fla. 1992).

Appellant asserts that the Fifth District Court of Appeal determined in *State v. Murray,* 51 So. 3d 593, 596 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b], that there is no requirement that a defendant be told a blood test is an alternative to a breath or urine test in order for the defendant's consent to be knowing ly and voluntarily made.

Moreover, Appellant indicates that although Officer Liebknecht testified that he read Appellee the "implied consent," it is clear that what he meant was that he read from his agency issued "implied consent card." Based on Officer Liebknecht's testimony, the card has two parts, with directions to stop reading after the first few lines and

only to read part two if the response to the first part is a "no." Officer Liebknecht also testified that the second part contains the penalties applicable to implied consent and the first part is a general request to submit to a blood test. Appellant claims that the first part therefore falls under voluntary consent. Appellant argues that if Appellee consents after reading part one of the card, then that consent would fall under voluntary consent, even though the officer was reading from an implied consent card, because no penalties were read to Appellee.

Appellant maintains courts look to the totality of the circumstances, rather than one factor to determine if a defendant's consent is made knowingly and voluntarily, and that Appellee voluntarily consented to the blood test based on the following factors: before Officer Liebknecht began his criminal investigation, he read Appellee *Miranda* rights; testimony from the officer does not indicate a lack of voluntariness; he was the only officer in the room when he made the request; Appellee was not told he was under arrest; Appellee was not restrained; he made the request in a calm manner; he did not threaten Appellee or raise his voice; and Appellee consented, knowing his rights. Furthermore, Appellant points out that Appellee was never told of any consequences for refusing to submit to a blood test. For instance, he was never told that his license would be suspended or that his refusal could be used as evidence of guilt in court. Based on the testimony, Appellant argues, there is no indication that Appellee's consent was not freely and voluntarily made.

Additionally, Appellant asserts that the law does not support the trial court's finding that the officer's failure to read the consequences made Appellee's consent involuntary. Appellant further argues that the trial court's reliance on *Chu* is misplaced because there is no requirement that Appellee be told the blood test is an alternative to a breath or urine test for the consent to be voluntary. Thus, Appellant maintain s, Appellee voluntarily consented to the blood draw, and the court's application of the law to the facts in this case was clear error and should be overturned.

However, Appellee maintains the trial court correctly found that his consent was not knowingly and voluntarily made. He argues that pursuant to *Chu,* consent is deemed knowingly and voluntarily made if Appellee was fully informed that the implied consent requires submission only to a breath or a urine test and the blood test is offered as an alternative. Appellee asserts that whether consent is knowingly or voluntarily made is based on the totality of the circumstances such as the time and place of the encounter; number of officers present; the officer's words or actions; age and maturity of Appellee; Appellee's prior offenses; Appellee's execution of a written consent form; and whether Appellee was informed of his right to refuse consent; and the length of time of the interrogation.

He argues that Officer Liebknecht did not inquire for voluntary consent. Rather, Appellee states that the officer read from an implied consent card and did not read any administrative or criminal penalties. Nor did the officer tell Appellee that the blood test was voluntary and an alternative to a breath or urine test. Because Officer Liebknecht could not remember the exact wording of the card he read from, Appellee assumes that the card stated, "Under Florida Law you are required to submit to a blood test to determine the alcohol content of your blood. Will you submit to the test?" based on *State v. Iaco,* 906 So. 2d 1151 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1556a]. Appellee contends that in the instant case, even if the penalties were omitted, the officer was reading implied consent and invoked the Implied Consent law, which required the officer to inform him that a blood test was in the alternative to a breath or urine test. He also indicates that Officer Liebknecht failed to obtain written consent from him. Appellee asserts that the trial court considered the totality of the circumstances to find that voluntary consent was not given, including that he was not fully informed about the blood draw being under voluntary consent as opposed to implied consent; the fact that the implied consent card was not introduced into evidence; and that the officer could not recall exactly what words were used to request the blood sample or whether he read consequences for refusing to submit a blood sample. Therefore, he argues that the court's findings were supported by competent, substantial evidence, and the order suppressing the blood test results should be affirmed.

Standard of Review

Upon appellate review, "[a] trial court's ruling on a motion to suppress is presumed to be correct." *Brown v. State,* 719 So.2d 1243, 1245 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2295a]. The trial court's findings of fact must be supported by competent, substantial evidence. *State v. Liles,* 191 So. 3d 484, 486 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D892a]. This Court defers to the trial court's findings of fact, unless they are clearly erroneous *(Pantin v. State,* 872 So.2d 1000, 1002 (Fla. 4th DCA 2005) [29 Fla. L. Weekly D1161b]), and reviews *de novo* the trial court's application of law to the facts. *Liles,* 191 So. 3d at 486 (citing *Delhall v. State,* 95 So.3d 134, 150 (Fla. 2012) [37 Fla. L. Weekly S468a]).

Analysis

Regarding the first issue on appeal, this Court finds that the trial court erred in finding that a breath or urine test was not impractical or impossible. Section 316.1932(1)(c), Florida Statutes, otherwise known as the "Implied Consent Statute" reads:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section *if there is reasonable cause* to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances *and the person appears for treatment at a hospital,* clinic, or other medical facility *and the administration of a breath or urine test is impractical or impossible*.

(emphasis added.)

The Fifth District Court of Appeal has held that the impractical or impossible requirement for a breath or urine test means that a "breath or urine test would have been statutorily permissible . . . but for the inability to administer these tests." *State v. Hilton,* 498 So. 2d 698, 700 (Fla. 5th DCA 1986).

Florida Courts have typically held that when a defendant is transported to a hospital for injuries, it is impractical or impossible for an officer to request a breath or urine test. For example, in *Maingot v. State,* 15 Fla. L. Weekly Supp. 425a (Fla. 9th Jud. Cir. Ct. Jan. 15, 2008), this Court, acting in its appellate capacity, determined that a hearing officer had sufficient facts to find that a breath or urine test was impractical when an injured defendant was transported to the hospital, read his *Miranda* rights, and admitted to drinking alcohol. *See also State v. Renwick,* 7 Fla. L. Weekly Supp. 406a (Fla. 11th Jud. Cir. Ct. Apr. 4, 2000) (holding that the breath test was deemed impractical due to the extent of the defendant's possible injuries from a crash and because it was recommended that the defendant be transported to the hospital, and finding that law enforcement officers should err on the side of caution, deferring to medical personnel in determining the practicality of obtaining a breath test); *Stocker v. State* 10 Fla. Weekly Supp. 487a (Fla. 19th Jud. Cir. Ct. Apr. 21, 2003) (holding that a breath or urine test was impractical when the defendant was transported to the hospital for treatment, the officer believed the defendant was driving under the influence of alcohol, the officer testified that a urine test was used primarily for drugs, and neither the

hospital nor the officer possessed an Intoxilyzer machine); *Murphy v. Florida DHSMV*, 24 Fla. L. Weekly Supp. 782a (Fla. 6th Jud. Cir. Ct. Dec. 6, 2015) (finding that a breath or urine test was impractical or impossible due to the delay of time from the crash and the fact that the trooper did not know if the defendant would be admitted to a hospital).

In the present case, Appellant presented evidence that a breath or urine test would have been impractical. Testimony revealed the following facts: Appellee was driving his vehicle at the time of the crash; he emitted the odor of alcohol from his breath at the crash site; a six pack of beer, including an empty bottle, was recovered during the search of his vehicle; and he was transported to the hospital. These facts are analogous to those present in other cases where courts have determined that it would be impractical to conduct a breath or urine test. The trial court found that Appellant established through competent, substantial evidence that Officer Libeknecht had reasonable cause to believe that Defendant was driving a motor vehicle while under the influence of alcohol or controlled substances. Additionally, at the hospital, Officer Liebknecht noticed Appellee had bloodshot and glassy eyes, slurred speech, and emitted an odor of alcohol on his breath.

The trial court found it was undisputed that Appellee appeared for treatment at a hospital for injuries sustained in the crash. Record evidence also showed that the officer in the instant case knew Appellee would be receiving a CT scan, was bleeding profusely from his head, with blood "all over" his shirt, and had a swollen leg. This is enough information for the officer to reasonably conclude that transferring Appellee to a breath test center would not occur soon. The trial court disregarded the officer's testimony that he did not have a breath test with him, nor had he ever known of a hospital to have a breath test, and that he typically takes suspects to a DUI center. To require a law enforcement officer to inquire further into Appellee's specific medical treatment, diagnosis, or release status when he already had information that reasonably led him to believe Appellee would be held further that night is not supported by the statute or case law. These facts support the officer's conclusion that a breath test would have been impractical.

Although the trial court also overlooked this fact, Officer Liebknecht testified that a urine test would not have accurately detected the blood alcohol content in Appellee's system, so he did not request one. Thus, a urine test was impractical. Furthermore, even if a urine sample would have accurately measured Appellee's blood alcohol content, it was reasonable for the officer to conclude that it would have been impractical for Appellee with a head injury and a swollen leg to walk to a bathroom in order to submit a urine sample.

Contrary to the trial court's findings, we find Appellant met the criteria for implied consent under section 316.1932(1)(c), and we therefore must reverse.

Regarding the second issue raised on appeal, this Court finds that the trial court erred in holding that Officer Liebknecht was required to inform Appellee of the consequences for failing to provide a blood sample and that the blood sample was in the alternative to a breath or urine sample.

Appellee relies on *Iaco* for the proposition that because Officer Liebknecht read from an implied consent card, the Implied Consent statute was invoked. We find that reliance misplaced. The court in *Iaco* considered two cases where both defendants voluntarily consented to breath tests after being read implied consent statutes where the law enforcement officers omitted penalties pursuant to agency policies. 906 So. 2d at 1152-53. The *Iaco* court held that "administrative and criminal consequences apply *only if the defendant refuses* the breathalyzer test. *When the defendant consents to the test, those consequences do not apply.* Thus, failing to be advised of them does not warrant suppressing the test results." *Id.* at 1153 (emphasis added). *Iaco* involved a breath test and its ruling does not support Appellee's argument. *See also State v. Dubiel,* 958 So. 2d 486, 488 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1338a] (finding that where the officer read the defendant *Miranda* rights, requested a blood sample, and did not advise the defendant of the consequences for failing to consent, the defendant consented, and the court held that failing to advise of the consequences of refusing a blood test does not warrant suppression of the results in a criminal proceeding).

Appellee also relies on *Chu.* However, the facts in the instant case are also distinguishable from *Chu,* which held that,

> [C]ircumstances may occur where it is *more convenient* for a person to submit to a blood test rather than a breath or urine test. *Under such circumstances* we see no reason to exclude a voluntary blood test provided the person has been fully informed that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative. The key to admissibility is that the consent must be knowingly and voluntarily made and not as the result of the acquiescence to lawful authority.

521 So. 2d at 332. (Emphasis added.)

In *Chu,* the officer requested a blood draw at the scene of the crash because the paramedics were present and the officer thought it would be easier to test the defendant. *Id.* at 331. There was no question that the defendant was not going to be transported to the hospital because there were no injuries. *Id.* In the instant case, Appellant presented evidence that a blood test was not merely more convenient. Rather, due to Appellee's injuries and further treatment at the hospital, that the officer did not have a breath test with him, nor was he aware of any hospital having breath tests, a breath or urine test would have been impractical or impossible. In addition, there was no record evidence to suggest that Appellee's consent was coerced, forced, or based upon misinformation from the officer. Appellant presented evidence that Appellee's consent was voluntary. Officer Liebknecht was the only officer in the room, and he did not yell, threaten, or coerce Appellee. In addition, the officer did not tell Appellee that if he did not submit to a blood test, his license would be suspended. The officer did not read any penalties to Appellee. The record testimony reflects that the officer requested Appellee to submit to a blood draw and Appellee consented. Had Officer Liebknecht informed Appellee of consequences for failing to provide a blood sample, it would have affected the voluntary nature of Appellee's consent. *See State v. Slaney,* 653 So.2d 422, 430 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D717b] ("[W]here, as here, a DUI arrestee consents to a blood withdrawal after being improperly advised that he will lose his driver's license if he fails to give such consent, the ensuing consent is involuntary in nature because it was induced by a misrepresentation."). Thus, the facts of *Chu* and its holding are inapplicable.

Appellant relies on *Murray* and its holding that because the defendants consented to the blood draw, the trooper was not required to inform them that the blood test was in the alternative to a breath or a urine sample. 51 So. 3d at 596. However, *Murray*'s facts are distinguishable from the instant case. In *Murray,* the troopers determined that they lacked probable cause to arrest either defendant for DUI. *Id.* at 594. Nevertheless, the troopers asked the defendants to voluntarily provide blood samples. *Id.* The defendants consented although no implied warnings were given. *Id.* The court held that under these facts, section 316.1932(1)(c) was not implicated because the test was done outside the scope of the implied consent law. *Id.* at 595. Therefore, the court found that the consent was voluntary and the results should not have been suppressed. *Id.* at 596.

Although *Murray*'s facts and holding are inapposite to the present case, it does not affect our ruling. In *State v. Meyers,* 261 So. 3d 573, 574 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b] a law enforcement officer observed the defendant drive erratically and crash into a

median. *Id.* The officer apprehended the defendant after he fled on foot. *Id.* The police report noted that the defendant was slurring his words, had red, bloodshot, watery eyes, and his breath smelled of alcohol. *Id.* The defendant was then transported to the hospital because of injuries he sustained while fleeing on foot. *Id.* Once the officer arrived at the hospital, he immediately requested a blood test, without ascertaining how long the defendant would be hospitalized, and without informing the defendant that the implied consent law only requires submission to a breath or a urine test and that a blood test is offered as an alternative. *Id.* The defendant voluntarily consented. *Id.* The court held that because the defendant consented to the blood test and nothing in the record indicated that his consent was involuntary, Florida's implied consent law did not apply. *Id.* It ruled that the trial court erred in suppressing the blood test results for failure to comply with the provisions of the implied consent law. *Id.* at 574-75. The court noted that the Florida Supreme Court has explained that if a defendant expressly consents to a blood test, "then the blood test falls wholly outside the scope of the implied consent law." *Id.* at 574 (quoting *Robertson v. State,* 604 So. 2d 783, 790 (Fla. 1992)).

The facts in the instant case are analogous to *Meyers.* Just as in *Meyers,* Officer Liebknecht did not inquire into how long Appellee would be hospitalized and did not advise Appellee that the blood test was in the alternative to a breath or urine test. *Id.* Nonetheless, the blood results should have been admitted because Appellee voluntarily consented, as the defendant did in *Meyers. Id.*

Case law does not support the trial court's finding that Officer Liebknecht was required to inform Appellee of the consequences for failing to provide a blood sample and that a blood test was an alternative to a breath or urine sample. Therefore, this Court finds that the trial court erred in finding Appellee's consent was involuntary because the officer failed to advise Appellant on the consequences of refusing to submit to a blood test and that the blood test is offered as an alternative to a breath or urine test.

The trial court's finding that Appellee's consent was neither voluntary, nor was it valid under the Implied Consent statute was not supported by competent, substantial evidence. Accordingly, we hold that the trial court erred in granting Appellee's Motion to Suppress.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the "Order Granting Defendant's Motion to Suppress," dated January 13, 2020, is **REVERSED AND REMANDED**.

No motions for rehearing will be considered.

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[1]This Court entered its initial Order on December 1, 2020, and it made the following statement within its analysis on page nine: "Regarding the first issue on appeal, this Court finds that the trial court erred in finding that a breath or urine test was impractical or impossible." This Order corrects the typographical error in the aforementioned sentence to read, "Regarding the first issue on appeal, this Court finds that the trial court erred in finding that a breath or urine test was *not* impractical or impossible." (Emphasis added.) The ruling contained in this Order otherwise remains undisturbed.

[2]*Miranda v. Arizona,* 384 U.S. 436 (1966).

* * *

Insurance—Personal injury protection—Language of PIP statute does not preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule

GOVERNMENT EMPLOYEES INSURANCE COMPANY, Appellant, v. SACOWI MEDICAL CLINIC, LLC (a/a/o Herronda Mortimer), Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CV-000005-A-0. L.T. Case No. 2017-SC-011031-O. November 30, 2020. Appeal from the County Court for Orange County, Florida, David P. Johnson, County Judge. Counsel: Louis Schulman, for Appellant. Chad A. Barr, for Appellee.

(Before HARRIS, MARQUES, BLACKWELL, JJ.)

ORDER REVERSING TRIAL COURT

(JENNIFER M. HARRIS, J.) Government Employees Insurance Company ("Appellant") timely appeals the trial court's "Final Judgment" in favor of Sacowi Medical Clinic, LLC ("Appellee"), entered on December 12, 2018.This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A).[1]

RELEVANT FACTS AND PROCEDURAL HISTORY

The underlying action stems from an automobile accident that occurred on or about October 19, 2016, in which Appellant's insured, Herronda Mortimer ("Insured"), sustained injuries. Insured sought health care services from Appellee, and she assigned her PIP benefits to Appellee, who ultimately billed Appellant for medical services provided to Insured. Appellant applied 20% of Insured's coinsurance for the billed amount charges and paid the remaining 80%.

On June 12 2017, Appellee filed its single count complaint, alleging Appellant breached its contract in failing to fully reimburse Appellee pursuant to the terms of Appellant's PIP policy. Appellant filed its amended answer and demand for jury trial on July 27, 2018.

Appellee filed its motion for summary judgment on February 6, 2018, arguing that Appellant should not have applied Insured's 20% co-insurance to the billed amount charges, and therefore, Appellant was responsible to reimburse the entire billed amount charge.[2] In support of its motion, Appellee relied on a federal trial court order.[3] The trial court heard the motion on December 21, 2018, and it entered summary judgment and final judgment in favor of Appellee that same day. In so doing, the trial court concluded that Appellant was required to pay 100% of charges that were less than the schedule of maximum charges, rather than 80% pursuant to the terms of Appellant's PIP policy and Florida's PIP statute, section 627.736, Florida Statutes, and in effect waiving Insured's 20% coinsurance obligation. Appellant filed its timely notice of appeal on January 17, 2019, thus contesting the trial court's determination that Appellant's policy requires it to pay 100% of the billed charges that are less than the schedule of maximum charges and resulting in the instant appeal.

STANDARD OF REVIEW

An order granting final summary judgment is reviewed *de novo. Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Additionally, the question presented to the Court concerns interpretation of the PIP statute, as well as a PIP insurance policy, which are also subject to *de novo* review. *Geico Gen. Ins. Co. v. Virtual Imaging Svs.,* 141 So. 3d 147, 152 (Fla. 2013) [38 Fla. L. Weekly S517a].

ANALYSIS AND RULING

Appellant raises two issues on appeal, the first of which is easily disposed. Appellant first contends that Appellee failed to prove any damages, thus warranting a dismissal of its claim. On January 10, 2020, Appellee filed its "Confession of Error," wherein it stated that it confessed error as to this point only, agreed to vacation of the final summary judgment in its favor, and indicated that the matter must be remanded to the trial court for further proceedings. The Court therefore reverses and remands on this issue.

The second issue before this Court is narrow: whether Appellant's Insured is subject to the 20% coinsurance provision of Appellant's policy and section 627.736(1)(a), Florida Statutes, when the provider's billed amount is less than 200% of the Medicare Part B schedule. The Fifth District Court of Appeal recently determined this exact issue in *Geico Indem. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry),* 290 So. 3d 980 (Fla. 5th DCA 2019)[44 Fla. L. Weekly D3045b] ("*Irizarry*"), and found that the insurance company's methodology of reimbursing 80% of a billed amount charge, with the provider responsible to collect the insured's 20% coinsurance, was in accordance with Florida's PIP statute. Because the *Irizarry* ruling concerns the exact same issue and the exact same policy language, it is dispositive in this case, and we must reverse. *See*

Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (finding that the decisions of Florida district court bind all Florida trial courts, absent an inter-district conflict).

In *Irizarry,* the Fifth District framed the procedural history and the legal issues in the following manner:

> Geico appealed the final order to the circuit court, arguing—as it had in the county court—that it was not required by its policy language to or by the statute to pay more than 80% of the billed amount, even if the billed amount was less than the schedule of maximum charges as listed in its policy or the statute. The circuit court agreed with Geico that its policy did not unambiguously require full payment of the billed amount. However, the circuit court affirmed the county court's ruling on the basis that the plain language of section 627.736(5) precluded the insurer from reducing the reimbursement amount. Specifically, the circuit court noted:
>
> [T]he controlling PIP provision specifically provide[s] that if elected the insurer would pay BA charges: "If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted." Florida Statutes, Section 627.736(5)(a)5. There is nothing in this statutory language which allows an insurer to limit the BA payment to 80%.

290 So. 3d at 982-83. When Geico brought the issue before the Fifth District on certiorari review, the court was then tasked with determining whether the trial court had departed from the essential requirements of the law when it found that the insurance company's policy limits reimbursement of a billed amount charge to 80% of the provider's charge, but disagreed with the insurance company that the PIP statute permitted such a limitation.[4] *Id.* Specifically, the district court sought to answer the question, "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" *Id.* at 983. Ultimately, the Fifth District answered in the negative and agreed with Geico and found that Geico's PIP policy properly limited reimbursement to 80% of the billed amount charge. *Id.* at 984.

This Court is bound to follow the precedent set in *Irizarry*, as it is the only district court of appeal that has analyzed the identical issue in this case, that is, whether Appellant is allowed to limit reimbursement to 80% of the billed amount charge. However, the trial court in this case came to the opposite conclusion reached in *Irizarry.* The Court notes that the trial court did not have the benefit of the *Irizarry* decision, as that decision was handed down after the trial court rendered its ruling. However, "Florida's pipeline rule requires that disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." *N. Broward Hosp. Dist. v. Kalitan,* 174 So. 3d 403, 412 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1531a] (citing *Hendeles v. Sanford Auto Auction, Inc.,* 364 So. 2d 467, 468 (Fla. 1978)) (internal quotations omitted). To that end, we must reverse the trial court's ruling in favor of Appellee.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment," entered on December 21, 2018, is **REVERSED and REMANDED** for further proceedings consistent with this opinion. Appellee's Motion for Award of Appellate Attorney's Fees and Costs, filed on February 15, 2019, is **DENIED**. Additionally, due to the Court's imminent loss of jurisdiction, **the Court will not entertain any motion for rehearing in this matter**.

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

[2]A billed amount charge is defined as a provider's charge that is less than the schedule of maximum charges or as applied to the instant appeal, a charge less than 200% of the Medicare Part B fee schedule.

[3]It should be noted that the order on which Appellee relied was later vacated on May 30, 2019. Appellee originally relied on *A&M Gerber Chiropractic, LLC v. Geico Gen. Ins. Co.,* 291 F. Supp. 3d 1318 (S.D. Fla. 2017) [27 Fla. L. Weekly Fed. D133a], which was later vacated in *A&M Gerber Chiropractic, LLC v. Geico Gen. Ins. Co.,* 925 F.3d 1205 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C2031a].

[4]Specifically, the trial court stated the following in interpreting the PIP policy and PIP statute:

> The reason this Court declines to interpret the policy as providing for GEICO to pay 100% of BA charges is simply that there is no support in the policy that justifies reading an agreement to pay 100% of BA charges into the policy. This Court does not wish to read a term into the policy which is not there. If anything, the evidence would indicate that GEICO's intent in drafting the policy was to apply the 80% rate not just to BA charges but across the board.
>
> Nevertheless, this Court agrees that the policy must be construed to provide that GEICO pays 100% of the BA charges, but only by applying the PIP statutory language to the policy.

Geico Indem. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry), 27 Fla. L. Weekly Supp. 239a (Fla. 7th Cir. Ct. March 14, 2019).

* * *

Insurance—Personal injury protection—PIP statute does not preclude insurer from limiting its reimbursement to 80% of the total billed amount when amount billed is less than statutory fee schedule

GEICO INDEMNITY COMPANY, Appellant, v. PREZIOSI WEST EAST ORLANDO CHIROPRACTIC CLINIC, LLC (a/a/o Antwoinette Hayes), Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018-CV-000064-A-O. L.T. Case No. 2017-CC-025499-O. November 30, 2020. Appeal from the County Court, for Orange County, Martha C. Adams, County Judge. Counsel: Michael A. Rosenberg, Cole, Scott & Kissane, P.A., Plantation, for Appellant. Chad A. Barr, Law Office of Chad A. Barr, Altamonte Springs, for Appellee.

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

ORDER REVERSING TRIAL COURT

(PER CURIAM.) Geico Indemnity Company ("Appellant") timely appeals the trial court's "Final Judgment" in favor of Preziosi West East Orlando Chiropractic Clinic, LLC ("Appellee"), entered on May 10, 2018. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A).[1]

RELEVANT FACTS AND PROCEDURAL HISTORY

The underlying action stems from an automobile accident that occurred on or about April 2, 2015, in which Appellant's insured, Antwoinette Hayes ("Insured"), sustained injuries. Insured sought health care services from Appellee, and she assigned her PIP benefits to Appellee, who ultimately billed Appellant for medical services provided to Insured. Appellant applied 20% of Insured's coinsurance for the billed amount charges and paid the remaining 80%.

On December 3, 2017, Appellee filed its single count complaint, alleging Appellant breached its contract in failing to fully reimburse Appellee pursuant to the terms of Appellant's PIP policy. Appellant filed its answer and demand for jury trial on January 31, 2018.

Appellee filed its motion for summary judgment on January 23, 2018, arguing that Appellant should not have applied Insured's 20% co-insurance to the billed amount charges, and therefore, Appellant was responsible to reimburse the entire billed amount charge.[2] In support of its motion, Appellee relied on a federal trial court order.[3] The trial court heard Appellee's motion on May 10, 2018, and it entered summary judgment and final judgment in favor of Appellee that same day. In so doing, the trial court concluded that Appellant was required to pay 100% of charges that were less than the schedule of maximum charges, rather than 80% pursuant to the terms of Appellant's PIP policy and Florida's PIP statute, section 627.736, Florida Statutes, and in effect waiving Insured's 20% coinsurance obligation. Appellant filed its timely notice of appeal on May 29, 2018, thus contesting the trial court's determination that Appellant's

policy requires it to pay 100% of the billed charges that are less than the schedule of maximum charges and resulting in the instant appeal.

STANDARD OF REVIEW

An order granting final summary judgment is reviewed *de novo. Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Additionally, the question presented to the Court concerns interpretation of the PIP statute, as well as a PIP insurance policy, which are also subject to *de novo* review. *Geico Gen. Ins. Co. v. Virtual Imaging Svs.,* 141 So. 3d 147, 152 (Fla. 2013) [38 Fla. L. Weekly S517a].

ANALYSIS AND RULING

The single issue before this Court is narrow: whether Appellant's Insured is subject to the 20% coinsurance provision of Appellant's policy and section 627.736(1)(a), Florida Statutes, when the provider's billed amount is less than 200% of the Medicare Part B schedule. The Fifth District Court of Appeal recently determined this exact issue in *Geico Indem. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry),* 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] ("*Irizarry*"), and found that the insurance company's methodology of reimbursing 80% of a billed amount charge, with the provider responsible to collect the insured's 20% coinsurance, was in accordance with Florida's PIP statute. Because the *Irizarry* ruling concerns the exact same issue and the exact same policy language, it is dispositive in this case, and we must reverse. *See Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992) (finding that the decisions of Florida district court bind all Florida trial courts, absent an inter-district conflict).

In *Irizarry,* the Fifth District framed the procedural history and the legal issues in the following manner:

> Geico appealed the final order to the circuit court, arguing—as it had in the county court—that it was not required by its policy language to or by the statute to pay more than 80% of the billed amount, even if the billed amount was less than the schedule of maximum charges as listed in its policy or the statute. The circuit court agreed with Geico that its policy did not unambiguously require full payment of the billed amount. However, the circuit court affirmed the county court's ruling on the basis that the plain language of section 627.736(5) precluded the insurer from reducing the reimbursement amount. Specifically, the circuit court noted:
>
> [T]he controlling PIP provision specifically provide[s] that if elected the insurer would pay BA charges: "If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted." Florida Statutes, Section 627.736(5)(a)5. There is nothing in this statutory language which allows an insurer to limit the BA payment to 80%.

290 So. 3d at 982-83. When Geico brought the issue before the Fifth District on certiorari review, the court was then tasked with determining whether the trial court had departed from the essential requirements of the law when it found that the insurance company's policy limits reimbursement of a billed amount charge to 80% of the provider's charge, but disagreed with the insurance company that the PIP statute permitted such a limitation.[4] *Id.* Specifically, the district court sought to answer the question, "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" *Id.* at 983. Ultimately, the Fifth District answered in the negative and agreed with Geico and found that Geico's PIP policy properly limited reimbursement to 80% of the billed amount charge. *Id.* at 984.

This Court is bound to follow the precedent set in *Irizarry,* as it is the only district court of appeal that has analyzed the identical issue in this case, that is, whether Appellant is allowed to limit reimbursement to 80% of the billed amount charge. However, the trial court in this case came to the opposite conclusion reached in *Irizarry.* The Court notes that the trial court did not have the benefit of the *Irizarry* decision, as that decision was handed down after the trial court rendered its ruling. However, "Florida's pipeline rule requires that disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." *N. Broward Hosp. Dist. v. Kalitan,* 174 So. 3d 403, 412 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1531a] (citing *Hendeles v. Sanford Auto Auction, Inc.,* 364 So. 2d 467, 468 (Fla. 1978)) (internal quotations omitted). To that end, we must reverse the trial court's ruling in favor of Appellee.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment," entered on May 10, 2018, is **REVERSED and REMANDED** for further proceedings consistent with this opinion. Appellee's Motion for Award of Appellate Attorney's Fees and Costs, filed on June 25, 2018, is **DENIED**. Additionally, due to the Court's imminent loss of jurisdiction, **the Court will not entertain any motion for rehearing in this matter.** (MARQUES and BLACKWELL, JJ., concur.)

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

[2]A billed amount charge is defined as a provider's charge that is less than the schedule of maximum charges or as applied to the instant appeal, a charge less than 200% of the Medicare Part B fee schedule.

[3]It should be noted that the order on which Appellee relied was later vacated on May 30, 2019. Appellee originally relied on *A&M Gerber Chiropractic, LLC v. Geico Gen. Ins. Co.,* 291 F. Supp. 3d 1318 (S.D. Fla. 2017) [27 Fla. L. Weekly Fed. D133a], which was later vacated in *A&M Gerber Chiropractic, LLC v. Geico Gen. Ins. Co.,* 925 F.3d 1205 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C2031a]

[4]Specifically, the trial court stated the following in interpreting the PIP policy and PIP statute:

> The reason this Court declines to interpret the policy as providing for GEICO to pay 100% of BA charges is simply that there is no support in the policy that justifies reading an agreement to pay 100% of BA charges into the policy. This Court does not wish to read a term into the policy which is not there. If anything, the evidence would indicate that GEICO's intent in drafting the policy was to apply the 80% rate not just to BA charges but across the board.
>
> . . .
>
> Nevertheless, this Court agrees that the policy must be construed to provide that GEICO pays 100% of the BA charges, but only by applying the PIP statutory language to the policy.

Geico Indem. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry), 27 Fla. L. Weekly Supp. 239a (Fla. 7th Cir. Ct. March 14, 2019).

* * *

Criminal law—Driving under influence—Trial court erred in finding that officer did not have reasonable suspicion that defendant was driving while impaired so as to justify officer's request that he perform field sobriety exercises where officer noticed that defendant, who had caused accident, had odor of alcohol, slurred speech, stumbling gait, watery eyes, and flushed face—Error to grant motion to suppress

STATE OF FLORIDA, Appellant, v. DAVID JOSEPH LONG, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-AP-14-A-O. L.T. Case No. 2019-CT-385-A-E. December 8, 2020. Appeal from the County Court for Orange County, Jeanette Bigney, County Court Judge. Counsel: Aramis D. Ayala, State Attorney, and Kelly Barbara Hicks, Assistant State Attorney for Appellant. No Appearance for Appellee.

(Before JORDAN, KEST, and MARQUES, JJ.)

FINAL ORDER REVERSING TRIAL COURT

(**PER CURIAM**.) The State of Florida appeals the trial court's final order granting David Joseph Long's (herein "Appellee") motion to suppress. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320 and reverse.

Background

On April 6, 2019, Appellee was arrested and charged with Driving

Under the Influence (DUI) with property damage, following a crash and DUI investigation. On June 17, 2019, Appellee filed a motion to suppress the evidence stemming from his DUI arrest. Appellee argued that the arresting officer "lacked probable cause or reasonable suspicion to require [him] to submit to field sobriety tests."

The trial court held a suppression hearing on August 26, 2019. The first witness to testify was David Brennon. Mr. Brennon, a retired law enforcement officer, was involved in the vehicle crash with Appellee on April 6, 2019. Mr. Brennan testified that he and his wife were traveling to Winter Park, Florida, from Deland, Florida. They had gotten off of I4 at the Lee Road exit, proceeded through a green light, and were driving straight through an intersection when another vehicle made a left turn and crashed into the left rear corner of their vehicle.

Mr. Brennon got out of his vehicle and approached the other vehicle as the driver was exiting. He stated that the driver "appeared dazed" and indicated that he was okay with a head nod. The driver did not engage in any verbal interaction. Mr. Brennon found the lack of responsiveness to be very concerning and believed that the driver might be impaired based on his training and experience. He relayed these concerns to law enforcement. Mr. Brennon identified Appellee in open court as the driver of the vehicle that caused the crash. On cross-examination, Mr. Brennon agreed that someone being dazed is "also consistent with someone being in a car accident and being hit by an airbag."

Officer Steven Ferguson also testified at the hearing. Officer Ferguson stated that he had been an officer with the Winter Park Police Department for about one year and had previously been with the Melbourne Police Department for four years. He has been through the police academy, which included a DUI course, and has completed two additional DUI block trainings, the basic DUI training course at Eastern Florida State College, and an advanced roadside impairment training.

On April 6, 2019, Officer Ferguson was assigned to the City of Winter Park, in the area one patrol division. At approximately 8:30 p.m., he responded to a car crash at the intersection of Lee Road and Wymore Road. While on the scene, he spoke with both drivers. During his interaction with Appellee, Officer Ferguson observed "that he had slightly slurred speech. . . had watery eyes, [and] had a flushed face." He also noted that Appellee "stumbled slightly" when "he turned to walk away" after their conversation. Officer Ferguson further stated that he smelled alcohol during their interaction.

Following the crash investigation, Officer Ferguson began to conduct his DUI investigation. Officer Ferguson read Appellee his Miranda rights and asked him if he was willing to participate in field sobriety exercises ("FSEs"). Appellee responded in the affirmative. Officer Ferguson had Appellee perform "the pen exercise [1], the walk and turn exercise, and the one-leg stand" exercise.

While conducting the HGN test Officer Ferguson observed that Appellee "had lack of smooth pursuit in both eyes, maximum deviation in both eyes. . . [and] was also swaying slightly left to right, approximately one to two inches, while standing in a straight position."

Officer Ferguson next directed Appellee to perform the walk and turn exercise. While Appellee was performing the exercise, Officer Ferguson observed Appellee lose his balance and step off of the line twice. Appellee attempted the exercise two times and failed to complete the steps as instructed on both attempts.

Lastly, Officer Ferguson instructed Appellee to perform the one-leg stand exercise. While Appellee was attempting this exercise, Officer Ferguson observed Appellee incorrectly lift his arms away from his body and fail to count out loud after being instructed to repeatedly to do so before and during the exercise.

Officer Ferguson testified that he then placed Appellee under arrest for DUI based on "the totality of the circumstances and all of the information from the exercises that [he] gathered."

The State argued that the crash, combined with Appellee's other signs of impairment, was more than enough for Officer Ferguson to develop reasonable suspicion to request that Appellee perform FSEs. Additionally, the State asserted that those factors combined with the results of the FSEs were sufficient for Officer Ferguson to develop probable cause to arrest Appellee for DUI.

Defense counsel argued that Officer Ferguson lacked the reasonable suspicion necessary to request Appellee to perform the FSEs. Counsel contended that the officer's testimony regarding the odor of alcohol did not specify where he smelled the odor coming from and that Appellee could have been dazed as a result of the car accident. Consequently, counsel asserted that the evidence collected during the FSEs was not admissible and that, without this evidence being considered, there was no probable cause for an arrest.

The trial court orally granted defense counsel's motion to suppress, agreeing that "somebody can be dazed as a result of a car accident." The trial court acknowledged there was testimony of "slurred speech, watery eyes, flushed face, stumbling, and smelled of alcohol," but found that there was a failure to elicit testimony as to "where the alcohol smell came from or whether it was metabolized alcohol. . ."

In its subsequent written Order, the trial court stated that the testimony supported findings that Appellee had slurred speech, had watery eyes, and was stumbling. These signs, the trial court found, "are consistent with a person involved in an accident with an airbag deployment, a person who was driving under the influence, or a combination." The trial court further found that Officer Ferguson's testimony that Appellee smelled of alcohol was "rather generic and has a broad factual meaning" and "without further elaboration was not enough to request field sobriety exercises based on the totality of the facts."

On appeal, the State contends that the trial court erred in discounting multiple signs of impairment simply because they could have been caused by the accident rather than alcohol consumption. Rather, the State argues, Officer Ferguson had the requisite reasonable suspicion that Appellee was under the influence of alcohol to request that he perform FSEs and to allow the officer to continue with his DUI investigation.

Standard of Review

A review of the trial court's order on a motion to suppress is a mixed standard of review. "The trial court's 'determination of historical facts enjoys a presumption of correctness and is subject to reversal only if not supported by competent, substantial evidence in the record.' " *State v. Diaz-Ortiz,* 40 Fla. L. Weekly D1718a (Fla. 5th DCA July 24, 2015) (quoting *State v. Clark,* 986 So. 2d 625, 628 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D580a]).

However, the trial court's application of the law to the historical facts is reviewed *de novo. State v. Myers,* 40 Fla. L. Weekly D1660b (Fla. 5th DCA July 17, 2015) (citing *State v. Triplett,* 82 So. 3d 860, 863 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1159b]).

Analysis

Before detaining someone for a DUI investigation and compelling the completion of sobriety tests, the officer must have reasonable suspicion that the individual committed the offense. *See State v. Taylor,* 648 So.2d 701, 703 (Fla.1995) [20 Fla. L. Weekly S6b]. "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]).

The purpose of a DUI investigation is to determine whether there is probable cause for a DUI arrest. *See State, Dep't of Highway Safety and & Motor Vehicles v. Haskins,* 752 So. 2d 625, 627 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2730a]. "[P]robable cause sufficient to justify an arrest exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.' " *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (quoting *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]).

As the Fifth District Court of Appeal has explained, "[w]hether a person has consumed sufficient alcohol to be deemed 'under the influence' . . . is a judgment call made by a police officer." *State v. Brown,* 725 So. 2d 441, 444 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a]. "It must be based on objective facts and circumstances observed by the officer at the time and place of the accident, and reliable information given to the officer by others." *Id.*

Ultimately, it is not this Court's place to reweigh the evidence. It is merely obligated to find whether there exists substantial, competent evidence to support the trial court's findings. But in this case, it cannot be said that the trial court's finding that the officer lacked the reasonable suspicion necessary to direct Appellee to perform FSEs was supported by substantial, competent evidence.

The Florida Supreme Court has provided an example of what constitutes reasonable suspicion sufficient to conduct a DUI investigation:

> "When [the defendant] exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being committed, i.e., DUI. [The officer's] request that [the defendant] perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights."

State v. Ameqrane, 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b] (citing *State v. Taylor,* 648 So. 2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b].

Here, Officer Ferguson, an experienced law enforcement officer, testified to a host of frequently cited signs of impairment, including slurred speech, stumbling, the odor of alcohol, watery eyes, flushed red face, and the inability or failure to follow the officer's instructions. Moreover, Appellee exhibited all of these indicators of intoxication immediately following a car crash caused by Appellee. Officer Ferguson's testimony was both specific enough and sufficient to establish a reasonable suspicion that Appellee was impaired.

Based on the totality of circumstances, Officer Ferguson had the requisite reasonable suspicion that Appellee was under the influence of alcohol to request that he conduct FSEs and allow the officer to continue with his DUI investigation. Therefore, we conclude that the trial court erred in granting Appellee's motion to suppress.

Conclusion

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the motion to suppress is **REVERSED,** and this cause is **REMANDED** for further proceedings. No motions for rehearing will be considered. (KEST and MARQUES, JJ., concur.)

[1]The "pen exercise" is also known as the Horizontal Gaze Nystagmus (HGN) field sobriety test.

* * *

ROBERT GALAMAGA, Petitioner, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000289-AP-01. L.T. Case No. 2019-X601139. December 8, 2020. A Petition for Writ of Certiorari from Final Administrative Action of the Miami-Dade Water and Sewer Department. Counsel: Robert Galamaga, pro se, Petitioner. Abigail Price-Williams, Miami Dade County Attorney, and Sarah E. Davis, Assistant County Attorney, for Respondent.

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

(PER CURIAM.) Denied. *See Francois v. State,* 137 So. 3d 1186, 1188-89 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D732a] (Lower tribunal granted broad discretion in ruling on a motion for continuance); *Taylor v. Mazda Motor of America, Inc.* 934 So. 2d 518, 521 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2560c] (No abuse of discretion in the denial of a motion for continuance where movant failed to comply with terms of pre-trial order for requesting a continuance); *Cole v. Heritage Communities, Inc.,* 838 So. 2d 1237 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D659a]. (Among factors to be considered in determining an abuse of discretion in denying a motion for continuance are whether the denial creates an injustice for the movant; **whether the cause of the request was unforeseeable by the movant, and not the result of dilatory practices**; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance) (emphasis added).

* * *

Landlord-tenant—Appeals—Jurisdiction—Non-final orders—Non-final county court orders denying tenant's motion for summary judgment and granting landlord's motion for substitution of party plaintiff, without entry of final order ending county court's judicial labors in case, are not appealable final orders—Where question of whether trial court departed from essential requirements of law can be addressed on plenary appeal, and irreparable harm has not been created by orders, certiorari relief is not available

GTYAB, LLC, Appellant, v. KC PROPERTY SERVICES LLC, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-154-AP-01. L.T. Case No. 2018-4110-CC24. November 24, 2020. An Appeal from County Court in and for Miami-Dade County, Stephanie Silver, Judge. Counsel: Michael Bernstein and Matthew A. Savino, The Bernstein Law Firm, for Appellant. John Phillips, for Appellee.

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

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

(PER CURIAM.) This matter comes before this court on Appellee's Motion to Dismiss. In its motion, Appellee contends that this Court lacks jurisdiction to hear this appeal. Appellant has filed their response. Upon consideration by the Court, Appellee's motion is granted for the reasons discussed below.

Appellee (Plaintiff below hereinafter referred to as Landlord) brought this action based upon a dispute regarding a residential lease. In the complaint, Landlord alleged that it leased an apartment to Appellant. After the lease period was over and after vacating the premises, Landlord contends that Appellant (Defendant below, hereinafter referred to as Tenant) damaged the premises in the amount of $5,712.66. Landlord refused to return the $3,100 security deposit, claiming a set off for the damages alleged in the complaint.

Tenant filed a motion for summary judgment contending that Landlord lacked standing to pursue this claim. In support of the motion Tenant presented deposition testimony from one Ken Maff, the corporate representative of Landlord. Maff testified that the apartment had never been owned by Landlord, and in fact, he was the true owner of the property, despite the fact that the lease indicated that Landlord was the owner of the property. Maff indicated that his name

appeared on the deed, and that Landlord was listed on the lease because "[I] was recommended to formulate a company to move the property into," but that he never pursued it. Maff also testified that he had never assigned the property to Landlord or entered into a management agreement with Landlord. Finally, Maff stated that his name was on previous leases for the apartment prior to the subject lease with Tenant. In response to the motion, Landlord claimed that Landlord was not the owner of the apartment but the lessor, despite being identified in the lease as the owner of the apartment.

After hearing arguments on the motion, the trial court denied the motion without prejudice. Tenant filed a motion for reconsideration. After hearing argument, the court denied the motion, finding that a "landlord" could refer to an "owner" or a "lessor." However, the court granted Landlord's *ore tenus* motion to substitute Kenneth Maff as the plaintiff. It is from these orders that this appeal is taken.

Appellant/Defendant maintains that this Court has jurisdiction to entertain an appeal of this non-final order pursuant to Fla. Stat. §26.012(1). That provision states:

> (1) Circuit Courts shall have jurisdiction of appeals from county courts, except:
>
> (a) Appeals of county court orders or judgments where the amount in controversy is greater than $15,000.
>
> This paragraph is repealed on January 1, 2023.
>
> (b) Appeals of county court orders or judgments declaring invalid a state statute or a provision of the State Constitution.
>
> (c) Orders or judgments of a county court which are certified by the county court to the district court of appeal to be of great public importance and which are accepted by the district court of appeal for review.

The language used in this provision is broad. Appellant cites cases from this circuit which held that this provision supports circuit court jurisdiction over interlocutory appeals. *See American Federated Title Corp. v. A & M Florida Properties, LLC,* 17 Fla. L. Weekly Supp. 84b (Fla. 11th Cir. App. Dec. 9, 2009); *Digital Medical Diagnostic, Inc. v. USAA General Indemnity Co.* 18 Fla. L. Weekly Supp. 17a (Fla. 11th Cir. App. Dec. 9, 2009).[1]

To determine whether this Court has jurisdiction to review this non-final order, we must examine the interplay between the Constitution, general law and the rules of procedure. Article V, Section 5 of the Florida Constitution grants the circuit courts of Florida jurisdiction as follows:

> (b) Jurisdiction.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

Rule 9.030, Florida Rules of Appellate Procedure governs jurisdiction of Florida courts. In accord with the Florida Constitutional provision cited above, Rule 9.030(c)(1)(B) states that "[t]he circuit courts shall review, by appeal nonfinal orders of lower tribunals as provided by general law . . . ." Rule 9.130(a)(a), Florida Rules of Appellate Procedure, states that:

> This rule applies to appeals to the district courts of appeal of the nonfinal orders authorized herein and to appeals to the circuit court of nonfinal orders when provided by general law. Review of other nonfinal orders in such courts and nonfinal administrative action shall be by the method prescribed by rule 9.100.

Thus, both the Florida Constitution and the applicable Rules of Appellate Procedure indicate that jurisdiction for appeals is premised upon general law such as Fla. Stat. §26.012(1). While cases decided by our sister panels cited by Appellant construe §26.012(1) broadly, other courts have not. In *Shell v. Foulkes,* 19 So. 3d 438, 440 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2039a], the Fourth District considered the appeal of an order of default without a subsequent final judgment. The circuit court exercised jurisdiction over two separate appeals in the case, both related to the default, and entered two opinions. The Fourth District reversed, stating:

> The Circuit Court exceeded its appellate jurisdiction. An order merely entering a default without a consequent final judgment is not a final order. The Circuit Courts do not have any general jurisdiction under the appellate rules to review non-final orders—such as the entry of a default without a final judgment. **As for general law, nothing in Chapter 26 or 83, part II, Florida Statutes, purports to give Circuit Courts appellate jurisdiction to review non-final orders merely entering a default. The Circuit Court should have dismissed the appeals for lack of jurisdiction. (emphasis added).**

Similar findings were made in *Spottswood Cos., Inc. d/b/a The Holiday Inn Key Western v. Valencia,* 18 Fla. L. Weekly Supp. 792a (Fla. 11th Cir. App. June 6, 2011) ("Neither §26.012(1), nor Rule 9.130(a)(1), Fla. R. App. P., can be read to confer jurisdiction over the non-final venue order sought to be appealed herein.") and *Zalloum v. River Oaks Community Services Assn.,* 2015 Fla. Cir. LEXIS 55847 (Fla. 7th Cir. App. Nov. 4, 2015).

Appellant argues that *Foulkes* is limited to only cases involving defaults without final judgments. We disagree. There is no reason why an order denying a nonfinal summary judgment or a nonfinal order substituting a party plaintiff should be treated any differently under §26.012(1) than a nonfinal order of default. We believe that a narrow reading of §26.012(1) is compelled by the holding in *Foulkes. See Pardo v. State,* 596 So. 2d 665 666 (Fla. 1992) (Absent interdistrict conflict, decisions of district courts of appeal bind all Florida trial courts). The *Foulkes* court, which addressed a nonfinal appeal under both the Rules of Appellate Procedure and Chapter 26 and Chapter 83, part II, Florida Statutes, concluded that circuit courts do not have jurisdiction over appeals from nonfinal orders, with defaults being but one example.[2] However, even if we believed that *Foulkes* could be distinguished and was not binding on this Court, we believe its premise is correct—§26.012(1) must be read narrowly. For circuit courts to exercise blanket jurisdiction over all nonfinal appeals from county court would be out of line with the limitations on the review of nonfinal orders imposed on district courts of appeal as expressed in Rule 9.130. Further, to find that §26.012(1) requires circuit courts to hear all nonfinal appeals would render Rule 9.030(c)(2) a nullity as it pertains to issues arising from county courts, since that Rule permits the exercise of certiorari jurisdiction by circuit courts to review nonfinal orders from all lower tribunals. Finally, the broad reading of §26.012(1) urged by Appellant would be contrary to the general policy favoring resolution of all issues in a single proceeding and to avoid multiple appeals. *See* Padovano, P., *Florida Appellate Practice* § 1:7 (2019 ed.), citing *Zirin v. Charles Pfizer & Co.,* 128 So.2d 594, 596 (Fla. 1961). There is no reason to depart from that judicial philosophy and require that circuit courts acting in their appellate capacity should engage in unfettered piecemeal decision making in all cases.

Appellant also argues that the trial court's substitution order has "all the trappings and effect of a final order. . . ." They maintain that a party who was not a party to the lease and who does not have proper standing has been impermissibly inserted into this case. However, we do not agree that the trial court's orders denying Tenant's motion for reconsideration of the denial of summary judgment and granting Landlord's motion for substitution of the party plaintiff concluded judicial labor in this case. "Florida's test of finality for appellate purposes is well established: the order constitutes the end of judicial

labor in the trial court, and nothing further remains to be done to terminate the dispute between the parties." *Bloomgarden v. Mandel,* 154 So. 3d 451, 454 (Fla. 3d DCA 2014) [40 Fla. L. Weekly D95a], citing *Miami-Dade Water and Sewer Auth. v. Metro Dade County,* 469 So. 2d 813, 814 (Fla. 3d DCA 1985). While a party has been substituted for the original Appellee, the interests of Landlord and Landlord's corporate representative Maff are so interrelated that there would be no prejudice to Appellant in fully litigating this matter before the trial court, after which full consideration of the trial court's orders can be addressed on plenary appeal. Since other issues remain pending before the trial court, the court's substitution order was not a final order.

Appellant has argued that in the alternative, this court should exercise jurisdiction under Rule 9.030. Rule 9.030(c)(2) states:

> (2) Certiorari Jurisdiction. The certiorari jurisdiction of circuit courts may be sought to review **nonfinal orders of lower tribunals** other than as proscribed by rule 9.130.

The exercise of common-law certiorari is discretionary, and the scope of review is significantly limited. The party petitioning for certiorari review of a non-final order must demonstrate that the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post judgment appeal." *Bd. of Trustees of Internal Improvement Fund v. American Educational Enterprises, LLC*, 99 So. 3d 450, 454 (Fla. 2012) [37 Fla. L. Weekly S589a] (citing *Reeves v. Fleetwood Homes of Fla., Inc.,* 889 So. 2d 812, 822 (Fla. 2004) [29 Fla. L. Weekly S783a] (quoting *Bd. of Regents v. Snyder,* 826 So. 2d 382, 387 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1634a]. If the party seeking review does not demonstrate that it will suffer material injury of an irreparable nature, then an appellate court may not grant certiorari relief from a non-appealable, non-final order. *See Capital One, N.A. v. Forbes,* 34 So. 3d 209, 212 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1052b]. Similarly, if the alleged harm can be remedied on appeal, the harm is not considered irreparable, and thus certiorari relief is not merited. *See Pepsi Bottling Grp., Inc. v. Underwood,* 8 So. 3d 1260, 1262 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D920b].

Appellant maintains that the trial court departed from the essential requirements of law which would result in irreparable harm to Appellant. In particular, they argue that denial of their motion for summary judgment was not proper because Appellee lacked standing to bring this case before the trial court, and that Appellee's motion for substitution was not proper under Fla. R. Civ. P. 1.260, which only allows for substitution of a party upon the death, incompetency and transfer of interest of the party.

We are not convinced that the determination of whether the trial court departed from the essential requirements of law in denying summary judgment and granting substitution of a party cannot be addressed on plenary appeal. As to irreparable harm to Appellant, we note that Plaintiff/Landlord's corporate representative, Ken Maff, now the substituted Plaintiff, testified that 1) the subject apartment had never been owned by Plaintiff/Landlord; 2) Maff was the true owner of the property, despite the fact that the lease indicated that Plaintiff/Landlord was the owner of the property; 3) Maff's name appeared on the deed; and 4) Plaintiff/Landlord was listed on the lease because Maff intended to, but never acted to create a company that would become the apartment owner. Given Maff's sworn testimony, and the interests of the Landlord and Maff being so intertwined, we fail to see how irreparable harm has been created by the trial court's denial of summary judgment or its substitution order such that this Court should exercise certiorari jurisdiction.

Accordingly, Appellee's Motion to Dismiss this appeal is hereby **GRANTED without prejudice** and this case is **REMANDED** to the trial court for further proceedings consistent with this opinion**.** Appellee's Motion for Attorney's Fees is hereby **GRANTED** pursuant to Fla. Stat. §83.48, conditioned upon obtaining a judgment in his favor below. The trial court shall determine the amount of a reasonable fee. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

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[1]The *American Federated* court stated "[b]ecause section 26.012(1) does not exclude interlocutory appeals from the circuit court's appellate review, we have jurisdiction over interlocutory appeals," citing a contrary conclusion in *Tannenbaum Chiropractic Inst. Inc. v. State Farm Mut. Auto. Ins. Co.,* 10 Fla. L. Weekly Supp. 478b (Fla. 13th Cir. App. May 19, 2003) ("[We know of no general law that imparts appellate jurisdiction in the circuit court over nonfinal civil orders of the county court."

[2]This conclusion is borne out by footnote 7 of the *Foulkes* opinion, which cites to *City of Tampa v. Ippolito,* 360 So.2d 1316 (Fla. 2d DCA 1978) and includes the following parenthetical in pertinent part: "Circuit Court appellate jurisdiction is only from final judgments and orders of the County Court . . . ." While the *Ippolito* case did not make a specific finding, by including this footnote in its opinion the *Foulkes* court concluded that the limitation of §26.012(1) to final judgments and orders extended beyond just orders of default.

* * *

Criminal law—Indirect criminal contempt—Violation of stay away order—Because there is no statutory provision that authorizes imposition of freestanding stay away order as part of sentence on trespass charge, orders requiring defendant to stay away from supermarket were void, and court lacked subject matter jurisdiction to hold defendant in contempt for violating orders—No merit to arguments that orders fell within inherent authority of court or that orders were downward departure sentences—Trial court could have ordered defendant to stay away from supermarket as condition of probation if it had sentenced him to probationary term

MARCUS TERRELL JOHNSON, Appellants, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-000007-AC- 01 L.T. Case No. B19026840. November 28, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Robin Faber, Judge. Counsel: Carlos J. Martinez, Public Defender and James A. Odell, Assistant Public Defender, Public Defender's Office, for Appellant. Katherine Fernandez Rundle, State Attorney and Joseph B. Rome, Assistant State Attorney, State Attorney's Office, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Marcus Terrell Johnson ("Johnson" or "Defendant") appeals from his guilty plea, conviction and sentence imposed on a charge of indirect criminal contempt. The trial court held Johnson in contempt for violating two "stay away orders" issued as part of sentences on underlying charges of trespass. Johnson argues that the underlying "stay away orders" were illegal and void sentencing provisions and therefore, the lower court had no subject-matter jurisdiction to commence contempt proceedings for their violation.

In each of cases B19026840 and B1927637, Mr. Johnson pled guilty to one misdemeanor count of trespass. In case B19026840, the trial court sentenced Mr. Johnson to a "SAO"[1] requiring Johnson to stay away from El Charrito Supermarket, 708 SW 6th Avenue, Homestead, FL 33030. The trial court did not place Mr. Johnson on probation. In case B1927637, Defendant accepted an adjudication to a new charge of trespass. As part of the plea agreement, Johnson was ordered to stay away from El Charrito Supermarket. No probation was ordered. In each case the stay away order was a freestanding order directing Mr. Johnson to "stay away from. . .El Charrito Supermarket, 708 SW 6th Avenue, Homestead, FL 33030." The SAO's were indefinite with no date of termination.

On November 5, 2019, the State Attorney filed two "Suggestions and Petitions for Rule to Show Cause" alerting the court that Mr. Johnson had been arrested at the supermarket prohibited by the stay

away. The trial court issued two rules to show cause as to why Mr. Johnson should not be held in contempt and summoned him for a hearing.

Mr. Johnson moved to dismiss the contempt charges, arguing that the trial court had no authority to issue freestanding sentencing orders to stay away from the supermarket, and therefore, could not hold Mr. Johnson in contempt for violating those orders. The trial court denied the motions and allowed Mr. Johnson to preserve this issue on appeal and plead to violating the SAO's in exchange for credit time served. This appeal followed.

Analysis

The Defendant argues that the sentencing order imposed upon him was illegal because the trial court lacked the power to issue "free-standing" stay-away orders. We review *de novo* a claim that a sentence is illegal. *Burks v. State,* 283 So. 3d 864 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2582b]. A *de novo* standard of review also applies to a determination whether the trial court had subject matter jurisdiction over this contempt proceeding. *Lovest v. Mangiero,* 279 So. 3d 205 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1950a].

A judge's right to impose sentence is not unfettered; it is constrained by law. "In Florida, the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." *Woods v. State,* 740 So. 2d 20 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D831a]. If a sentencing order does not comport with Florida law, the resulting sentence is illegal.

Courts have stricken sentencing orders made without authority or in conflict with state law. For example, in *Pridgen v. City of Auburndale,* 430 So. 2d 967 (Fla. 2d DCA 1983), a defendant convicted of violating a municipal ordinance was placed on a 6-month term of probation. Because Chapter 948, the probation statute, only authorizes probation for a criminal violation of state law and not local law, the court found that the term of probation was illegal. Likewise, in *State v. Muoio,* 438 So. 2d 160 (Fla. 2d DCA 1983), the appellate court struck down an order permitting a defendant convicted of DUI to perform community service in lieu of paying a mandatory fine.

Courts will strike down an illegal sentence even where a defendant pleads guilty to the illegal provision. In *State v. Coban,* 520 So. 2d 40 (Fla. 1988), a Defendant indicted for first-degree murder pled to an illegal sentence of life in prison without parole, in exchange for waiver of the death penalty. Even though that defendant pled to avoid the risk of the imposition of the death penalty, the court struck the illegal sentence. The court concluded that the only statutory sentences for first-degree murder were death or life with a 25-year parole restriction, and the resulting sentence without the parole restriction was therefore illegal. The court further admonished, "[t]he plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions." *Id.* at 41.

Turning to Mr. Johnson's underlying misdemeanor convictions, the crime of trespass charged under section 810.09, Florida Statutes is a first-degree misdemeanor. First-degree misdemeanors are punishable as provided in sections 775.082(4) or 775.083, Florida Statutes (2019). Section 775.082(4) provides:

> (4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:
>
> (a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding one year;
>
> * * *

Section 775.083, Florida Statutes (2017) addresses fines. A person convicted of a misdemeanor "may be sentenced to pay a fine" which "shall not exceed" $1,000 when convicted of a first-degree misdemeanor.

In lieu of or in addition to a sentence of incarceration or a fine, a trial judge may also place a person convicted of a misdemeanor on probation. § 948.01(2), Fla. Stat. (2018) ("if the defendant is found guilty of a nonfelony offense as the result of a trial or entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld, the court may place the defendant on probation"). The trial court may, alternatively, place a person found guilty of a misdemeanor on a split sentence where part or all of the term of incarceration is suspended while the defendant completes a probationary term. § 948.012(1), Fla. Stat. (2018).

Beyond incarceration and probation, other statutory provisions address the court's authority to impose alternative sentencing orders. For example, section 775.089, Florida Statutes requires that the judge make an order of restitution if the offender's crime caused damage to a victim. Section 775.13, Florida Statutes obligates judges to order offenders to comply with registration requirements for certain sexual offenses. Section 775.091, Florida Statutes permits that, "[i]n addition to any punishment, the court may order the defendant to perform a specified public service."

Section 921.187, Florida Statutes adopts many of these unique statutory provisions, and in addition, allows that for any drug-related offense in violation of Chapter 893, the trial judge may impose drug treatment for the offender. §921.187(k), Fla. Stat. (2018).

Finally, as a catchall, a trial court imposing sentence under section 775.082 does not forfeit other options available at law. Section 775.082(7), Florida Statutes (2018) states:

> (7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

With respect to freestanding orders to "stay away" from a person or place, section 784.048, Florida Statutes permits a trial judge to impose a freestanding stay-away order as part of the sentence imposed on a charge of stalking. Thus, the legislature is aware of how to codify judicial authority to issue a stay away order at sentencing. *See, e.g., Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So.2d 306, 315 (Fla. 2006) [31 Fla. L. Weekly S788a] ("[W]e have pointed to language in other statutes to show that the [l]egislature 'knows how to' accomplish what it has omitted in the statute in question.").

In reviewing all statutes pertaining to sentencing for a first-degree misdemeanor, there is no statutory provision which would entitle a judge to impose a freestanding "stay away order" as part of a sentence on a charge of trespass. An order imposed absent legislative or other authority is void. *See, e.g., State ex rel. Saunders v. Boyer,* 166 So. 2d 694 (Fla. 2d DCA 1964) (granting habeas corpus to contemnor who violated void sentencing order to "one year at hard labor in the county jail," where such sentence was not authorized by state law); *Moore v. State,* 245 So. 2d 880 (Fla. 2d DCA1971) (same); *State v. S. M. G.,* 313 So. 2d 761 (Fla. 1975) (judicial order requiring mother of delinquent child to engage in drug rehabilitation was void, and therefore trial court lacked authority to hold her in contempt for failure to follow that order).

The State argues that the trial court's order fell within the inherent authority of the court. They cite no authority for the principle that a trial court possesses the authority to enjoin defendants at sentencing from people or places absent legislative authority. Had the trial judge placed Mr. Johnson on a probationary term for one year, as set forth by section 948.01(2), the court could have ordered him to stay away from a location as a condition of his probation. However, absent an order imposed as a condition of probation, we know of no statutory authority to support a stay away order imposed as part of a sentence.

The State further argues that the stay away order was a downward departure. The concept of downward departure is codified to mean a

departure from a sentence required under the criminal punishment code. Pursuant to section 921.0026, Florida Statutes, such departures apply to sentences imposed for felonies, not misdemeanors.

Accordingly, we conclude that the trial court's orders enjoining Mr. Johnson to avoid the El Charrito Supermarket were void, and therefore, the trial court lacked subject matter jurisdiction to hold him in contempt for violation of those orders[2]. We therefore quash the contempt order and sentence. (WALSH and SANTOVENIA, JJ., Concur.)

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[1]"SAO" refers to "Stay Away Order".

[2]Johnson also argues on appeal that even in situations where a stay away order is lawfully issued, the length of that stay away order cannot "exceed the statutory maximum sentence." *May v. State,* 670 So. 2d 1103, 1103 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D787d]. The stay away orders issued against Mr. Johnson were indefinite, which is longer than the maximum sentence for trespass: one year of imprisonment or probation. This also rendered the stay away orders illegal. Mr. Johnson concedes this particular argument was not provided to the trial court below, but this court may still address this argument because "an illegal sentence constitutes fundamental error which may be addressed for the first time on appeal." *Nelson v. State,* 719 So. 2d 1230, 1231 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2241e].

(TRAWICK, J., Concurring.) Judges handling criminal cases throughout the State of Florida are often faced with a dilemma similar to, if not the same as the one which confronted the trial judge here—a defendant charged with a "nuisance" or "quality of life" misdemeanor such as, for example, shoplifting, assault, disorderly conduct, urinating in public or trespassing. The victim—often a small corner store owner whose business is adversely impacted with this type of criminal activity, or a community which is plagued by persons who have little regard for the community's residents—each wants to make sure that the defendant is prevented from coming back and repeating the crime. The prosecutor offers a plea to either probation or a relatively short jail sentence, most often credit time served. Included with the plea is a stay away order from a specified location. The defendant, for a variety of reasons, either has no permanent address and so is not eligible to be placed on probation, or he or she does not want to be placed under such supervision. Instead, being anxious to get out of jail or just wanting get the case over with, the defendant agrees to the credit time served offer along with a "freestanding" or "stand alone" stay away order. The defense attorney, knowing that his or her client doesn't want to fight the charge, does not object. The court, happy to get another case off of its crowded docket, quickly conducts a plea colloquy and moves on to the next case, not really considering whether jurisdiction will exist if there is a violation of the stay away order. Soon after his or her release, the defendant goes back to the store or other area covered by the stay away order and is re-arrested for a new offense. More likely than not, the stay away order violation is ignored while a resolution of the new case is being considered. The prosecutor offers, the defendant agrees to, and the court accepts another plea which again includes a stand alone stay away order. The defendant is released and returns to the prohibited area. Violate, repeat, violate, repeat. And on, and on, and on.

This is a vexing problem for everyone involved. Our decision here establishes what most of us know but choose to ignore—a trial court does not have jurisdiction to issue a stand alone stay away order unless such an order is statutorily prescribed, such as for the offense of stalking pursuant to section 784.048, Florida Statutes. As the majority opinion's analysis aptly demonstrates, such an order is void and cannot be enforced based upon the court's "inherent authority." While victims of "nuisance" or "quality of life" offenses beg—no, demand—that prosecutors and judges help keep repeat offenders out of their businesses and communities, the judicial system is constrained as to how much it can do under the law. This is a problem that begs for a legislative fix. Until that happens, our courts, regrettably, will continue to issue unenforceable stand alone stay away orders. Defendants, knowing that nothing will come of such an order, will continue to violate them with impunity. Disregard of court orders should never be tolerated in a society of laws. This is even more problematic when the orders are meant to benefit crime victims. The clock is running and the ball rests not with the judiciary, but in the hands of the State Legislature.

* * *

Insurance—Personal injury protection—Where jury found that medical provider's charge was not reasonable but that reasonable amount is more than partial payment made by insurer, provider was entitled to judgment in its favor for unpaid charges plus interest and penalties—No merit to argument that, because provider billed amount that was not reasonable, jury verdict was first time insurer was put on notice of true reasonable charge and provider should be required to file new claim for reasonable amount found by jury

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. MARTINEZ HEALTH INC., a/a/o Nakita Shim, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-309-AP-01. L.T. Case No. 13-12775 SP05(04). November 24, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Alexander Bokor, Judge. Counsel: Gregory J. Willis, Michael Rosenberg, and Thomas L. Hunker, Cole Scott & Kissane, P.A., for Appellant. Stuart L. Koenigsberg, A Able Advocated—Stuart L. Koenigsberg, P.A., for Appellee.

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

OPINION

(WALSH, J.) A personal injury protection ("PIP") policy under section 627.736, Florida Statutes (2008), establishes the right to coverage for "[e]ighty percent of all reasonable expenses" for medically necessary care related to an auto accident. § 627.736(1)(a), Fla. Stat. (2008). In the breach of contract lawsuit leading up to this appeal, the assignee of the insured, a medical provider, claimed that the insurer failed to pay 80% of its reasonable expenses, while the insurer claimed in response that it correctly paid the claim.

In this appeal, we resolve the following question: Who is the prevailing party when a jury verdict determines that the reasonable amount for PIP services is more than what the insurer paid but less than what the provider billed? The applicable statutory provisions, jury instructions and verdict forms lead us to conclude that a jury verdict which is less than the amount charged but more than the amount paid is a verdict for the provider. We therefore affirm the judgment below finding the provider to be the prevailing party.

Background

Nakita Shim was injured in a car accident, sought medical attention, and assigned her personal injury protection ("PIP") benefits to her medical provider, Martinez Health, Inc. ("Provider"). The Provider billed Ms. Shim's insurer, State Farm Mutual Automobile Insurance Company ("State Farm") $6,595.00 for medical services provided to their insured. State Farm reduced reimbursement and paid the Provider $3,708.00.[1] The Provider sued State Farm for breach of contract to recover the difference, and the case proceeded to jury trial. The sole issue at trial was the reasonable price for the medical services.

The jury answered two questions on the verdict form:

1. Were the charges for the services reasonable?

YES ___ NO __x__

[If your answer to Question 1 is YES, then you should skip Question 2, and sign and date the verdict form. If your answer to Question 1 is NO, then answer Question 2, and sign and date the verdict form.]

2. What are the reasonable charges for the services rendered?

72040	(Cervical X-Ray)	$90.83	
72070	(Back X-Ray)	$90.72	
97010	(Hot Packs)	$35.00	
97124	(Massage)	$55.00	
99203 (25)	(Office Visit)	$258.56	
97140 (59)	(Manual Therapy)	$ 56.46	
		[06/07-07/02]	[07/02-08/13]
97012	(Mechanical Traction)	$36.60	$36.60
97014	(Electrical Stimulation)	$35.82	$35.82
97035	(Ultrasound)	$35.75	$35.75
98940	(Adjustment)	$52.58	$52.58
99213 (25)	(Office Visit)		$145.50
99213 (25)	(Office Visit)		$145.50

SO SAY WE ALL, this 21 day of June, 2018.[2]

The total difference between the amount State Farm paid and the reasonable amount found by the jury was $926.19.00.

Following this verdict, State Farm filed a "Motion for Entry of Defense Final Judgment Pursuant to Jury Verdict." State Farm argued that because the jury found in question #1 that the total amount charged by the Provider was not reasonable, the Provider failed to meet its burden of proof and State Farm was entitled to a defense judgment. State Farm further argued that because the jury verdict was the first time it was put on notice of the correct reasonable amount of medical charges, the Provider should be required after the verdict to submit a second, corrected statement of claim to State Farm for the reasonable amount of medical charges, as found by the jury verdict. State Farm argued that it should not, based upon this verdict, be taxed with penalties for its untimely failure to pay the reasonable amount for services, because until the jury verdict, it had not been put on notice of the correct reasonable amount.

The trial court denied State Farm's motions and rendered judgment for the Provider in the amount of $926.19.00, plus interest and penalties.

Analysis

If a jury verdict determines that the amount of reasonable PIP charges is more than what the insurer paid but less than what a provider billed, who is the prevailing party?[3] A determination of prevailing party requires the interpretation of the PIP statute and review is therefore *de novo*. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328 (Fla. 2007) [32 Fla. L. Weekly S453a], *citing Foundation Health v. Westside EKG Assocs.,* 944 So. 2d 188, 193-94 (Fla. 2006) [31 Fla. L. Weekly S669b] (applying the *de novo* standard of review to questions of statutory interpretation); *Aramark Unif. & Career Apparel, Inc. v. Easton,* 894 So. 2d 20, 23 (Fla. 2004) [29 Fla. L. Weekly S551a] (same).

State Farm argues that because the jury concluded in verdict question #1 that the amount billed by the Provider was not reasonable, the Provider failed to meet its burden of proof and therefore was not the prevailing party. If the Provider failed to meet its burden of proof, then judgment should be for the defense.

In its simplest terms, this case was a breach of contract suit. The breach was the failure of the insurer to pay 80% of all reasonable expenses, the benefits under the policy. § 627.736(1)(a), Fla. Stat. (2008). The jury resolved the dispute on the claim—not solely whether the total charges *as billed* were reasonable, but what the reasonable amount of the charges were. If State Farm failed to pay that amount, then it breached the contract of the insured. Stated another way, the benefits under a PIP policy are not the total amount of a provider's bill, if determined to be reasonable, but rather, 80% of all reasonable expenses. § 627.736(1)(a), Fla. Stat.

To analyze this issue, we further examine two additional relevant subsections of the 2008 PIP statute which dictate what medical claims are to be paid and when they are overdue, sections 627.736,(5)(a)1 and (4)(b), Florida Statutes. We are required to read statutes relating to the same subject matter *in pari materia*. *See Fla. Dept. of Hwy. Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S243a], *as revised on denial of reh'g* (Nov. 10, 2011).

Section 627.736(5)(a) provides:

(5) CHARGES FOR TREATMENT OF INJURED PERSONS.—

(a)1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance **may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment**, if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

(2008) (emphasis added).

Applying section 627.736(5)(a)1, a provider "may charge" only a reasonable amount which may not exceed the amount customarily charged and payments customarily accepted by the provider. The insurer "may pay" for such charges directly to the medical provider rendering the service. This section of the statute does not address what happens when the insurer decides to pay a *reduced amount* or *partially* pays, as it did here.

State Farm relies upon section (5)(a)1 but downplays relevant language contained within section 627.736(4)(b). Section 627.736(4) addresses "BENEFITS; WHEN DUE." Subsection 627.736(4)(b) expressly addresses *partial underpayments* and the consequences for an insurer who makes an *untimely partial underpayment*:

(b) Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. . . . **Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer**. When an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge, provided that this shall not limit the introduction of evidence at trial; . . . . However, **notwithstanding the fact that written notice has been furnished to the insurer, any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment**. For the purpose of calculating the

> extent to which any benefits are overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. **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 by the insurer may be made at any time, including after payment of the claim or after the 30-day time period for payment set forth in this paragraph**.

(emphasis added).

State Farm argues that if the jury determines that the provider's **total bill** is not reasonable, then State Farm has not breached its contract—that a verdict for any amount less than the total amount of the provider's bill is a defense verdict. This argument that a provider claiming an overdue partial underpayment makes an all-or-nothing gambit to a jury conflicts with section 627.736(4)(b), "***[a]ny part or all of the remainder of the claim*** **that is subsequently supported by written notice is overdue if not paid within 30 days** after such written notice is furnished to the insurer." (emphasis added) Under this section, State Farm is beholden to the provider for an untimely partial nonpayment of "any part or all of the reminder" of reasonable charges plus penalties.

The jury instructions and verdict form comport with section 627.736(4)(b) by requiring the jury to determine the total reasonable amount of the charges, which informs the court if "all or any part" of the charge is overdue. On whether a charge is reasonable, the jury was instructed:

> If you find the charge for a service or services reasonable, you should award that amount as damages. If you find the charge for a service or services is not reasonable, **you should award an amount that the greater weight of the evidence shows is reasonable**.

(emphasis added) (R. 890).[4] If the jury finds that the greater weight of the evidence supports an amount that is more than what the insurer paid, that is a verdict for the claimant.

The verdict form asks in question #2,

> If you find the charge or charges reasonable, you should proceed to number 2. However, if you find the charge or charges unreasonable, **you must determine a reasonable amount for the charge or charges, and then proceed to question 2.** .
>
> 2. What is the total amount you find reasonable?

(emphasis added)

Thus, State Farm's construction of the PIP statute conflicts with the language of section (4)(b), the jury instructions and verdict form.

In our recent decision in *State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Pablo Pico Jr.* 2017-390-AP-01 (November 13, 2020) ("*Pico*") [28 Fla. L. Weekly Supp. 778a], we concluded that if a jury found that reasonable charges were less than what the provider charged but more than what the insurer paid, the provider is the prevailing party. We based our conclusion upon clear statutory grounds found in Section 627.736(4)(b) (2008), the standard jury instructions and verdict form. We further observed that State Farm's argument, if accepted by an appellate court, would strip every plaintiff of its right to recover its **partially** unpaid and overdue reasonable charges, payable under sections (1)(a) and (4)(b) of the PIP statute:

> Unless the provider is prescient enough to bill the precise amount ultimately found by a future jury, the provider cannot recover its reasonable unpaid charges. Despite a jury finding that there are unpaid partial reasonable charges, a provider will never recover these charges because following entry of a defense judgment, the unpaid amounts need never be paid.

Pico, at p. 8.[5]

In the current case, State Farm presents a new argument: State Farm now argues that the jury verdict was the first time that it was put "on notice" of the true reasonable charge. More than a decade after the services were rendered and the charges were incurred, the Provider should now be required to file a *second new claim* stating the amount found by the jury. Nowhere in Florida statutory or procedural law is there any foundation for such a duplicative procedure. Further, this novel two-claim-procedure directly conflicts with additional language found within section 627.736(4)(b) and is therefore erroneous. After stating that "all or any part of" a reasonable charge is overdue if not paid in 30 days, section (4)(b) states:

> 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 by the insurer may be made at any time, including after payment of the claim** or after the 30-day time period for payment set forth in this paragraph.

State Farm argues that because it was never "put on notice" of the correct amount of the claim until the jury rendered its verdict, it is unfair to tax it with penalties for its failure to timely pay an unknown amount. What State Farm overlooks is that section (4)(b) allows such an insurer **to pay the charge and reserve its right to later challenge that charge as unreasonable**. Again, (4)(b) allows that "**[s]uch assertion by the insurer may be made at any time, including after payment of the claim**." (emphasis added)

Had State Farm paid the claim, it could have then filed an action to recover or claw-back the inflated and overpaid amount as unreasonable in price. Had the underlying lawsuit been an action filed by State Farm to recover excess benefits, the verdict above would have been a defense verdict. Why? Because the provider, having already been paid in full, would have necessarily been paid the partial sum (if any) later found reasonable by the jury. The insurer, as the plaintiff, would receive a judgment for the overpayment, the remainder of the sum, plus interest. No penalty would be taxed to the insurer for late payment. Notwithstanding that lawsuits by the insurer are infrequent in this circuit, the legislature has proscribed a clear method to prevent the harm of which State Farm complains.

State Farm's proposed solution—that the Provider file a second claim 10 years later for the same services already determined by the jury—is problematic for three reasons. First, again, there is no statute or rule addressing or permitting such a procedure. Second, requiring that two claims (and, potentially, two actions) be filed to recover one claim—the first merely to determine the amount, the second to recover the amount—violates the PIP statutory scheme which provides for "swift and virtually automatic payment" of PIP claims.[6] Finally, such a claim would likely be barred by principles of *res judicata*,[7] collateral estoppel,[8] laches or the statute of limitations. Moreover, jury verdicts are not intended to provide advisory opinions. The procedure State Farm advocates would overwhelm and clog an already overloaded county court docket with unnecessary advisory trials. Jury trials are avenues to permanently resolve disputed issues of fact and result in enforceable judgments or dismissals. Final judgments end litigation and judicial labor; they do not satisfy curiosity.

Furthermore, if State Farm were granted the defense judgment it seeks, it would be enforceable. A defense judgment orders that the "plaintiff take nothing by the action and defendant go hence without day." Form 1.991. Fla. R. Civ. P. Armed with a defense judgment, State Farm would be entitled to argue for a dismissal of any second claim by the Provider.

Because Section 637.736(4)(b) determines that "any part" of a provider's bill not paid in 30 days is overdue, and because the jury instructions directed the jury to "award an amount that the greater weight of the evidence shows is reasonable," the jury verdict for a reasonable amount for services in excess of what the insurer paid is a verdict for the Provider, and therefore entitles the Provider to a judgment for the unpaid reasonable charges, plus interest and penalties. For these reasons, we affirm the judgment entered for the Provider below.

Appellee's motion for appellate attorney's fees pursuant to sections 627.428(8) and 627.736, Florida Statutes, is granted. This matter is remanded to the trial court to fix a reasonable amount. (TRAWICK, J., concurs. SANTOVENIA, J., concurs in result.)

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[1]Some of State Farm's reductions were based upon applying 200% of the Medicare part B fee schedule. (R. 163 Explanation of Benefits Form). Based upon the opinion in *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a], State Farm was not permitted to unilaterally elect reduced reimbursement based upon the Medicare fee schedule, and thus, defended the suit by claiming that the charges were not reasonable in price.

[2]State Farm objected and instead requested a verdict form with a single question—were the charges for the services reasonable? If the jury answered this question "No," the defendant's proposed verdict form would direct the jury to sign and date the verdict form. The trial judge rejected the defendant's proposed form of verdict.

[3]However, as State Farm acknowledges in a graph prepared in its initial brief, the jury found that one CPT code service amounting to some of the provider's charges was reasonable as charged.

[4]The Provider filed the standard jury instructions, including the instruction on reasonableness. The Insurer, the Appellant here, did not file the transcripts of the trial, nor the admitted jury instructions read to the jury at trial. The only transcript provided is an excerpt of a post-trial hearing on the challenged issue of who was the prevailing party.

[5]After the jury verdict in the Pico case, State Farm attempted to rectify the issue of remaining unpaid reasonable charges by filing a "Motion for Leave to Pay Additional PIP Benefits Pursuant to the Jury's Verdict Without the Payment Being Deemed a Confession of Judgment." We upheld the trial court's order denying this motion.

[6]"'Without a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his [or her] life without undue financial interruption.' " *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683-84 (Fla.2000) [25 Fla. L. Weekly S1103a] (quoting *Gov't Emps. Ins. Co. v. Gonzalez*, 512 So.2d 269, 271 (Fla. 3d DCA 1987)).

[7]State Farm's proposal would appear to violate *res judicata* principles. *See Zikofsky v. Mktg. 10, Inc.*, 904 So. 2d 520 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a] (elements of *res judicata* bar successive suits between same parties following adjudication on the merits where four identities exist: identity of thing, cause of action, parties and capacities of parties).

[8]The doctrine of "collateral estoppel or issue preclusion, 'bars relitigation of the same issue between the same parties which has already been determined by a valid judgment,' even where the present and former cause of action are not the same." *Kowallek v. Lee Rehm*, 183 So. 3d 1175, 1177 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D157a] (quoting *Zikofsky*, 904 So. 2d at 525).

* * *

Counties—Code enforcement—Order finding violation of county code and imposing fine and costs is affirmed

NATURES TROPICAL NURSERY, LLC., Appellants, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000306-AP-01. L.T. Case No. 2019-T081685. December 15, 2020. An Appeal of an administrative decision rendered by the Miami-Dade County Office of Code Enforcement—Civil Violation Notice 2019-T081685. Counsel: Lance Joseph, Lance Joseph, Esq., P.A., for Appellant. Abigail Price-Williams, Miami-Dade County Attorney, and Zach Vosseler, Assistant County Attorney, for Appellee.

(Before WALSH, SANTOVENIA, TRAWICK, JJ.)

OPINION

(PER CURIAM.) Affirmed.

We find that there was no due process violation as Appellant was properly noticed and afforded an opportunity to testify, present evidence, and cross-examine at the hearing. *Richard v. Bank of America, N.A.,* 258 So. 3d 485, 489 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2531a] (citation omitted) ("[g]enerally due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure before judgment is rendered"). We further find that there was no departure from the essential requirements of the law. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (". . . Applied the correct law" is synonymous with "observing the essential requirements of law.") In addition, there was competent, substantial evidence to support the hearing officer's decision. *Bagarotti v. Reemp't Assistance Appeals Comm'n,* 208 So. 3d 1197, 1199 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D159a] ("an administrative hearing officer's findings of fact may not be disturbed by a reviewing court if those findings are supported by competent, substantial evidence"). Finally, applying *Timbs v. Indiana,* 139 S. Ct. 682 (2019) [27 Fla. L. Weekly Fed. S642a], we also find that the $1,085 fine and costs imposed were not excessive, and neither cruel or unusual. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

* * *

Criminal law—Indirect criminal contempt—Violation of stay away order—Because there is no statutory provision that authorizes imposition of freestanding stay away order as part of sentence on charge of threatening police officer, order requiring defendant to stay away from certain location was void, and court lacked subject matter jurisdiction to hold defendant in contempt for violating order—No merit to arguments that order fell within inherent authority of court or that order was downward departure sentence—Trial court could have ordered defendant to stay away from location as condition of probation if it had sentenced him to probationary term

ERIC FRESHMAN, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-6-AC-01. L.T. Case No. B18031146. November 25, 2020. An Appeal from Miami-Dade County Court, Hon. Robin Faber, County Court Judge. Counsel: Carlos Martinez, Miami-Dade Public Defender and James A. Odell, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Miami-Dade State Attorney and Joseph B. Rome, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

CORRECTED OPINION

(WALSH, J.) Eric Freshman appeals from his guilty plea, conviction and sentence imposed on a charge of indirect criminal contempt. The trial court held Mr. Freshman in contempt for violating a "stay away order" issued as part of a sentence on an underlying charge of threatening a police officer. Mr. Freshman argues that the underlying "stay away order" was an illegal and void sentencing provision and therefore, the lower court had no subject-matter jurisdiction to commence contempt proceedings for its violation.

On December 7, 2018, Mr. Freshman pled guilty to a charged misdemeanor offense of threatening a police officer. This charge stemmed from an incident between Mr. Freshman and a police officer on the Miami Beach oceanfront boardwalk at 17th street. The trial court sentenced Mr. Freshman to a 60-day term in the Dade County Jail, with 40 days of jail credit and a "SAO."[1] The trial court did not place Mr. Freshman on probation. At the time of sentencing, the trial court also issued a separate "Stay Away Order" restraining Mr. Freshman from a geographic area on Miami Beach, from the ocean (furthest East point) to the bay (furthest West point) on "17th Street/ Lincoln Road" until December 7, 2019.

On January 4, 2019, Mr. Freshman moved to amend the order to allow him a route of travel within Miami Beach along Alton Road and Collins Avenue. This motion was granted on January 8, 2019. On November 5, 2019, the State Attorney filed a "Suggestion and Petition for Rule to Show Cause" alerting the court that Mr. Freshman had been seen within the boundaries prohibited by the stay away. The trial court issued a rule to show cause as to why Mr. Freshman should not be held in contempt and summoned him for a hearing.

Mr. Freshman moved to dismiss the contempt charge, arguing that

the trial court had no authority to issue a freestanding sentencing order to stay away from a geographic area, and therefore, could not hold Mr. Freshman in contempt for violating that order. The trial court denied the motion, Mr. Freshman pled guilty to the charge of contempt and was sentenced to credit for the 57 days he spent in jail on the charge.

Analysis

The Defendant argues that the sentencing order imposed upon him was illegal because the trial court lacked the power to issue a "free-standing" stay-away order. We review *de novo* a claim that a sentence is illegal. *Burks v. State,* 283 So. 3d 864 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2582b]. A *de novo* standard of review also applies to a determination whether the trial court had subject matter jurisdiction over this contempt proceeding. *Lovest v. Mangiero,* 279 So. 3d 205 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1950a].

A judge's right to impose sentence is not unfettered; it is constrained by law. "In Florida, the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." *Woods v. State,* 740 So. 2d 20 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D831a]. If a sentencing order does not comport with Florida law, the resulting sentence is illegal.

Courts have stricken sentencing orders made without authority or in conflict with state law. For example, in *Pridgen v. City of Auburndale,* 430 So. 2d 967 (Fla. 2d DCA 1983), a defendant convicted of violating a municipal ordinance was placed on a 6-month term of probation. Because Chapter 948, the probation statute, only authorizes probation for a criminal violation of state law and not local law, the court found that the term of probation was illegal. Likewise, in *State v. Muoio,* 438 So. 2d 160 (Fla. 2d DCA 1983), the appellate court struck down an order permitting a defendant convicted of DUI to perform community service in lieu of paying a mandatory fine.

Courts will strike down an illegal sentence even where a defendant pleads guilty to the illegal provision. In *State v. Coban,* 520 So. 2d 40 (Fla. 1988), a Defendant indicted for first-degree murder pled to an illegal sentence of life in prison without parole, in exchange for waiver of the death penalty. Even though that defendant pled to avoid the risk of the imposition of the death penalty, the court struck the illegal sentence. The court concluded that the only statutory sentences for first-degree murder were death or life with a 25-year parole restriction, and the resulting sentence without the parole restriction was therefore illegal. The court further admonished, "[t]he plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions." *Id.* at 41.

Turning to Mr. Freshman's underlying misdemeanor conviction, the crime of threatening a police officer, charged under section 836.12, Florida Statutes (2018) is a first-degree misdemeanor. First-degree misdemeanors are punishable as provided in sections 775.082(4) or 775.083, Florida Statutes (2019). Section 775.082(4) provides:

> (4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:
> (a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding one year;
> * * *

Section 775.083, Florida Statutes (2017) addresses fines. A person convicted of a misdemeanor "may be sentenced to pay a fine" which "shall not exceed" $1,000 when convicted of a first-degree misdemeanor.

In lieu of or in addition to a sentence of incarceration or a fine, a trial judge may also place a person convicted of a misdemeanor on probation. § 948.01(2), Fla. Stat. (2018) ("if the defendant is found guilty of a nonfelony offense as the result of a trial or entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld, the court may place the defendant on probation"). The trial court may, alternatively, place a person found guilty of a misdemeanor on a split sentence where part or all of the term of incarceration is suspended while the defendant completes a probationary term. § 948.012(1), Fla. Stat. (2018).

Beyond incarceration and probation, other statutory provisions address the court's authority to impose alternative sentencing orders. For example, section 775.089, Florida Statutes requires that the judge make an order of restitution if the offender's crime caused damage to a victim. Section 775.13, Florida Statutes obligates judges to order offenders to comply with registration requirements for certain sexual offenses. Section 775.091, Florida Statutes permits that, "[i]n addition to any punishment, the court may order the defendant to perform a specified public service."

Section 921.187, Florida Statutes adopts many of these unique statutory provisions, and in addition, allows that for any drug-related offense in violation of Chapter 893, the trial judge may impose drug treatment for the offender. §921.187(k), Fla. Stat. (2018).

Finally, as a catchall, a trial court imposing sentence under section 775.082 does not forfeit other options available at law. Section 775.082(7), Florida Statutes (2018) states:

> (7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

With respect to freestanding orders to "stay away" from a person or place, section 784.048, Florida Statutes permits a trial judge to impose a freestanding stay-away order as part of the sentence imposed on a charge of stalking. Thus, the legislature is aware of how to codify judicial authority to issue a stay away order at sentencing. *See, e.g., Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So.2d 306, 315 (Fla. 2006) [31 Fla. L. Weekly S788a] ("[W]e have pointed to language in other statutes to show that the [l]egislature 'knows how to' accomplish what it has omitted in the statute in question.").

In reviewing all statutes pertaining to sentencing for a first-degree misdemeanor, there is no statutory provision which would entitle a judge to impose a freestanding "stay away order" as part of a sentence on a charge of threatening a police officer. An order imposed absent legislative or other authority is void. *See, e.g., State ex rel. Saunders v. Boyer,* 166 So. 2d 694 (Fla. 2d DCA 1964) (granting habeas corpus to contemnor who violated void sentencing order to "one year at hard labor in the county jail," where such sentence was not authorized by state law); *Moore v. State,* 245 So. 2d 880 (Fla. 2d DCA1971) (same); *State v. S.M.G.,* 313 So. 2d 761 (Fla. 1975) (judicial order requiring mother of delinquent child to engage in drug rehabilitation was void, and therefore trial court lacked authority to hold her in contempt for failure to follow that order).

The State argues that the trial court's order fell within the inherent authority of the court. They cite no authority for the principle that a trial court possesses the authority to enjoin defendants at sentencing from people or places absent legislative authority. Had the trial judge placed Mr. Freshman on a probationary term for one year, as set forth by section 948.01(2), the court could have ordered him to stay away from a location[2] as a condition of his probation. However, absent an order imposed as a condition of probation, we know of no statutory authority to support a stay away order imposed as part of a sentence.

We further observe that the trial court's order is, in effect, an injunction. The example of Mr. Freshman's order is of particular concern, where the crime of threatening a police officer is not logically linked to an injunction barring the Defendant from a swath of a city's territory. It may be that Mr. Freshman has become a nuisance on Miami Beach. We do not reach the question whether

Miami Beach could seek such an injunction—but at least an injunction proceeding would require presentation of sworn evidence and a high evidentiary burden to grant such extraordinary relief. In the absence of statutory authority, the fact that a defendant pleads guilty to a misdemeanor and is subject to sentencing does not grant a judge inherent authority to fashion injunctive relief for a city troubled by a defendant who has become a nuisance.

The State further argues that the stay away order was a downward departure. The concept of downward departure is codified to mean a departure from a sentence required under the criminal punishment code. Pursuant to section 921.0026, Florida Statutes, such departures apply to sentences imposed for felonies, not misdemeanors.

Accordingly, we conclude that the trial court's order enjoining Mr. Freshman to avoid a geographic boundary on Miami Beach was void, and therefore, the trial court lacked subject matter jurisdiction to hold him in contempt for violation of that order. We therefore quash the contempt order and sentence. (SANTOVENIA, J., CONCURS.)

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[1]"SAO" refers to the "Stay Away Order" imposed by separate order.

[2]The Defendant does not raise and therefore we do not address the propriety of a stay away order enjoining an individual from a large portion of the city of Miami Beach.

(TRAWICK, J., Concurring.) Judges handling criminal cases throughout the State of Florida are often faced with a dilemma similar to, if not the same as the one which confronted the trial judge here—a defendant charged with a "nuisance" or "quality of life" misdemeanor such as, for example, shoplifting, assault, disorderly conduct, urinating in public or trespassing. The victim—often a small corner store owner whose business is adversely impacted with this type of criminal activity, or a community which is plagued by persons who have little regard for the community's residents—each wants to make sure that the defendant is prevented from coming back and repeating the crime. The prosecutor offers a plea to either probation or a relatively short jail sentence, most often credit time served. Included with the plea is a stay away order from a specified location. The defendant, for a variety of reasons, either has no permanent address and so is not eligible to be placed on probation, or he or she does not want to be placed under such supervision. Instead, being anxious to get out of jail or just wanting get the case over with, the defendant agrees to the credit time served offer along with a "freestanding" or "stand alone" stay away order. The defense attorney, knowing that his or her client doesn't want to fight the charge, does not object. The court, happy to get another case off of its crowded docket, quickly conducts a plea colloquy and moves on to the next case, not really considering whether jurisdiction will exist if there is a violation of the stay away order. Soon after his or her release, the defendant goes back to the store or other area covered by the stay away order and is re-arrested for a new offense. More likely than not, the stay away order violation is ignored while a resolution of the new case is being considered. The prosecutor offers, the defendant agrees to, and the court accepts another plea which again includes a stand alone stay away order. The defendant is released and returns to the prohibited area. Violate, repeat, violate, repeat. And on, and on, and on.

This is a vexing problem for everyone involved. Our decision here establishes what most of us know but choose to ignore—a trial court does not have jurisdiction to issue a stand alone stay away order unless such an order is statutorily prescribed, such as for the offense of stalking pursuant to section 784.048, Florida Statutes. As the majority opinion's analysis aptly demonstrates, such an order is void and cannot be enforced based upon the court's "inherent authority." While victims of "nuisance" or "quality of life" offenses beg—no, demand—that prosecutors and judges help keep repeat offenders out of their businesses and communities, the judicial system is constrained as to how much it can do under the law. This is a problem that begs for a legislative fix. Until that happens, our courts, regrettably, will continue to issue unenforceable stand alone stay away orders. Defendants, knowing that nothing will come of such an order, will continue to violate them with impunity. Disregard of court orders should never be tolerated in a society of laws. This is even more problematic when the orders are meant to benefit crime victims. The clock is running and the ball rests not with the judiciary, but in the hands of the State Legislature.

* * *

Insurance—Homeowners—Venue—Forum selection clause—Trial court departed from essential requirements of law by denying insurer's motion to dismiss for improper venue where policy contained clause mandating venue in California, and insured's assignee did not show that enforcement of clause would be unreasonable or unjust—Moreover, facts overwhelmingly favor venue in California where property, assignee's office, and insured's address are located in California; policy was issued in California; and services were provided in California—No merit to argument that insurer waived defense of improper venue by not contesting venue in motion to dismiss original complaint where facts regarding venue defense were not apparent in original complaint

ALLSTATE INSURANCE COMPANY, Petitioner, v. ALL INSURANCE RESTORATION SERVICES, INC., Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-079-AP-01. L.T. Case No. 2018-09778-SP-26. November 22, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Gloria Gonzalez Meyer, Judge. Counsel: Evan A. Zuckerman, Vernis & Bowling of Broward, P.A., for Petitioner. Christopher F. Zacarias, Law Office of Christopher F. Zacarias, P.A., for Respondent.

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

OPINION

(SANTOVENIA, J.) This matter involves a Petition for Writ of Certiorari filed by Allstate Insurance Company ("Allstate") seeking to quash the Order Denying Defendant's Motion to Dismiss for Improper Venue ("Order") which was entered by the trial court on February 19, 2020.

Factual and Procedural Background

Respondent, All Insurance Restoration Services, Inc. ("Respondent" or "AIRS") filed a complaint for damages against Allstate seeking to recover homeowner's insurance benefits for mold mitigation services rendered by AIRS to Allstate's alleged insured, "Lidia Salina" based on her purported assignment to AIRS. Allstate moved to dismiss Respondent's complaint, or in the alternative, for a more definite statement because the complaint did not include any information identifying the alleged assignor or the insured property other than the name "Lidia Salina." The complaint did not provide a policy number, property address, or any other identifying information regarding the policy, claim, or the place where the alleged services were rendered. AIRS also failed to attach to the complaint a copy of the policy and the assignment of benefits agreement in violation of Florida Small Claims Rule 7.050(a)(1).

The initial complaint generally alleged that venue was proper in Miami-Dade County because a breach of the insurance policy occurred in Miami-Dade County and that AIRS was unable to find the policy number or policy to support its complaint.

Prior to filing its motion to dismiss, Allstate contacted AIRS because Allstate was unable to find any Florida policyholder by the name of "Lidia Salina" and requested that AIRS provide more information. AIRS did not respond to this request.

Allstate filed the affidavit of its representative, Lauren Collins in support of its motion to dismiss. The Collins affidavit stated that Allstate could find no individual named "Lidia Salina" in its Florida

database, as follows:

> Allstate does service Standard Flood Insurance Policies ("SFIPs") as part of the National Flood Insurance Program ("NFIP") in the State of Florida, and previously insured a "Lidia Salinas" for flood damage pursuant to an SFIP. Ms. Salinas's SFIP terminated on or about March 6, 2010 and was not thereafter renewed by Allstate; however, it is not known if this is the individual referenced in Plaintiff's Complaint. Both Castle Key Insurance and Castle Key Indemnity write homeowners' insurance policies for properties located in the State of Florida, but neither company has any record of issuing a homeowners' insurance policy to an individual named "Lidia Salina" as alleged in Plaintiff's Complaint. Upon receipt of this lawsuit, I personally contacted Plaintiff's counsel to request more information about the insured named herein, and informed Plaintiff's counsel as follows:
>
> The complaint does not contain any information for Allstate to be able to identify the claim on which you seek to sue. There is no address for Lidia Salina, who is reportedly the homeowner who assigned her claim to AIRS, your client. There is no policy number, claim number, copy of a policy contract, or even a copy of the Assignment of Benefits to identify the file. I have made several calls to your office over the last two days, and have spoken to Anna each time. She was not able to provide any information to help clear this up. I left my name and contact number, but have not heard back from you.

The Collins affidavit makes clear that Allstate does not write homeowner's insurance policies in the State of Florida and that Allstate checked not only its records to ascertain whether "Lidia Salina" was an Allstate insured, but also caused a search to be made of the records of its Florida affiliates, Castle Key Insurance and Castle Key Indemnity for that purpose.

The trial court denied Allstate's motion to dismiss the initial complaint and granted its motion for more definite statement pled in the alternative. The trial court ordered AIRS to file an amended complaint providing a more definite statement containing the insured's address and attaching the assignment agreement.

The amended complaint filed by AIRS on September 4, 2019, for the first time, indicated that the insured's property where AIRS provided remediation services was not located in Florida. Rather, the amended complaint stated that services were provided in California at 6025 Bellflower Blvd., Lakewood, CA 90713. The amended complaint continued to list the insured's name incorrectly as "Lidia Salina", but also indicated that the insured's policy number was 099249337[1]. This policy number, as well as the newly attached assignment agreement, made it possible for Allstate to determine that the insured's name was not "Lidia Salina" as stated in the original complaint and amended complaint, but rather Lidia Salina*s*. Allstate was thus able to determine that Salinas was not insured by Allstate's Florida affiliates, but was insured instead by Allstate's California affiliate for the California property. The amended complaint also indicated that the AIRS entity who was Salinas's assignee was located in California and that the subject assignment was executed in California and not in Florida.

Once the amended complaint was filed and Allstate was able to obtain a certified copy of the insured's California policy, it became apparent that the subject policy contained a mandatory forum selection clause providing for venue in California. Allstate timely filed a Motion to Dismiss the Amended Complaint for Improper Venue based on the mandatory forum selection clause in the policy. This Motion to Dismiss noted that "Lidia Salinas's California homeowner's insurance policy contains a venue-specific endorsement which states as follows: '. . .any and all lawsuits in any way related to this policy shall be brought, heard and decided only in a state or federal court located in California.' "

AIRS' response to Allstate's Motion to Dismiss the Amended Complaint for Improper Venue did not contain any showing that enforcement of the mandatory forum selection clause would be unreasonable or unjust. Rather, AIRS' response relied exclusively upon a waiver theory, asserting that Allstate could not move to enforce the mandatory forum selection clause because it had not asserted a venue-related defense in its motion to dismiss the original complaint. AIRS relied on Florida Rule of Civil Procedure 1.140 as well as *Cassidy v. Ice Queen Intern., Inc.,* 390 So. 2d 465 (Fla. 3d DCA 1980) in support of its waiver argument.

The Motion to Dismiss for Improper Venue was heard by the trial court on February 19, 2020 ("Hearing"). At the Hearing, Allstate argued that (1) the original complaint contained no information which would have allowed Allstate to locate the correct insured and policy; (2) Allstate's representative had submitted an affidavit indicating that she could not locate the insured with the limited information provided in the original complaint; (3) Allstate's representative attempted to obtain the correct information from AIRS' counsel prior to the filing of Allstate's motion to dismiss the original complaint and had received no response; (4) Allstate promptly raised the mandatory forum selection clause as grounds for dismissal as soon as AIRS provided sufficient information for Allstate to locate a certified copy of the insured's policy; and (5) no showing had been made or could be made by AIRS to prevent enforcement of the mandatory forum selection clause, requiring that the case be dismissed.

The trial court denied Allstate's Motion to Dismiss for Improper Venue and entered a written order on February 19, 2020. The Order did not contain any findings of fact or conclusions of law. Allstate timely filed an appeal of the Order[2] and its Petition followed.

Certiorari Review

The party petitioning for common-law certiorari review of a non-final order must demonstrate that the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post judgment appeal." *Bd. of Trustees of Internal Improvement Fund v. American Educational Enterprises, LLC*, 99 So. 3d 450, 454 (Fla. 2012) [37 Fla. L. Weekly S589a] (citing *Reeves v. Fleetwood Homes of Fla., Inc.,* 889 So. 2d 812, 822 (Fla. 2004) [29 Fla. L. Weekly S783a] (quoting *Bd. of Regents v. Snyder,* 826 So. 2d 382, 387 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1634a]); *see also Williams v. Oken,* 62 So. 3d 1129, 1132 (Fla. 2011) [36 Fla. L. Weekly S202a]; *Brooks v. Owens,* 97 So. 2d 693, 695 (Fla. 1957). A finding that the petitioning party has "suffered an irreparable harm that cannot be remedied on direct appeal" is a "condition precedent to invoking a district court's certiorari jurisdiction." *Jaye v. Royal Saxon, Inc.,* 720 So. 2d 214, 215 (Fla. 1998) [23 Fla. L. Weekly S551a]; *see Williams, supra*., 62 So. 3d at 1132 ("The last two elements are jurisdictional and must be analyzed before the court may even consider the first element."); *Martin-Johnson, Inc. v. Savage,* 509 So. 2d 1097, 1099 (Fla. 1987), *superseded by statute on other grounds,* § 768.72, Fla. Stat. (1989); *McDonald v. Johnson,* 83 So. 3d 889, 891 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D258a] ("This court considers the second and third prongs first because they are used to determine jurisdiction."); *Killinger v. Guardianship of Grable,* 983 So. 2d 30, 32 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1161a]; *Harley Shipbuilding Corp. v. Fast Cats Ferry Serv., LLC,* 820 So. 2d 445, 448 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1572a]. If the party seeking review does not demonstrate that it will suffer material injury of an irreparable nature, then an appellate court may not grant certiorari relief from a non-appealable, non-final order. *See Capital One, N.A. v. Forbes,* 34 So. 3d 209, 212 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1052b]. Similarly, if the alleged harm can be remedied on appeal, the harm is not considered irreparable, and thus certiorari relief is not merited. *See Pepsi Bottling Grp., Inc. v. Underwood,* 8 So. 3d 1260, 1262 (Fla. 1st

DCA 2009) [34 Fla. L. Weekly D920b].

A petition for writ of certiorari is an appropriate mechanism to review a venue-related order. *See Enfinger v. Baxley*, 96 So. 2d 538, 539 (Fla. 1957) (noting that "an order denying a motion to dismiss for improper venue may be reviewed . . . on certiorari"); *Kauffman v. King*, 89 So. 2d 24, 26 (Fla. 1956) (concluding that certiorari is the proper review mechanism of interlocutory orders denying motions to dismiss for improper venue); *Home News Pub. Co. v. U-M Pub., Inc.*, 246 So. 2d 117, 119 (Fla. 1st DCA 1971) (noting that an "order denying appellants' motion for transfer. . .being interlocutory in character, is not reviewable under Rule 4.2, F.A.R.," but is reviewable on certiorari); *Paxson v. Collins*, 100 So. 2d 672, 673 (Fla. 3d DCA 1958) (reviewing by certiorari an order dismissing a complaint for improper venue).

The Florida Supreme Court in *Kauffman* considered erroneous orders concerning venue to be one type of "exceptional case" where certiorari was appropriate, as it involved irreparable harm because the remedy on final appeal would mean re-litigating the entire case in the correct venue, which the *Kauffman* court deemed "inadequate." The Court stated:

> It is only in exceptional cases, such as those where. . .the interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate, that this court will exercise its discretionary power to issue the writ. . .The instant case is an exceptional one, under the above rule. The trial judge departed from the essential requirements of the law in denying to the resident defendants a privilege granted to them by statute; and we agree with counsel for the petitioner that it is palpably unjust to require her to incur the expense and be subjected to the inconvenience of defending this suit in Date [sic] County and, in the event of an adverse verdict (which would be reversed by this court on appeal, for the reasons above stated) to have to spend additional time and money to defend it again in Palm Beach County. Her remedy by appeal is, in such circumstances, inadequate.

89 So. 2d at 26. In the instant case, both parties agree that certiorari review by this court is appropriate as AIRS concedes in its Response to the Petition "that the denial of a motion to dismiss for improper venue may result in material injury that could only be corrected via a petition for writ of certiorari".

The irreparable harm to Allstate here is identical to the irreparable harm which the Florida Supreme Court found could not be corrected on post-judgment appeal in *Kauffman*: Allstate would be required to incur the expense and inconvenience of defending a suit in Florida through judgment and, once the judgment were reviewed and reversed on a direct appeal on improper venue grounds and the suit were invariably re-filed in the correct venue, California, Allstate would have to spend additional time and money to defend the suit again in California. Finding irreparable harm for the remainder of the litigation that cannot be corrected on post-judgment appeal pursuant to *Kauffman*, *supra*., the court's analysis turns to whether there has been a departure from the essential requirements of the law.

Mandatory Forum Selection Clause

Because Florida law presumes that forum selection clauses are valid and enforceable, the "party seeking to avoid enforcement of such a clause must establish that enforcement would be unjust or unreasonable." *See Michaluk v. Credorax (USA), Inc.*, 164 So. 3d 719, 723 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1133a]; *Espresso Disposition Corp. v. Santana Sales & Marketing Group, Inc*., 105 So. 3d 592, 594 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D88d] (quoting *Am. Safety Cas. Ins. Co. v. Mijares Holding Co., LLC,* 76 So. 3d 1089, 1092); *see also Corsec, S.L. v. VMC Intern. Franchising, LLC*, 909 So. 2d 945, 947 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1985a]. Under Florida law, a forum selection clause is only considered unjust or unreasonable if the party seeking avoidance establishes that enforcement would result in "no forum at all." *Espresso, supra*., 105 So. 3d at 594-95 (citations omitted); *see also Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n,* 874 So. 2d 1231, 1235 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1302a]. Stated differently, the party seeking to avoid a contractual agreement must establish "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[3] *Corsec,* 909 So. 2d at 947 (quoting *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986)). In *Manrique*, the Florida Supreme Court "emphasize[d] that the test of unreasonableness is not mere inconvenience or additional expense" and that absent the requisite showing by "the party seeking to escape his contract", "there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain". *Id*. at fn 4 (citations omitted).

If a venue clause is "mandatory in nature," Florida courts are obliged to honor it. *H. Gregory 1, Inc. v. Cook*, 222 So. 3d 610 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1665a]. Mandatory forum selection clauses contained in agreements (using the words "must", "exclusive," or "shall") govern the venue of the action, requiring dismissal of claims brought in an improper venue. *See Gold Crown Resort Marketing, Inc. v. Phillpotts*, 272 So. 3d 789 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1127a] (forum selection clauses in California customers' membership agreements were unambiguously mandatory). *See Michaluk, supra.*, 164 So. 3d at 722-23 ("A forum selection clause will be deemed mandatory where, by its terms, suit may be filed only in the forum named in the clause. . . 'Generally, a forum selection clause is mandatory where the plain language used by the parties indicates 'exclusivity. . .For example, "[i]f the forum selection clause 'states or clearly indicates that any litigation must or shall be initiated in specified forum,' " then the clause is mandatory. . .") (citations omitted).

In a case factually similar to this case, the court held that the trial court erred in denying a motion to dismiss and failing to enforce a contractual forum selection clause which would have required that lessors' complaint for breach of lease be brought in California, rather than in Florida. *See Straight, Inc. v. Yorba Linda Commercenter Assocs.*, 594 So. 2d 849, 850 (Fla. 2d DCA 1992). The court found the forum selection clause to be enforceable and recognized that "the modern trend is to enforce reasonable forum selection clauses." (*citing Manrique, supra*., 493 So. 2d at 437). In *Straight*, the court noted that the only connection to Florida was that it was lessee's principal place of business while the lessor partnership was located in California, as were the leased property and, presumably, the witnesses. *Id.*

The policy issued to Salinas is attached as Exhibit A to Allstate's Motion to Dismiss for Improper Venue. The forum selection clause in the policy provides that ". . .any and all lawsuits in any way related to this policy **shall** be brought, heard and decided **only** in a state or federal court located in California." (emphasis added). Given the use of the mandatory word "shall" and the exclusive word "only", the forum selection clause is mandatory. *See Michaluk, supra.*, 164 So. 3d at 722-23; *Celistics, LLC v. Gonzalez*, 22 So. 3d 824 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2456a]; *Weisser v. PNC Bank, N.A*., 967 So. 2d 327 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2387a].

Allstate's Motion to Dismiss for Improper Venue cited to *Manrique*, *supra*., and other cases for the proposition that a trial court must honor a mandatory forum selection clause unless the non-moving party can show that the clause is unreasonable or unjust. Here, AIRS filed no affidavit in opposition nor did AIRS even attempt to make its required showing in its response to Allstate's Motion to Dismiss for Improper Venue. As such, AIRS did not meet its burden

of proof to show that the mandatory forum selection clause was unreasonable or unjust; ie, that enforcement of the clause would result in AIRS having no forum at all. *See Espresso, supra.,* 105 So. 3d at 594-95; *Walbridge, supra.,* 800 So. 2d at 287; *Manrique, supra.,* 493 So. 2d at 437. Absent such a showing that enforcement of the venue clause would be unreasonable or unjust, the trial court was required to enforce the mandatory forum selection clause. *See Manrique, supra.,* 493 So. 2d at 440 ("We hold that forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust"); *Michaluk, supra.,* 164 So. 3d at 722-23. Accordingly, the trial court failed to comply with the essential requirements of law.

Nor is the contractual forum selection clause the sole basis supporting venue in California. Enforcement of the mandatory forum selection clause would not be unjust or unreasonable as the facts overwhelmingly favor venue in California[4]. As in *Straight*, *supra*., "rather than being unreasonable, the California forum is particularly reasonable." 594 So. 2d at 850. The July 11, 2017 invoice submitted from AIRS' California address was addressed to Allstate's California address. The insured's property is located in California. The remediation services by AIRS were provided in California. AIRS' California office sent an invoice to Salinas at her California address. The one-page assignment contract lists AIRS, the assignee, at a California address. The Allstate policy was issued in California. The witnesses would also presumably be located in California.

Waiver

Not having shown that venue in California is unjust or unreasonable, AIRS relied instead at the Hearing, and relies in its Response to Allstate's Petition, solely on the argument that Allstate waived the defense of improper venue by not contesting venue in its motion to dismiss the original complaint. That motion to dismiss was premised only on AIRS' failure to attach to the complaint a copy of its agreement with "Lidia Salina" in violation of Florida Small Claims Rule 7.050(a)(1).

AIRS relies on Florida Rule of Civil Procedure 1.140(b) in support of its waiver argument. Rule 1.140(b) states, in pertinent part, as follows:

> Every defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: . . .(3) **improper venue**. . . A motion making any of these defenses must be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued must be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated must be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. . . . .
> * * *
> **(h) Waiver of Defenses.**
> (1) A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2). . .

(emphasis added).

The author's note accompanying the original Florida Rule of Civil Procedure 1.140 states in relevant part that:

> Under prior law, successive motions presenting defenses and objections to pleadings were not only permitted, but, in maintaining the distinction between special and general appearances, were required. The abolition of the special appearance eliminated the need for successive motions, and the rule took the further step of precluding a succession of motions. . . .Successive motions are [now] allowed only (1) **when a defense or objection provided for in Rule 1.140 was not available when the prior motion was made upon one or more of the specified defenses or objections,** or (2) when the prior or subsequent motion is based upon a defense or objection provided for by statute or by a rule other than Rule 1.140.

(emphasis added).

Courts have found no waiver by a defendant who asserts a defense for the first time in response to an amended complaint where the facts underlying the defense were not apparent in the initial complaint. *See Eden Owners Ass'n, Inc. v. Eden III, Inc.*, 840 So. 2d 419, 420 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D772c] ("Because we conclude that the appellant failed to set forth an actionable claim based upon breach of the construction contract or other contracts containing arbitration provisions until the second amended complaint, and because the appellees promptly moved to compel arbitration thereafter, the appellees' responses to the initial and first amended complaints did not constitute a waiver."); *Elegele v. Harley Hotels, Inc.*, 689 So. 2d 1305, 1307 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D812a] ("Once the plaintiff has filed an amended complaint, the defendant is entitled to respond to it anew. We see nothing to prevent the defendant from raising new motions or new defenses that were not raised as against the prior, now superseded, complaint. We find no waiver.").

Furthermore, waiver is defined as "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1114 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D3115a]. 69A defendant does not waive venue where there is no "intentional or voluntary relinquishment of a known right." *See Voineag v. Kline*, 831 So. 2d 783, 784 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2592c] (defendants did not waive right to change venue when a witness established six months after initiation of lawsuit that the original venue was improper because the accident had occurred in a different county than the location plaintiff had alleged in its complaint).

AIRS also relies upon *Cassidy v. Ice Queen Intern., Inc.*, 390 So. 2d 465 (Fla. 3d DCA 1980) to support its waiver argument. However, AIRS' reliance upon *Cassidy* is misplaced. In *Cassidy*, the appellee-defendant had filed a motion to dismiss in the trial court based on two grounds, neither of which included improper venue. *Id*. at 466. The trial court granted the motion to dismiss and on appeal, the appellee argued for the first time that improper venue was an additional ground supporting that the trial court's order granting the motion to dismiss should be affirmed. *Id*. The appellate court found that the venue argument had been waived because it was not raised below. *Id*.

AIRS additionally relies upon *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423 (Fla. 4th DCA 2003) [29 Fla. L. Weekly D119a] to support its contention that "[t]he filing of amended pleadings does not revive a waived venue argument." However, *Johnson* is distinguishable on its facts, which show no "material difference between the original complaint and the second amended complaint insofar as the relationship to the [agreement at issue] is concerned." *Id*. at 427.

Rule 1.140(e), Fla. R. Civ. P. governing motions for more definite statement provides, in relevant part, that:

> **If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading.** The motion must point out the defects complained of and the details desired. . .

The trial court granted Allstate's motion for more definite statement, resulting in the filing of AIRS' amended complaint. The trial court's order granting Allstate's motion for a more definite statement was

tantamount to a finding that the original complaint was so vague or ambiguous that Allstate could not reasonably be required to frame a responsive pleading, and that it was entitled to a more definite statement before interposing a responsive pleading. *See* Rule 1.140(e), Fla. R. Civ. P. The complaint was vague because it not only misspelled the name of the insured, but it also failed to include any information identifying the subject property address, policy number, or date of loss. Also, AIRS had failed to attach a copy of the insurance policy and the assignment of benefits to the original complaint. The trial court's finding of waiver of Allstate's right to enforce the mandatory forum selection clause is wholly inconsistent with its order granting Allstate's motion for a more definite statement.

Moreover, the facts do not support a theory that the defense of venue was waived because Allstate was somehow on notice through the initial complaint that venue was not proper in Miami-Dade County. The original complaint alleges that the contract was breached in Miami-Dade County and that payment was due in Miami-Dade County. Nothing in the complaint even hinted at the fact that the insured's property is located in California or that AIRS, the assignee, is located in California and the remediation services by AIRS were provided in California. Moreover, nothing in the complaint indicated that the policy was issued in California. The location of the property in California and the correct name of the insured did not become apparent until AIRS filed its amended complaint because it was ordered by the trial court to do so. It is one thing to say that a defendant has waived the right to assert a defense which is evident from the claims and facts in a complaint, and quite another to say that a defendant has waived a right to assert a defense that is not apparent on the face of the complaint. Contrast *Three Seas Corporation v. FFE Transportation Services, Inc.*, 913 So. 2d 72, 75 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2351a] (finding waived venue argument not revived by filing of amended pleadings where the amended complaint repeated the identical breach of contract claim which had been made in the original complaint); *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 427 (finding waiver where there was no material difference between the original complaint and the second amended complaint insofar as the relationship to the agreement at issue). Allstate is correct in arguing that it could not have waived its right to invoke the mandatory forum selection clause, as it could not knowingly or intentionally waive a right that it did not know it possessed.

Here, as to the waiver issue, AIRS filed no affidavit in opposition to Allstate's affidavit supporting the motion to dismiss the complaint. Notwithstanding, the trial court disregarded at the Hearing Allstate's unrefuted affidavit, stating that "the problem is, Allstate should have known this is their insured. She is their insured, and they waived [enforcement of the mandatory forum selection clause]." This was error.

The trial court's denial of Allstate's Motion to Dismiss for Improper Venue departed from the essential requirements of law because AIRS failed to present any evidence below that enforcement of the mandatory forum selection clause in the policy was unreasonable or unjust, thus mandating enforcement of the clause. Also, the Order departed from the essential requirements of law because there was no waiver under Florida Rule of Civil Procedure 1.140 where Allstate raised the improper venue defense when it became evident from facts and the assignment contract included with the amended complaint—notably information which AIRS had omitted from the original complaint.

For the foregoing reasons, the trial court's denial of Allstate's Motion to Dismiss the Amended Complaint for Improper Venue constituted a departure from the essential requirements of law resulting in irreparable harm for the remainder of the litigation which cannot be remedied on post-judgment appeal. Accordingly, Allstate's Petition for Writ of Certiorari is GRANTED, the Order Denying Allstate's Motion to Dismiss the Amended Complaint for Improper Venue is QUASHED, and this cause is remanded to the trial court with instructions to dismiss the case for improper venue and for further proceedings in accordance with this opinion. Respondent's Motion for Attorney's Fees is DENIED. (TRAWICK and WALSH, JJ., concur.)

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[1]The assignment agreement between AIRS and Lidia Salinas includes the Allstate policy number for the homeowner's policy insuring Salinas, the correct spelling of the insured's last name as Salinas, and the property address at which AIRS provided remediation services. Presumably, AIRS was on notice of all of this information at the time the assignment was executed by Salinas on July 10, 2017. Notwithstanding, AIRS failed to attach the assignment to its initial complaint filed on September 19, 2018 and failed to provide this information to Allstate thereafter upon request, even after Allstate filed the Collins affidavit.

[2]Given that general law does not provide for interlocutory review by this court of the trial court's Order, Allstate's motion requesting that this court in the alternative review the Order under common-law certiorari was granted and a petition for writ of certiorari was filed by Allstate. *See Home News Pub. Co. v. U-M Pub., Inc.*, 246 So. 2d 117, 119 (Fla. 1st DCA 1971) ("the order denying appellants' motion for transfer. . .being interlocutory in character, is not reviewable under Rule 4.2, F.A.R., because it does not fall within the classification of orders which may be interlocutorily reviewed pursuant to the provisions of that rule. We hold, however, that . . .the order denying transfer of the action may, in this court's discretion, be reviewed by common law certiorari. The notice of appeal directed to the trial court's order denying appellants' motion to transfer. . .is treated as a petition for writ of certiorari, and this cause shall proceed to a determination of the merits of this question in the same manner as if review had initially been sought by certiorari").

[3]It would be difficult for a Florida court to enforce court orders requiring that certain actions that may be necessary—for example, property inspections—be performed in California.

[4]The original complaint alleges that the contract was breached in Miami-Dade County and that payment was due in Miami-Dade County. The amended complaint contains those same venue allegations and specifies that "**payment on the invoice pursuant to Florida law is due and payable in Miami-Dade County, Florida"** (emphasis added). However, neither the one-page assignment contract nor the July 11, 2017 invoice requires payment in Miami-Dade County, both documents being silent as to the required location of payment.

* * *

Insurance—Personal injury protection—Mistrial—Where record is clear that trial court denied motion in limine seeking exclusion of any mention of plaintiff's expert witness's ownership interest in corporate plaintiff but that testimony regarding ownership interest of plaintiff's trial counsel would not be allowed, trial court did not abuse discretion in ordering mistrial when insurer questioned witness about counsel's ownership interest in company—No merit to argument that plaintiff's questioning of expert witness regarding his ownership interest opened door to irrelevant questions about counsel's ownership interest—No merit to claim that there was no prejudice because witness did not answer objectionable question—No merit to argument that trial court erred in granting both curative instruction and motion for mistrial—Insurer agreed that trial would continue based on curative instruction and court would reserve ruling on motion for mistrial until after jury verdict

STATE FARM MUTUAL AUTOMOBILE INS. CO., Appellant, v. GABLES INSURANCE RECOVERY, INC., a/a/o Denis Torres Pantoja, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-254 AP 01. L.T. Case No. 2012-27399 SP 05. November 25, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Maria D. Ortiz, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC; Christopher L. Kirwan and R. Ryan Smith, Kirwan Spellacy Danner Watkins & Brownstein, P.A., for Appellant. G. Bart Billbrough and Adriana de Armas, Billbrough & Marks, P.A., for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.) This is a breach of contract case for personal injury protection ("PIP") benefits. Denis Torres Pantoja ("Pantoja")

allegedly sustained injuries from an automobile accident. At the time of the accident, Pantoja was insured by the Appellant, State Farm Mutual Automobile Insurance Company ("Appellant" or "State Farm"). Pantoja sought medical care and made a claim for PIP benefits pursuant to the State Farm policy. Under an assignment of benefits from Pantoja, All X-Ray Diagnostic Services ("All X-Ray") provided medical services and x-rays. Thereafter, All X-Ray assigned its claim for payment to Gables Insurance Recovery, Inc. ("Gables"). State Farm did not pay the full amount of the bill and Gables tendered its pre-suit notice letter and filed suit. State Farm answered the complaint, denying that the services were medically necessary or related to the accident and that the charges were reasonable.

Both parties' summary judgment motions were denied and trial was set for January 22, 2019. Several motions in limine were filed by both parties. At the January 22, 2019 hearing on Gables' motion in limine number VIII ("Motion in Limine"), Gables sought to exclude, *inter alia*, any "evidence, information and material supporting the allegation that the principals of Plaintiff have any personal financial stake in the litigation." The owners of Gables are Robert N. Pelier, Esquire ("Pelier"), who served as trial counsel for Gables below, and Carlos Plana ("Plana"), who testified at trial as Gables' principal. The trial court denied the Motion in Limine as to Plana and granted the Motion in Limine as to Pelier. At trial, State Farm asked a question which Gables contends and the trial court found violated the pre-trial ruling on the Motion in Limine. Gables moved to strike and for a curative instruction and admonishment of counsel before the jury, or in the alternative for mistrial. The motion for mistrial was granted initially, but the parties agreed to proceed with the trial and address the motion for mistrial after the verdict. The trial court accepted the parties' agreement, instructed the jury to disregard the question, and admonished State Farm's counsel for violating the court's previous ruling.

On January 30, 2019, the jury returned its verdict finding that the charges were related, but not medically necessary. Gables renewed its motion for mistrial and State Farm moved to poll the jury as to its deliberations and the impact of prejudice, if any, from the objectionable question. The trial court denied State Farm's motion and granted Gables' motion to set aside verdict based on its initial mistrial ruling. On August 15, 2019, the trial court entered its order granting the motion for mistrial.

On August 22, 2019, State Farm moved for rehearing and reconsideration of the trial court's mistrial order. State Farm's motion was denied. On September 9, 2019, State Farm filed its timely notice of appeal from the August 15, 2019 Order on Plaintiff's Motion for Mistrial which granted a new trial.

Analysis

This court reviews the trial court's ruling on the motion for mistrial under an abuse of discretion standard. *Salazar v. State,* 991 So. 2d 364 (Fla. 2008) [33 Fla. L. Weekly S535a]; *Perez v. State,* 919 So. 2d 347, 363 (Fla. 2005) [30 Fla. L. Weekly S729a] ("trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review") quoting *Goodwin v. State,* 751 So. 2d 537, 546 (Fla. 1999) [24 Fla. L. Weekly S583a]; *Floyd v. State,* 913 So. 2d 564, 576 (Fla. 2005) [30 Fla. L. Weekly S724a]; *Ricks v. Loyola,* 822 So. 2d 502, 506 (Fla. 2002) [27 Fla. L. Weekly S591a]; *Ford v. State,* 802 So. 2d 1121, 1129 (Fla. 2001) [26 Fla. L. Weekly S602a] ("A trial court's ruling on a motion for a mistrial is within the sound discretion of the court and will be sustained on review absent an abuse of discretion"). Trial courts have broad discretion in ruling on motions for a new trial and motions for mistrial. *Brown v. Estate of Stuckey,* 749 So. 2d 490 (Fla. 1999) [24 Fla. L. Weekly S397a]. "When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion." *Allstate Prop. & Cas. Ins. v. Flores,* 46 So. 3d 94 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2151a] (*citing Brown v. Estate of Stuckey,* 749 So. 2d at 497-98). Discretion is abused only when no reasonable person would take the view adopted by the trial court. *Trease v. State,* 768 So. 2d 1050, 1053 (Fla. 2000) [25 Fla. L. Weekly S622a]; *Canakaris v. Canakaris,* 382 So. 2d 1197, 1203 (Fla. 1980) ("If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion"). The appellant faces a "heavy burden," and must establish that the trial court's abuse of discretion is "clear from the record." *Flores,* 46 So. 3d at 95; *see Castlewood Int'l Corp. v. La Fleur,* 322 So. 2d 520, 522 (Fla. 1975) (holding that there must be a strong showing to upset an order granting a new trial, a heavy burden rests on those seeking to overturn such an order, and any abuse of discretion must be patent from the record); *Cloud v. Fallis,* 110 So. 2d 669, 673 (Fla. 1959) ("a stronger showing is required to upset an order granting a trial than is required for an order denying a new trial").

Gables' Motion in Limine sought to preclude any mention of the financial structure of Gables, the corporate plaintiff below. Specifically, the Motion in Limine requested that "eliciting specific information regarding a corporate principal's interest in the company should be precluded." At the hearing on the Motion in Limine, State Farm argued that it was allowed to inquire about a witness's financial interest in the litigation, particularly if Gables called Plana, its owner, as an expert witness on the reasonableness of its charges. Gables acknowledged that a party has the right to inquire of a testifying witness as to its financial interest, but that inquiry could not extend to the corporate structure or financial holdings of the principals of the corporate plaintiff. Gables argued at the hearing on the Motion in Limine:

> There is certainly ample authority that when a witness is testifying certainly financial motive and bias is at issue, but what we raised in the motion is, is that is Gables Insurance Recovery, that is the Plaintiff. Certainly it is fair game as it pertains to the corporation, but to seek information or inquire as to personal stakes, and getting into the corporate structure, that is improper as it pertains to a corporate entity.

The parties' arguments, which focused on the appropriateness of questions addressing the financial interests of a testifying witness, presented the context in which the trial court ruled on the Motion in Limine. After the trial judge denied the Motion in Limine, counsel for Gables asked the court to clarify whether the ruling would be limited to Plana (who was a testifying witness) or whether the ruling also applied to Pelier (who was trial counsel and was not a testifying witness). The court responded: "I don't see why Mr. Pelier. He is not going to be a witness. It will only be Mr. Plana." State Farm did not ask the trial judge for any clarification, but instead stated: "I don't see how Mr. Pelier would come in." The court responded: "No. Mr. Pelier would not. . ." In short, the court made clear that reference to or inquiry as to the financial interest of Pelier, the trial attorney representing Gables, was not a permissible area of questioning and State Farm's counsel acknowledged same.

If State Farm's statement that "I don't see how Mr. Pelier would come in" was only an acknowledgment that Pelier would not be a witness and nothing more, as State Farm now argues on appeal, there was still no basis for the objectionable question. Pelier's ownership in Gables was not relevant to any issue in the trial; i.e., whether the medical services were related or necessary or whether the charges were reasonable, nor does State Farm even attempt to so argue. Pelier did not testify; accordingly, his financial interest in Gables was not relevant to his bias, motive or credibility as a witness. Pelier's ownership interest in Gables was relevant *only* to his personal

financial stake in the litigation, which the trial judge properly determined to be an area of inquiry prejudicial to Gables.

On appeal, State Farm argues that the trial court's ruling on the Motion in Limine was unclear. The record does not support this contention. The subject of the Motion in Limine was the exclusion of any mention of the ownership interests in the corporate entity. The transcript confirms that the trial court denied the Motion in Limine as to Plana, since he was a testifying witness for Gables. When the trial court stated that "I don't see why Mr. Pelier. He is not going to be a witness. It will only be Mr. Plana," the trial court was clearly referring to the fact that Plana was going to be a testifying witness, as to whom questions regarding financial interest would have been relevant to address bias and credibility, while Pelier was not going to testify so that his financial interest in Gables would not have been relevant. State Farm's response shows counsel's understanding that testimony regarding Pelier's interest in the corporation would not be coming in and was off limits. Notwithstanding, State Farm proceeded on cross examination of Plana to inquire as to Pelier's financial interest in Gables.

The following exchange occurred when State Farm conducted its cross examination of Plana, who had testified on direct examination that he was the Executive Director and owner of Gables:

> Q Thank you. Sir, you are here today, you are an owner of Gables Insurance Recovery, correct?
>
> A Yes, as I previously testified to.
>
> Q Do you own it alone?
>
> A No.
>
> Q You and Mr. Pelier own Gables Insurance Recovery, correct?

When Plana did not volunteer Pelier's ownership interest in response to the second question as to whether Plana owned the company alone, State Farm then followed up with the leading question specifically mentioning Pelier: "You and Mr. Pelier own Gables Insurance Recovery, correct?" That question is wholly inconsistent with State Farm's counsel's acknowledgement to the court that "I don't see how Mr. Pelier would come in".

State Farm now attempts on appeal to justify its question by arguing that Gables opened the door to this area of questioning by asking Plana on direct examination whether he was an owner of the company. The legal principle of opening the door allows admission of otherwise inadmissible testimony to explain or limit evidence previously admitted. *Siegel v. State,* 68 So. 3d 281, 288 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1633a], *citing Rodriguez v. State,* 753 So. 2d 29, 42 (Fla. 2000) [25 Fla. L. Weekly S89a]. In *Siegel,* the door was opened when plaintiff claimed financial inability to pay for medical treatment, such that the trial court allowed the defense to question the plaintiff concerning the availability of her financial resources. Unlike the circumstances in *Siegel,* State Farm's inquiry as to the ownership of Pelier was not relevant. Only the ownership of Plana was relevant since he was the witness giving testimony. As such, the testimony that Plana was an owner of Gables did not open the door to inquire as to any unrelated ownership interests, including Pelier's.

State Farm points out that there was no answer to the objectionable question so that presumably there was no prejudice to Gables. However, it cannot be overlooked that the question to Plana was a leading question containing the statement "you and Mr. Pelier own Gables", which was heard by the jury.

State Farm also contends that the trial court erred in both giving a curative instruction with an admonishment and granting the motion for mistrial after the verdict. The transcript confirms that Pelier made a contemporaneous objection to the question regarding Pelier's ownership interest and moved for a curative instruction or in the alternative a mistrial, thereby preserving the issue for appeal. *Murphy v. Intl. Robotics Systems, Inc.,* 710 So. 2d 587 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D447b]. The trial court granted the motion for mistrial, acknowledging that State Farm's inquiry as to Pelier's ownership in Gables would unfairly prejudice Gables, and impact Pelier's credibility and that of his client. The court further found that the adverse impact of State Farm's question could not be remedied by a curative instruction. At that juncture, four days into the trial, it was State Farm who asked the trial court to continue the trial and rule on the motion for mistrial after the verdict, as follows:

> Your Honor, I would take whatever admonishment is done. I would rather have this trial go to jury verdict and get it over with. And these are all motions that can be handled post-verdict and you can keep the same ruling. But let's get a jury verdict because if they win it, it make it moot and we don't have to try it again. If they lose you can consider all of these things post-verdict. But, right now, if they prevail in this trial it makes all of this moot, and we have been here for four days putting on witnesses and doing everything else.

The parties then agreed to proceed with the trial because if Gables prevailed, the issue would be rendered moot. The court would address the mistrial issue post-verdict. In order to proceed, Gables requested that the question be stricken, that the jury be instructed to disregard the question, that State Farm's counsel be admonished in front of the jury, and that the court reserve ruling on the motion for mistrial. State Farm stated that it understood that the court would rule on the motion for mistrial after the verdict. On appeal, State Farm attempts to assert a contrary position that is unsupported by the record.

A trial court may exercise its discretion to determine whether to rule on a motion for mistrial immediately or to reserve ruling until after the jury verdict. *Ed Ricke and Sons, Inc. v. Green by and Through Swan,* 468 So. 2d 908 (Fla. 1985). A motion for a mistrial coupled with a request that the court reserve ruling on the motion until after the jury has completed its deliberation does not constitute a waiver and prohibit appellate review of the motion. *Id.* at 910. As such, State Farm's contention that Gables waived its objection or its motion for mistrial by asking for both a curative instruction with an admonishment of counsel and a mistrial is incorrect. Furthermore, the record below evidences that State Farm was aware that in proceeding with the trial, the judge would be admonishing counsel and would be ruling on the motion for mistrial after the verdict. Accordingly, the record does not support State Farm's argument on appeal that the court erred in giving both a curative instruction for the trial to proceed and granting the motion for mistrial after the verdict. Nor does State Farm cite to any legal authority which requires such a conclusion.

In addition, State Farm argues that the trial court misinterpreted the Motion in Limine and its own ruling on the Motion in Limine. It is clear from the record, however, that the trial court remembered and understood its ruling on the Motion in Limine. When State Farm asked the trial judge to state the basis[1] for granting the motion for mistrial, the judge stated:

> Because it is very prejudicial. First of all, if I recall directly, **I denied that motion in limine, which was motion in limine number eight. But I did address the fact that Pelier was a part owner**. And, honestly, to ask a question about him being a part owner is—He is not a witness in the case. And an attorney can't—If he was going to be a part of this case he wouldn't be able to represent the client. And then it is making him a witness in the case and it is very prejudicial.

(emphasis added).

State Farm also asserts that the trial court erred when it denied the insuror's motion to interview the jury.[2] State Farm's position is contrary to case law precedent. "Jury inquiry is limited to allegations which involve an overt prejudicial act or external influence, such as a juror receiving prejudicial non-record evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions." *Reaves v. State,* 826 So. 2d 932, 943 (Fla. 2002) [27

Fla. L. Weekly S601a]. Juror interviews are not permitted relative to any matter that inheres in the verdict itself and relates to the jury's deliberations. *Id.*; *Gray v. State*, 72 So. 3d 336, 337 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2363b].

When State Farm failed to follow the trial court's ruling on the Motion in Limine by asking Plana if Pelier owned Gables, it was the trial judge who was best suited to determine the prejudice, if any, resulting from that question. The trial court found the question to be very prejudicial. From its vantage point, the trial court discerned prejudice that could not be remedied by a curative instruction. Having made that determination, even if another judge may have handled the situation differently, it cannot be said that the trial court acted unreasonably. In summary, the trial court exercised its sound discretion in ruling on the motion for mistrial. The record supports the trial court's proper exercise of its sound discretion. Applying the reasonableness test, it is clear that the trial court did not abuse its discretion. *See Flores, supra.,* 46 So. 3d at 95.

For the foregoing reasons, we find that the trial judge did not abuse her discretion in granting the motion for mistrial and ordering a new trial. Accordingly, the August 15, 2019 Order on Plaintiff's Motion for Mistrial is AFFIRMED. (TRAWICK and WALSH, JJ., concur.)

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[1]The trial court's finding of prejudice is based on Rule 4-3.7, Rules Regulating the Florida Bar, which provides that a lawyer "shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client," subject to certain exceptions not applicable here. The rule was designed to prevent the evils that arise when a lawyer dons the hat of both an advocate and a witness for his or her own client. *State v. Scott,* 717 So.2d 908 (Fla. 1998) [23 Fla. L. Weekly S175a]. A lawyer serving in a dual role of both advocate and witness can prejudice the tribunal and the opposing party because the trier of fact may be confused or misled by a lawyer serving as both advocate and witness, especially where the trier of fact is a jury. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. When they are one in the same, it may not be clear whether the statement of an advocate-witness should be taken as proof or as analysis of the proof. *Roberts v. State,* 840 So.2d 962 (Fla. 2002) [27 Fla. L. Weekly S1017a]; *Allied Signal Recovery Trust v. Allied Signal, Inc.,* 934 So.2d 675 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2443b]. Where an attorney will be a material witness, an indispensable witness, or when the attorney's conduct may be a central figure in the case, that attorney is subject to being precluded from representing the client at trial. *KMS Restaurant Corp. v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.,* 107 So.3d 552 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D475a]; *Graves v. Lapi,* 834 So.2d 359 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D195b]; *Fleitman v. McPherson,* 691 So.2d 37, 38 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2091a].

[2]A trial court's decision on a motion to interview jurors is reviewed under an abuse of discretion standard. *Anderson v. State,* 18 So. 3d 501, 519 (Fla. 2009) [34 Fla. L. Weekly S430b].

* * *

Counties—Employees—Dismissal—Petition for writ of certiorari challenging decision of president/CEO of county public health trust rejecting hearing examiner's recommendation and dismissing employee is denied—Decision was sole prerogative of president/CEO and was supported by competent substantial evidence that employee failed to treat patient's blood pressure spike before going on break and ran from room of unresponsive patient rather than calling Code Blue

MONIQUE MESSAM, RN., Appellant, v. THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY/JACKSON HEALTH SYSTEM, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000218-AP-01. L.T. Case No. 01-18-0002-2223. December 15, 2020. On Review from Final Decision by Public Health Trust of Miami-Dade County. Counsel: Leslie Holland, for Appellant. Leona Nicole McFarlane, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Nurse Monique Messam petitions the decision by the President and CEO of the Public Health Trust of Miami-Dade County to terminate her employment at Jackson Hospital.

We find that the decision to reject the hearing examiner's recommendation and terminate the employee was the sole prerogative of the President and CEO of Jackson Health System, and thus complied with the essential requirements of law. *See Raghunandan v. Miami-Dade County,* 777 So. 2d 1009 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D22c] (issue whether certain behavior or conduct constitutes incompetence or misconduct is a matter of opinion " 'infused by policy considerations for which the agency has special responsibility' ") (quoting *Schrimsher v. Sch. Bd. of Palm Beach County,* 694 So. 2d 856, 862 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1372e]).

Competent substantial evidence, including the Petitioner's own testimony that she failed to treat her patient's blood pressure spike before going on break and when he was unresponsive, ran out of the room rather than calling in a Code Blue, supported the decision of the CEO. In *Dusseau v. Metro. Dade County Bd. of County Com'rs,* 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a], in approving reversal of a circuit court decision, the Court emphasized that a reviewing circuit panel is required to review the record for evidence *supporting* the decision below, rather than reweighing the evidence presented:

> [The] "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters.

Petitioner does not allege that she was deprived of her due process rights. Accordingly, we deny this petition for writ of certiorari. (TRAWICK and SANTOVENIA, JJ., concur.)

* * *

Criminal law—Criminal history record—Expunction or sealing—Florida Department of Law Enforcement properly refused to issue certificate of eligibility where offense of which defendant was convicted, drug trafficking, rendered him ineligible for expungement—Law in effect at time of filing petition for expunction controls proceeding

RONNIE McCLENDON, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF LAW ENFORCEMENT, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-3575, Division D. November 30, 2020. Counsel: Ronnie McClendon, Pro se, Petitioner.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMILY PEACOCK, J.) THIS CASE is before the court on Petitioner Ronnie McClendon's April 5, 2019, Appeal. Because this court does not have appellate jurisdiction over this administrative matter, it is treated as a petition for writ of certiorari. Rule 9.040(c), Florida Rules of Appellate Procedure (if a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought). Petitioner seeks an order directing Respondent Florida Department of Law Enforcement to issue a "certificate of eligibility" under §943.0585, Florida Statutes. The certificate is a prerequisite to petitioning the court for expunction of certain judicial records. A letter from Respondent informed Petitioner that it was denying his application because the offense for which he was convicted is not eligible for the certificate under §943.0584(2), which contains a list of offenses for which expunction is not eligible. The offense with which Petitioner was charged appears to fall under §893.135(1)(c)1., Florida Statutes. It is not eligible for expunction. Although this court is not unsympathetic to Petitioner's plight, especially considering the length of time that has passed since the offense for which he wants the record

expunged, the law is clear that it is the law in effect at the time a petition for expunction is filed that governs the proceeding. *State v. Goodrich,* 693 So.2d 1093, 1094 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1285a], *citing State v. Greenberg*, 564 So. 2d 1176, 1177 (Fla. 3d DCA 1990) (law in effect at time of filing petition for expunction applies.) This court is required to follow it.

Because Petitioner has not set forth a legal right to the requested relief, it is ORDERED that the petition is DENIED without need for a response on the date imprinted with the Judge's signature.

* * *

Attorney's fees—Arbitration—Appeal of trial court's denial of attorney's fees following arbitrator's denial of fees—Whether trial court should have vacated award and sent matter back to arbitrator for reconsideration of denial of request for attorney's fees was not preserved for appellate review where appellant never asked trial court to vacate award and send matter back to arbitrator and never asked arbitrator for rehearing—Further, appellant's failure to seek fees in its answer to complaint provided legal basis for trial court's denial of fee request

CARS & CONCEPTS, INC., Appellant, v. UNIFIRST CORPORATION, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 20-CA-3393, Division X. L.T. Case No. 15-CC-35918. November 5, 2020. On review of a final judgment of the County Court for Hillsborough County. The Honorable Joelle Ann Ober, County Court Judge. Counsel: James A. Wardell, Tampa, for Appellant. John W. Gardner, The Gardner Law Firm, Brandon, for Appellee.

APPELLATE OPINION

(PAUL L. HUEY, J.) This case is before the court to review a final order denying Cars and Concepts' motion for attorney's fees. Appellant Cars and Concepts, Inc. ("Cars and Concepts") successfully defended itself against UniFirst Corporation's ("UniFirst") suit against it for alleged breach of contract. The subject contract contained an arbitration provision that allowed, but did not require, the presiding arbitrator to award fees to the prevailing party. In the proceeding below, the arbitrator took jurisdiction to determine the dispute and concluded there was no enforceable contract between the parties. The arbitrator went on to deny attorney's fees on the ground that, in the absence of a contractual relationship, there was no basis for an award of fees. In addition, the arbitrator concluded there was no prevailing party. Believing the arbitrator's decision as to attorney's fees to be incorrect, Cars and Concepts unsuccessfully sought fees in the trial court. The trial court also denied fees, concluding that the fee determination belonged exclusively to the arbitrator. This appeal followed. In this appeal Cars and Concepts asks this court to reverse the trial court's decision denying fees and to direct the trial court to remand it back to the arbitrator for reconsideration. Because Cars and Concepts waived the requested relief by its failure to preserve the issue for appellate review, this court is constrained to affirm the judgment. In addition, Cars and Concepts' failure to plead entitlement to fees in its answer to the complaint provides additional support for the trial court's judgment.

THE CASE AND FACTS:

The parties had a previous contractual relationship before the subject dispute arose. This earlier contract expired, and, unbeknownst to Cars and Concepts, an employee without authorization to do so purported to enter Cars and Concepts into a new contract with UniFirst. Both agreements contained the same arbitration clause. When Cars and Concepts denied contractual obligations under the second contract, UniFirst sued and demanded arbitration. Cars and Concepts answered, asserting that there was no valid contract between the parties and no basis to compel arbitration.

The arbitration clause in both agreements said:

> All disputes . . . between Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by binding arbitration. . . . . .The arbitrator shall award to the substantially prevailing party, if any, as determined by the arbitrator, all of its costs and fees. "Costs and fees" are defined as all reasonable pre-award expenses of the arbitration including arbitrators' fees, administrative costs, travel expenses, out of pocket expenses. . .court costs and attorney's fees.

The trial court determined that the broad arbitration clause in the earlier agreement survived such that an arbitrator, rather than the court, should decide issues related to the subsequent agreement.[1]

The parties underwent arbitration of the dispute. In its March 22, 2017, award, the arbitrator agreed with Cars and Concepts that no valid second contract existed between the parties. The arbitrator also determined the issue of prevailing party attorney's fees. The arbitrator concluded both that there was no prevailing party and that in the absence of a valid contract, there was no basis to award attorney's fees. There has been no direct challenge to the award by either party.[2]

Approximately 70 days after the award, on June 1, 2017, Cars and Concepts filed a motion for fees in the county court. In its motion, Cars and Concepts argued that since the court determined the arbitration clause survived the earlier contract, it should likewise enforce the fee provision. Cars and Concepts added that there was no doubt the dispute "arose out of the contract." It further asserted entitlement under §57.105(7)'s mandate that contractual rights to attorney's fees in favor of one party are reciprocal to other parties to a contract. A hearing was held two and a half years later on January 8, 2020. There is no transcript of the hearing in the record. The trial court's order denying fees was rendered March 20, 2020. This timely appeal followed.

DISCUSSION:

In its appeal, Cars and Concepts asks this court to set aside the trial court's denial of fees with the direction that the trial court send the question back to the arbitrator. Although this court is sympathetic to Cars and Concepts' plight, we must deny the request for several reasons. Although the trial court may, in certain circumstances, send a matter back to the arbitrator under §682.10(4), Florida Statutes, the record does not reflect that Cars and Concepts ever asked the trial court to do so or that it asked the arbitrator for rehearing under §682.10(1). Therefore, the availability of such relief is not preserved for appellate review. *Dober v. Worell*, 401 So. 2d 1322, 1324 (Fla.1981) (appellate court will not consider issue raised for the first time on appeal). Moreover, Cars and Concepts' failure to seek fees in its answer to the complaint provides another legal basis to uphold the trial court's decision.

Cars and Concepts' underlying motion for fees after the arbitrator's award expressly denies them is not unlike a request to modify an award. Arbitration award modifications and other relief available to parties after an award's rendition are addressed in §§ 682.10, 682.13, and 682.14, Florida Statutes. Section 682.10(1), provides generally that an arbitration award may be modified or corrected by the *arbitrator* on motion of a party to the arbitrator within 20 days after the movant receives notice of the award. Although the arbitration clause gives the arbitrator exclusive authority to award attorney's fees for the proceeding,[3] Cars and Concepts did not seek relief under this statute. Section 682.10(4) allows the court to send a matter back to the arbitrator under certain circumstances that do not appear to be present here. In addition, Cars and Concepts did not seek this relief in the trial court. It cannot be raised for the first time on appeal. *Dober v. Worell*, at 1324. Section 682.13(1)(e) allows *a court* to vacate an award *without rehearing* if there was no agreement to arbitrate, unless a party participated in the arbitration proceeding without raising the objection

under s. 682.06(3) not later than the beginning of the arbitration hearing.[4] Although whether fees are awardable under the scenario presented here is a compelling issue, we do not address its merits because we do not read Cars and Concepts' June 1, 2017, motion for fees as seeking to vacate the award under this section. This ground is not explicit in the motion, and there is no transcript showing Cars and Concepts sought vacation of the award in the hearing. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla.1979) (the burden is on the appellant to demonstrate error). Although § 682.14 allows *the court* to correct certain defects such as miscalculations, mistakes, or if the arbitrator has awarded upon a matter not submitted in the arbitration, it is not applicable to the issues presented here, and Cars and Concepts does not argue its application.

In addition to the reasons already set forth, another theory supports the trial court's decision to deny fees. Although not raised by UniFirst or referenced by the court, the record clearly shows Cars and Concepts did not plead its intent to seek fees in its answer to the complaint. Entitlement to attorney's fees, whether based on contract or statute, must be pled or the claim is waived. *Stockman v. Downs,* 573 So. 2d 835, 837-38 (Fla. 1991). This longstanding rule is reiterated in *Barco v. Sch. Bd. of Pinellas Co.,* 975 So. 2d 1116, 1119 (Fla. 2008) [33 Fla. L. Weekly S87b]. If there is any basis which would support the judgment in the record, the judgment will be upheld. *Dade Cty. Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644 (Fla. 1999) [24 Fla. L. Weekly S216a].

IT IS THEREFORE ORDERED that the judgment of the county court is AFFIRMED without prejudice. Oral argument is DENIED. (HUEY, HINSON, HOLDER, JJ.)

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[1]Because the correctness of the trial court's referral of the matter to arbitration is not before the court, we do not address issues related to that referral in this appeal.

[2]For reasons that will become clear, this court does not address the correctness of the arbitrator's decision not to award Cars and Concepts its requested fees. This opinion should not be read as approving or disapproving the arbitrator's decision on fees.

[3]*Cf.* §682.15, Fla. Stat.

[4]Since the arbitrator determined the parties had not entered into an agreement, we assume this issue was raised before the arbitrator in the hearing, even though the record lacks a transcript of the proceeding. This court's conclusion does not rest on this, however.

* * *

Civil procedure—Default—Damages—Unliquidated—Plaintiff alleging defendants were unjustly enriched by plaintiff's payment of utilities for parcel of property that is owned by defendants and lies between two parcels owned by plaintiff—After entry of defaults, defendants were entitled to properly noticed trial or evidentiary hearing on amount of damages where damages were unliquidated—Damages were unliquidated where plaintiff sought general damages, not specific amount—Attorney's fees—Error to award attorney's fees to plaintiff where there was no contractual or statutory basis for award

Z & Y INVESTMENTS GROUP LLC, and NALA FL MT LLC, Appellants, v. RONI OZ, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-014806 (AP). L.T. Case No. COCE18-012575 (50). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mardi Levey Cohen, Judge. Counsel: Marc Edward Rosenthal, Rosenberg Cummings & Edwards PLLC, Fort Lauderdale, for Appellants. Jordan R. Ramsey, Law Firm of Gary M. Singer, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Z & Y Investments Group, LLC and Nala FL MT LLC ("Appellants") appeal the May 30, 2019 Final Money Judgment and Injunction in Favor of Plaintiff (hereafter "Final Judgment"). Having carefully considered the briefs, the record, and the applicable law, the Final Judgment is hereby **REVERSED**, as set forth below.

In the proceedings below, Roni Oz ("Appellee") filed suit against Appellants alleging unjust enrichment. Appellee owns two pieces of real property with Appellants owning the parcel directly in-between the two. Appellee claimed to have been making utility payments for all three pieces of land and sought damages, as well as, attorney's fees, costs and injunctive relief. Defaults were entered against Appellants, and thereafter, Appellee filed a Motion for Final Judgment after Default and set the matter for hearing. Appellants failed to appear at the hearing and the county court entered a Final Judgment in favor of Plaintiff awarding damages, attorney's fees, and costs. Thereafter, Appellants sought rehearing and their motion was denied by the county court.

Appellants filed the instant appeal challenging the county court's award of damages and attorney's fees.[1] Appellants argue that the Final Judgment should be reversed because the county court erred in awarding damages as Appellee sought unliquidated damages which requires the setting of either a trial or an evidentiary hearing. As such, Appellants argue that the Final Judgment hearing was not properly noticed, and as a result thereof, their due process rights were violated. Appellants also argue that the county court erred in awarding attorney's fees because Appellee did not have a contractual or statutory basis for an attorney's fees award as required under Florida law. We agree and find that the Final Judgment should be reversed on both grounds.

The standard of review as to whether damages alleged are liquidated or unliquidated is a question of law subject to *de novo* review. *Talbot v. Rosenbaum,* 142 So. 3d 965, 967 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1527a]. And the setting of unliquidated damages without the required notice and without proof is fundamental error. *Id.* The standard of review regarding a claim that a party has been denied procedural due process (such as insufficient notice) is reviewed *de novo. Residential Mortg. Servicing Corp. v. Winterlakes Prop. Owners Ass'n, Inc.,* 169 So. 3d 253, 255 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1575a]. And, the standard of review as to party's entitlement to attorneys' fees is reviewed *de novo. Weiner v. Maulden,* 267 So. 3d 1045, 1047 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D953b]; *see also Anderson v. Hilton Hotels Corp.,* 202 So. 3d 846, 852 (Fla. 2016) [41 Fla. L. Weekly S500a].

Liquidated damages are specific and precise sums of money immediately apparent from the express terms of the contract itself, or determinable therefrom by mathematical calculation, or fixed by a specific rule of law. *Hill v. Murphy,* 872 So.2d 919, 922 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2145a]. But, "[w]hen the complaint alleges only general damages without demanding a specific amount, damages are deemed unliquidated when a default admitting liability is entered." *Watson v. Internet Billing Co.,* 882 So. 2d 533, 534 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2141a].

Damages for unjust enrichment are based on value from standpoint of the recipient of the benefits and measured in terms of the benefit to the owner, not the cost to the provider. *Kane v. Stewart Tilghman Fox & Bianchi, P.A.,* 85 So. 3d 1112, 1115 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D528b]. Because unjust enrichment damages are economic damages, the amount of damages must be measurable and quantifiable: "[i]t has long been accepted in Florida that a party claiming economic losses must produce evidence justifying a definite amount." *United Auto. Ins. Co. v. Colon,* 990 So. 2d 1246, 1248 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2283a]. "Economic damages may not be founded on jury speculation or guesswork and must rest on some reasonable factual basis." *Id. See Swindell v. Crowson,* 712 So. 2d 1162, 1164 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1439c].

Appellee's complaint alleged general damages of less than $15,000.00 but not greater than $5,000.00. Appellee's alleged damages are not based upon a specific contract or statute. And, it is not apparent from the record on appeal that an exact or specific amount of damages was sought by Appellee for the alleged benefit conferred upon Appellants. Appellee's complaint contains an attached email

from the City of Hollywood utilities department which lists only the total amount paid by Appellee each month. Appellee's also filed an Affidavit in Support of Final Judgment and damages which contains only a total amount for the utility bills, as well as, late fees and accountant fees. No itemized or breakdown as to the amount attributed to each specific property is contained in the record. The *exact* amount of damages suffered by Appellee, or benefit conferred upon Appellants is not determinable with exactness from the cause of action as pleaded. As such, because the amount of damages sought by Appellee was not for a specific amount, the county court was required "to consider testimony or evidence to ascertain facts upon which to base a value judgment". *Bowman v. Kingsland Dev., Inc.,* 432 So.2d 660, 662 (Fla. 5th DCA 1983). However, this did not occur here. Instead, Final Judgment was entered by the county court following Appellants' failure to attend the Final Judgment hearing and after accepting Appellee's claimed amount of damages.

Appellants failure to attend the Final Judgment hearing and contest damages does not shift the damages to becoming liquidated in nature. As was the case herein, the filing of an affidavit stating a sum certain or a legal conclusion does not establish that damages are liquidated. *See Ciprian-Escapa v. City of Orlando,* 172 So. 3d 485, 490 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1670a]; *Rodriguez-Faro v. M. Escarda Contractor, Inc.,* 69 So. 3d 1097, 1099; (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2142b]; *L.B.T. Corp. v. Camacho,* 429 So. 2d 88, 90-91 (Fla. 5th DCA 1984); *Turner v. Allen,* 389 So.2d 686 (Fla. 5th DCA 1980). Given what is apparent from the record and for the above stated reasons, Appellants are correct in arguing that the alleged damages sought by Appellee for his unjust enrichment claim are unliquidated.

Further, "[i]t is well settled that '[a] default admits a plaintiff's entitlement to liquidated damages under a well-pled cause of action, but not to unliquidated damages absent proper notice and a trial on damages.' " *Specialty Sols., Inc. v. Baxter Gypsum & Concrete, LLC*, 45 Fla. L. Weekly D1219d (Fla. 5th DCA May 22, 2020) (quoting *Ciprian-Escapa.* 172 So. 3d at 488)). Further, a judgment rendered without a trial on unliquidated damages is void as to any unliquidated damages but valid as to any liquidated damages. *See Ciprian-Escapa,* 172 So.3d at 488-89 (citing *BOYI, LLC v. Premiere Am. Bank, N.A.,* 127 So. 3d 850, 851 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2548a]; *Cellular Warehouse, Inc. v. GH Cellular, LLC,* 957 So. 2d 662, 666 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D942a]).

Here, due process required the county court to hold a trial (or evidentiary hearing), after proper notice, to determine the amount of damages. *See Bodygear Activewear, Inc. v. Counter Intelligence Servs.,* 946 So. 2d 1148, 1150-51 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D35a]; *see also* Fla. R. Civ. P. 1.440(c). And, "[w]hen a claim involves unliquidated damages a defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of those damages. *Boulos v. Yung Sheng Xiamen Yong Chem. Indus. Co., Ltd.,* 855 So. 2d 665, 667 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2123a].

Florida law is clear that a determination on unliquidated damages requires that either an evidentiary hearing take place or a trial. Both need to be properly noticed pursuant to Florida Rule of Civil Procedure 1.440(c) and at least 30 days notice is required. This did not occur here. Additionally, the notice of hearing did not state that the hearing would be evidentiary or that any evidence would be taken. No trial order was filed, and no notice was given that the Final Judgment hearing would be conducted as a trial. Due process requires that Appellants receive proper notice as required under Florida law and Appellants' failure to attend the hearing does not change the fact that notice was legally insufficient. A violation of the due process right by the trial court is constitutes fimdamental error. *See Pettry v. Pettry,* 706 So. 2d 107, 108 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D542a]. As such, the county court erred in awarding unliquidated damages without proper notice and without conducting either an evidentiary hearing or trial as required by Florida Law.

An attorney's fees award requires competent and substantial evidence to determine reasonableness. *See 1445 Washington Ltd. P'ship v. Lemontang,* 19 So. 3d 1079 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2051a] (citing *Brewer v. Solovsky,* 945 So.2d 610, 611 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D29a]). Therefore, attorney's fees are considered unliquidated damages. *See Cellular Warehouse, Inc. v. GH Cellular, LLC,* 957 So.2d 662, 665 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D942a]. Additionally, "it is well-settled that attorneys' fees can derive only from either a statutory basis or an agreement between the parties." *Florida Hurricane Prot. & Awning, Inc. v. Pastina,* 43 So. 3d 893 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2024a] (citing *Trytek v. Gale Indus., Inc.,* 3 So. 3d 1194, 1198 (Fla. 2009) [34 Fla. L. Weekly S247a]).

Appellee filed suit based on common law unjust enrichment. Appellee cited to no legal basis for entitlement to attorney's fees whether pursuant to contractual agreement or statute, rule or case law. Additionally, the county court made no findings to support an award of attorney's fees in its Final Judgment. Being the prevailing party to a lawsuit is not sufficient justification alone to support an award of attorney's fees under Florida law. This is especially true since the hearing on the Motion for Final Judgment was insufficiently noticed. Therefore, the county court erred in awarding attorney's fees to Appellee.

Accordingly, the May 30, 2019 Final Money Judgment and Injunction in Favor of Plaintiff is hereby **REVERSED** as to damages and attorney's fees only, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

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[1]Appellants have not sought to challenge the defaults entered against them, the county court's award of costs, or the injunction entered against Z & Y Investments Group, LLC, and as such, those issues will not be addressed.

* * *

Insurance—Personal injury protection—Coverage—Emergency medical condition—Trial court erred in concluding that PIP statute requires that EMC determination be rendered by treating physician

C & R HEALTHCARE, LLC, a/a/o Samaria Harasta, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-001475. L.T. Case No. CONO14-000261. September 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge. Counsel: David B. Pakula, Pembroke Pines, for Appellant. Andrew T. Lynn, Kubicki Draper, P.A., Tampa, for Appellees.

OPINION

(PER CURIAM.) C & R Healthcare, LLC a/a/o Samaria Harasta ("Appellant") appeals the final summary judgment of the county court rendered in favor of Progressive Select Insurance Company ("Appellee"). Having carefully considered the briefs, the record, and the applicable law, the final-summary judgment is hereby **REVERSED** as set forth below:

In the county court proceedings, Appellant commenced a breach of contract action against Appellee for unpaid personal injury protection ("PIP") benefits pursuant to an assignment of benefits from the insured, Samaria Harasta (the "Insured"). Appellant moved for partial summary judgment on the issues of reasonableness, relatedness, and medical necessity ("RRN") and subsequently, moved for partial summary judgment seeking a determination that the Insured suffered an Emergency Medical Condition ("EMC") that would

entitle Appellant to the $10,000 PIP liability policy limits. Thereafter, Appellee moved for final summary judgment on the EMC issue. A hearing was held on both parties' motions for summary judgment. Following the hearing, the county court entered final summary judgment in favor of Appellee. This appeal followed. This Court reviews the county court's determination *de novo. See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

The gravamen of Appellant's complaint is that the county court erred in granting final summary judgment in favor of Appellee because the county court erroneously concluded that Florida law requires a treating physician to render an EMC. From Appellant's perspective, the county court's determination runs counter to both section 627.736(1)(a)(3), Florida Statutes, and the subject insurance policy, which only require a qualifying physician to render an EMC. In contrast, Appellee contends that the plain language of sections 627.736(1)(a)(3), (1)(a)1, and (1)(a)2, Florida Statutes, limits the rendering of an EMC to a physician that has performed initial and follow-up care and services to the Insured. Specifically, Appellee suggests that the EMC rendered by Dr. Bruce H. Berman, M.D. ("Dr. Berman") on behalf of Appellant was invalid because Dr. Berman did not actually provide treatment to the Insured, but rather based his determination only on an initial report completed by Dr. Kevin McFarlin Usry, D.C. ("Dr. Usry"). Furthermore, Appellee maintains that Dr. Berman merely copied the statutory definition of an EMC as delineated in section 627.736, Florida Statutes.

The starting point for the court's analysis is section 627.736(1)(a)(3), Florida Statutes, which reads, in pertinent part:

> Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. up to $10,000 if a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced practice registered nurse licensed under chapter 464 has determined that the injured person had an emergency medical condition.

Under Florida law,

> It is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides this Court's interpretation. *Borden v. East-European Ins. Co.,* 921 So. 2d 587, 595 (Fla. 2006) [31 Fla. L. Weekly S34a]. **The best method to determine the intent of the legislature is to "look to the actual language used in the statute."** ***Daniels v. Fla. Dep't of Health,*** **898 So. 2d 61, 64 (Fla. 2005)** [30 Fla. L. Weekly S143a]. **Clearly, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.**" *Id*. However, where the statute is ambiguous, the court "may resort to the rules of statutory construction, which permit [the court] to examine the legislative history to aid in [the] determination regarding legislative intent." *Diamond Aircraft Indus., Inc. v. Horowitch,* 107 So. 3d 362, 367 (Fla. 2013) [38 Fla. L. Weekly S45a]. When construing different parts of a statute, "[i]t is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So. 2d 1, 6 (Fla. 2004) [29 Fla. L. Weekly S788a] (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 455 (Fla. 1992)).

Med. Ctr. of Palm Beaches v. USAA Cas. Ins. Co., 202 So. 3d 88, 90-91 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2018b] (emphasis added).

Upon review of section 627.736(a)(1)(3), Florida Statutes, the plain language of the statute is clear and unambiguous: an EMC can be rendered by a qualified physician under the statute for reimbursement of care and services. While the county court and Appellee seem to challenge "how" the EMC was determined, nothing in the statute suggests that the factual or medical basis effecting this determination is open to dispute. For this reason, the county court erred in entering final summary judgment in favor of Appellee. Although Appellee argues that the peer review of its expert, Dr. Dainius Drukteinis, M.D., determined that the Insured did not have an EMC, this challenge would likely only serve to create a triable issue of fact upon remand in order to plausibly defeat Appellant's motion for partial summary judgment on the issue.

Therefore, the county court's final summary judgment is **REVERSED** and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellant's Motion for Attorney's Fees is hereby **GRANTED** with the amount to be determined by the county court upon remand. Further, Appellee's Motion for Provisional Award of Appellate Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN-SINGER, and RODRIGUEZ, JJ., concur.)

* * *

Criminal law—Search and seizure—Vehicle stop—Traffic infraction—Trial court erred in finding reasonable suspicion for stop based on charged offense of stopping for purpose of unloading passenger on roadway, rather than on offense of stopping in violation of traffic control device—Error to deny motion to suppress where trial court failed to make any factual findings regarding traffic control device or circumstances surrounding alleged violation of device

TAKEYSHA SWEET, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 17-36AC10A. L.T. Case No. 16-6797TC20A. November 17, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, John Hurley, Judge. Counsel: James K. Rubin, Assistant Public Defender, for Appellant. Nicole Bloom, Assistant State Attorney, for Appellee.

AMENDED[1] OPINION

(SIEGEL, J.) Having carefully considered the Initial Brief of Appellant, the Answer Brief of Appellee, the Reply Brief of Appellant, the record on appeal, and applicable law, we find the trial court erred initially by finding reasonable suspicion for the traffic stop of Appellant existed based on a violation of § 316.1945(1)(a)12, Florida Statutes, the charged offense, rather than § 316.1945(1)(a)10, Florida Statutes. Under the "tipsy coachman" doctrine, using a violation of § 316.1945(1)(a)10, Florida Statutes, instead, as a basis for reasonable suspicion of the traffic stop, the trial court nonetheless failed to make any factual findings as to the existence of any official traffic control devices in the area where the alleged offense occurred; the language set forth on any such official traffic control devices; the time of the offense, assuming any such official traffic control devices existed and were time-specific; and the location of any such traffic control devices.

Based on the foregoing, this Court vacates the judgments and convictions of Appellant, reverses the order of the trial court denying the motion to suppress, and remands this matter to the trial court for further proceedings consistent with this opinion. (MURPHY, and FEIN, JJ., concur.)

[1]The opinion is amended only to reflect that Judge Hurley was the judge who presided over the motion to suppress, while Judge Levy is currently the judge presiding over the case.

* * *

Civil procedure—Default—Error to enter default judgment where plaintiff failed to serve summons on any of three defendants—Even if service of process had been properly effectuated, trial court erred in entering default against all defendants for failure to appear for mediation when only one defendant was noticed for mediation and in entering default while motion to quash was pending and scheduled for hearing

HENRY KARP, HENRY AND CO., and JOHN CRAMER, Appellants, v. CHAYA VANUNU, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-009998 (AP). L.T. Case No. COSO18-008355 (62). October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Terri-Ann Miller, Judge. Counsel: Connis O. Brown, Brown Robert LLP, Fort Lauderdale, for Appellants. Chaya Vanunu, Pro se, Cooper City, for Appellee.

OPINION

(PER CURIAM.) Henry Karp, Henry and Co., and John Cramer ("Appellants") appeal a Default Judgment entered by the county court in favor of Chaya Vanunu ("Appellee"). Having carefully considered the briefs, the record, and the applicable law, the Default Judgment is hereby **REVERSED** as set forth below.

In the proceedings below, Appellants and Appellee entered into a contract for the installation of a home generator, 500-gallon propane tank, as well as, for electrical work and plumbing work. Appellee filed a statement of claim in small claims court against Appellants claiming that Appellants had not completed the contracted work. Summons were issued for Appellants on September 18, 2019, each of which were returned unserved on November 15, 2018. Thereafter, alias summons were issued for Appellants on November 28, 2018, and each were also returned unserved on February 4, 2019. After unsuccessful service, Appellee attempted service on Appellants via USPS certified mail pursuant to Florida Small Claims Rule 7.070. Thereafter, the matter was ordered to mediation, but only as to Appellant Henry Karp. Shortly thereafter, Appellants retained legal counsel, filed a Notice of Appearance and filed a Motion to Quash.

After Appellants failed to show at mediation, the county court entered a Default Judgment for Plaintiff (the "Default Judgment") dated April 5, 2019 against all three Appellants. In response, Appellants filed an Emergency Motion to Vacate Default Judgment. A hearing was conducted on April 22, 2019 and the county court deferred ruling, resetting the matter for hearing for May 30, 2019. Prior to the May 30, 2019 hearing, Appellants filed the instant appellate action.

Review of the record on appeal reveals that the county court erred in entering the Default Judgment. Appellee failed to serve summons on any of the Appellants on two occasions. Thereafter, Appellee attempted service via USPS certified mail pursuant to Rule 7.070. Appellee failed to comply with Rule 7.070 as the rule requires that certified mail be sent by a Clerk or Attorney of Record, yet Appellee, as a *pro se* litigant sent the certified mail. Additionally, Rule 7.070 requires that certified mail be sent to a defendant's residence or principle place of business, however, Appellee sent the certified mail to a mailbox located at a UPS store.

The county court, presumably believing that service upon Appellants was properly effectuated, referred the matter to mediation, but in doing so only ordered and noticed one of the three Appellants, Henry Karp. All three Appellants then hired legal counsel, filed a Notice of Appearance, filed a Motion to Quash and noticed the Motion to Quash for hearing. But, after none of the Appellants showed up to mediation, the county court entered the Default Judgment against all three Appellants, even though only one of the Appellants was noticed of and subject to the Mediation Order. The record reflects that no default was entered by the county court or the Clerk of Courts prior to the entry of the Default Judgment and no Motion had been filed requesting a default or default judgment. Additionally, Appellants were represented by counsel and had a pending Motion to Quash set for hearing. The county court entered the Default Judgment *sua sponte* and *ex-parte.*

When service is at issue, as it is in this matter, "[t]he burden of proof to sustain the validity of service of process is on the party seeking to invoke the jurisdiction of the court." *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992) (citing *Carlini v. State Dep't of Legal Affairs,* 521 So. 2d 254 (Fla. 4th DCA 1988)). And when the court is tasked with determining if service was proper "[s]trict compliance with service of process procedures is required." *BoatFloat, LLC v. Cent. Transp. Intern., Inc.*, 941 So.2d 1271 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2928a]. A judgment entered without service of process is void and will be set aside and stricken from the record at any time. *M.L. Builders, Inc. v. Reserve Developers, LLP,* 769 So. 2d 1079 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2277a] (citing *Falkner v. Amerifirst Federal Savings and Loan,* 489 So. 2d 758 (Fla. 3d DCA 1986)).

The due process right to be noticed when an individual is being sued as well as the opportunity to defend oneself in court is among the most basic and fundamental rights under the judicial system in Florida and the United States of America. After careful consideration and review of the record on appeal, this Court finds that Appellants' due process rights were violated as service of process was never properly effectuated. The county court did not yet have jurisdiction over the Appellants and improperly entered the Default Judgment. Moreover, had service been proper under Rule 7.070, the county court erred in entering the Default Judgment against all three Appellants when only one was noticed for the mediation that led to the Default Judgment being entered, as well as, while a Motion to Quash was pending and scheduled for hearing. Accordingly, the Court finds the Default Judgment for Plaintiff dated April 5, 2019 **VOID** and accordingly, the judgment is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

Landlord-tenant—Eviction—Costs—Trial court erred in denying tenant's motion to tax costs—In absence of any statement in order specifying otherwise, order granting tenant's motion to dismiss is deemed to be adjudication on merits, which makes tenant a prevailing party entitled to award of costs as matter of right

DON KOZICH, Appellant, v. VICKI LAZARUS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-019969 (AP). L.T. Case No. COCE17-010231 (50). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mardi Levey Cohen, Judge. Counsel: Don Kozich, pro se, Fort Lauderdale, Appellant. Victoria Lazarus, pro se, Fort Lauderdale, Appellee.

OPINION

(PER CURIAM.) Don Kozich ("Appellant") appeals an Order denying Motion to Tax Costs ("Order Denying Costs") entered by the county court. Having carefully considered the briefs, the record, and the applicable law, the Order Denying Costs is hereby **REVERSED** as set forth below.

In the proceedings below, Victoria Lazarus ("Appellee") filed suit for residential eviction. The county court held a hearing on Appellant's Amended Verified Motion to Dismiss and subsequently, entered an Order of Dismissal. Thereafter, Appellant timely filed his Motion to Tax Costs. The county court denied Appellant's Motion to Tax Costs. The Order Denying Costs contained no findings or explanation as to why Appellant's Motion to Tax Costs was denied.

The Order of Dismissal does not explicitly state that Appellant's Amended Verified Motion to Dismiss was granted on its merits. A

reading of the Order of Dismissal leaves doubts as to why the county court dismissed this action. The record fails to provide clarity. Rule 1.420(b) states in pertinent part that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits." Fla. R. Civ. P. 1.420(b). As such, the Order of Dismissal is deemed to have been adjudicated on its merits, and therefore, Appellant is the prevailing party.

As the prevailing party, Appellant is entitled to costs pursuant to section 83.48, Florida Statutes. A statutory award of costs is a matter of right and a trial judge has no discretion to deny costs to a party. *See Weitzer Oak Park Estate, Ltd. v. Petto,* 573 So. 2d 990, 991 (Fla. 3d DCA 1991). As such, the county court erred in denying Appellant's Motion to Tax Costs.

Accordingly, the October 18, 2017 Order denying Defendant's Motion to Tax Costs is hereby **REVERSED** and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Further, Appellant's April 9, 2020[1] Verified Motion for Final Judgment Taxing Costs Following Reversal on Petition to 4th DCA and Against Appellee/Respondent is hereby **GRANTED**, as to appellate costs pursuant to section 57.081(3), Florida Statutes. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

[1]Appellant filed an identical Verified Motion for Final Judgment Taxing Costs Following Reversal on Petition to 4th DCA and Against Appellee/Respondent on April 17, 2020.

* * *

ILAN WEISS, Appellant, v. EDNER DORSICA & OCIANIE DORCUES, Appellees. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-009502 (AP). L.T. Case No. COCE17-002400 (53). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Robert Lee, Judge. Counsel: Andrew I. Roth, Roth Law Group, Boca Raton, Pro Se. Steven B. Katz, Steven B. Katz, P.A., Lauderhill, for Appellees.

OPINION

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

* * *

STAR CASUALTY INSURANCE COMPANY, Appellant, v. FOUNTAINS THERAPY CENTER, INC., (a/a/o Marisol Varela), Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-009573(AP); Consolidated with CACE17-020785(AP). L.T. Case No. COCE11-002389 (51). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Kathleen McCarthy, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman, & Gregoire, PLLC, Ft. Lauderdale, for Appellant. Mac S. Phillips, Phillips, Tadros, P.A., Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Final Judgment is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorney's Fees pursuant to section 627.428, Florida Statutes, is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellant's Motion for Appellate Attorneys' Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

JEFFREY BROWN, Appellant, v. WORLD VISION ENTERTAINMENT MEDIA, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-019408 (AP). L.T. Case No. COCE13-009987 (54). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Florence Taylor Barner, Judge. Counsel: Geoffrey D. Ittleman, Geoffrey D. Ittleman, P.A., Fort Lauderdale, for Appellant. Michael I. Santucci, Santucci Priore, P.L., Fort Lauderdale, for Appellee.

OPINION

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

* * *

MRI RADIOLOGY NETWORK, P.A., d/b/a UNIVERSITY MRI AND DIAGNOSTIC IMAGING CENTERS, a/a/o Madison Zalnasky, Appellant, v. ESURANCE INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-011541 (AP). L.T. Case No. CONO16-002259 (70). November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge. Counsel: Douglas H. Stein, Douglas H. Stein, P.A., Miami, for Appellant. Michael A. Rosenberg, Cole, Scott & Kissane, P.A., Plantation, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorneys' Fees is hereby **GRANTED** conditionally upon the county court determining that Appellee's proposal for settlement is valid, enforceable, and made in good faith. Further, Appellant's Motion for Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

DENO LAM, Appellant, v. FLORIDA COMMUNITY BANK, N.A., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-012942 (AP). L.T. Case No. COCE16-010248. November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Florence Taylor Berner, Judge. Counsel: Seth Wieder, Loan Lawyers, LLC, Ft. Lauderdale, for Appellant. Nancy C. Ciampa, Carlton, Fields, Jorden, Burt, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the recent and the applicable law, this Court dispenses with oral argument and the May 20, 2017 Order Denying Plaintiff's Motion for Rehearing, and the May 30, 2017 Summary Final Judgment is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorney's Fees and Costs pursuant to section 559.77(2), Florida Statutes, is hereby contingent upon prevailing on remand at the county court for a determination of both entitlement and reasonable amount of attorney's fees. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. MILLENNIUM RADIOLOGY, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-008719 (AP). L.T. Case No. COCE12-007441. October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Peter B. Skolnik, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, for Appellant. Mac S. Phillips, Phillips Tadros, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorneys' Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Appellant's Motion for Appellate Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. COAST CHIROPRACTIC CENTER, a/a/o Brunette Louis-Pierre, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE16-017897 (AP). L.T. Case No. COCE12-021506. November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit Broward County; Robert W. Lee, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, for Appellant. Mac S. Phillips, Phillips Tadros, P.A., Fort Lauderdale, for Appellee.

OPINION

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

* * *

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. BRIAN ELIAS, DCM, LLC, a/a/o Ernold Banos, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-006346 (AP). L.T. Case No. COCE12-022281. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Kim Theresa Mollica, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman, & Gregoire, PLLC, Ft. Lauderdale, for Appellant. Mac S. Phillips, Phillips, Tadros, P.A., Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the January 17, 2017 Final Judgment rendered final by the March 6, 2017 Order on State Farm's Motion for Rehearing on the final judgment in favor of Plaintiff is hereby **AFFIRMED**. Appellee's Motion for Attorney's Fees pursuant to section 627.428, Florida Statutes, is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellant's Motion for Attorneys' Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

RK RESTORATION SERVICE, INC. (a/a/o Coleen Tessema), Appellant, v. CITIZENS PROPERTY INSURANCE CORPORATION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-023785 (AP). L.T. Case No. COWE18-007077 (83). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Ellen Feld, Judge. Counsel: Erik D. Diener, The Diener Firm, P.A., Plantation, for Appellant. C. Ryan Jones, Traub, Lieberman, Straus, & Shrewsberry LLP., St. Petersburg, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and it is hereby **ORDERED**, that:

1. The final judgment is **AFFIRMED**.
2. Appellant's Motion for Appellate Attorney's Fees is **DENIED.**

(BOWMAN, TOWBIN SINGER, AND RODRIGUEZ, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. JOSEPH GIORDANO, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 20-4AC10A. L.T. Case No. 19-4010MU10A. November 23, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Kim Mollica. Counsel: Nicole Bloom, State Attorney, for Appellant. Fred Haddad, Fred Haddad, P.A., for Appellee.

AMENDED OPINION

(PER CURIAM.) This Court withdraws the opinion issued November 13, 2020 and issues this in its place:

Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** the County Court's order granting Defendant's Motion to Suppress for Unlawful Stop. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. JORGE VEGA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-000061AC10A (AP). L.T. Case No. 18-010956MU10A. November 13, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Ginger Lerner-Wren. Counsel: Nicole Bloom, State Attorney's Office, Fort Lauderdale, for Appellant. Bradford M. Cohen, Bradford Cohen Law, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument, and the trial court's order granting Appellee's motion to suppress is hereby **AFFIRMED**. (SIEGEL, FEIN, and MURPHY, JJ., concur.)

* * *

FIRST CALL 24/7, INC. (a/a/o Judy Gomez), Appellant, v. CITIZENS PROPERTY INSURANCE CORPORATION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-022767 (AP). L.T. Case No. COWE18-007828 (80). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Olga Levine, Judge. Counsel: Erik D. Diener, The Diener Firm, P.A., Plantation, for Appellant. C. Ryan Jones, Traub, Lieberman, Straus, & Shrewsberry LLP., St. Petersburg, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and it is hereby **ORDERED**, that:

1. The final judgment is **AFFIRMED**.
2. Appellant's Motion for Appellate Attorney's Fees is **DENIED**.

(BOWMAN, TOWBIN SINGER, AND RODRIGUEZ, JJ., concur.)

* * *

SAMER ELHAKIM, Appellant, v. SEBASTIAN MARIN, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-029255 (AP). L.T. Case No. COCE18-023684 (50). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Mardi Levey Cohen, Judge. Counsel: Samuel D. Lopez, Samuel D. Lopez, P.A., Pembroke Pines,

for Appellant. Sheldon R. Rosenthal, Sheldon R. Rosenthal, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law the final judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

DOUGLAS A. PERERA, JR., aka D. ANTHONY PERERA, Appellant, v. ANHEUSER-BUSCH INCORPORATED, a Missouri corporation, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-019055 (AP). L.T. Case No.COCE17-018119 (52). November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit Broward County; Giuseppina Miranda, Judge. Counsel: C. Edward McGee, Jr., McGee & Huskey, P.A., Fort Lauderdale, for Appellant. Stacey S. Fisher, Sprechman & Fisher, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. Appellant's Motion for Appellate Attorneys' Fees and Costs is hereby **DENIED.** (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

EXPRESS DAMAGE RESTORATION LLC (a/a/o Fridlande Nicolas), Appellant, v. CITIZENS PROPERTY INSURANCE CORPORATION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-024850 (AP). L.T. Case No. COWE17-013605 (80). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Olga Levine, Judge. Counsel: Erik D. Diener, The Diener Firm, P.A., Plantation, for Appellant. C. Ryan Jones, Traub, Lieberman, Straus, & Shrewsberry LLP., St. Petersburg, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and it is hereby **ORDERED**, that:

1. The final judgment is **AFFIRMED**.
2. Appellant's Motion for Appellate Attorney's Fees is **DENIED**.

(BOWMAN, TOWBIN SINGER, AND RODRIGUEZ, JJ., concur.)

* * *

MARIE H. FLORENT-CARRE, Appellant v. BANK OF AMERICA, N.A., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-007231 (AP). L.T. Case No. COWE17-006000 (80). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Olga Levine, Judge. Counsel: James Jean-Francois, James Jean-Francois, P.A., Hollywood, for Appellant. Jason S. Dragutsky, Hayt, Hayt & Landau, P.L., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final summary judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN-SINGER, and RODRIGUEZ, JJ., concur.)

* * *

MAGGIE ERIKSSON, Appellant, v. COREY SMITH, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-023654 (AP). L.T. Case No. COCE18-017320 (54). November 19, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Florence Taylor Barner, Judge. Counsel: Maggie Eriksson, Tamarac, Pro Se. Corey Smith, Fort Lauderdale, Pro Se.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. VICTOR TENEUS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18-46AC10A. L.T. Case No. 17-012779MU10A. November 13, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kenneth A. Gottlieb, Judge. Counsel: Nicole Bloom, for Appellant. Michael Rocque, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief (Appellee did not submit an Answer Brief), and the applicable law, we hereby **AFFIRM** the trial court. (SIEGEL, A., MURPHY, and FEIN, JJ., concur.)

* * *

LUIS ALEJANDRO PERENQUEZ CASTIBLANC, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-09AC10A. L.T. Case No. 18-16196MU10A. November 13, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mindy F. Solomon. Counsel: Carla P. Lowry, for Appellant. Nicole Bloom, for Appellee.

OPINION

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

* * *

MAINSTREET ACQUISITION CORPORATION, Appellant, v. LLOYD R. BHAROSE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-008031 (AP). L.T. Case No. COWE 11-011307 (83). October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Ellen Feld, Judge. Counsel: Jonathan R. Singer, O&L Law Group, P.L., Tampa, for Appellant. Gregory A. Beck, Pro Hac Vice, Washington, D.C., for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the order granting Defendant's Motion to Dissolve Writ of Garnishment entered on February 22, 2019 is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

FIRST EMPIRE RESTORATIONS, LLC, a/a/o Javier Cimetta, Appellant, v. PEOPLE'S TRUST INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-017304 (AP). L.T. Case No. COCE17-017831 (50). November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mardi Levey Cohen, Judge. Counsel: Joseph Benjamin Goldglantz, Gold Litigation PA, Dania Beach, for the Appellant. David Clark Borucke, Cole, Scott & Kissane, P.A., Tampa, for the Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and it is hereby **ORDERED**, that the final judgment is **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

SADORA DAYANA BISSAINTHE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-60AC10A. L.T. Case No. 19-22480TC30A. November 13, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Phoebee Francois, Judge. Counsel: Russell J. Williams, for Appellant. Joanne Lewis, Assistant State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant, the Answer Brief of Appellee, the Reply Brief of Appel-

lant, the record on appeal, and applicable law, we find no trial error and affirm the trial court. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

JACQUELYN K. ALEXANDER, Appellant, v. LIRON SHALOM, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-019656 (AP). L.T. Case No. COSO18-001863 (60). October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Michael Davis, Judge. Counsel: Jacquelyn K. Alexander, Pro se, Sanford, North Carolina, for Appellant. Liron Shalom, Pro se, Hollywood, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the brief, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

OAKRIDGE PROPERTY OWNERS ASSOCIATION, INC., Appellant, v. P.G. SECURITY, INC., d/b/a PLATINUM GROUP SECURITY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-009807 (AP). L.T. Case No. COCE16-005614. October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Florence Taylor Barner, Judge. Counsel: Gerard S. Collins, Kaye Bender Rembaum, P.L., Pompano Beach, for Appellant. Kendrick Almaguer, The Ticktin Law Group, Deerfield Beach, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the decision of the county court is hereby **AFFIRMED**. Appellant's Motion for Prevailing Party Attorneys' Fees & Costs is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

CITIZENS PROPERTY INSURANCE CORPORATION, Appellant, v. EMPIRE PRO RESTORATION, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-029551 (AP). L.T. Case No. COCE16-025350. November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Kathleen McCarthy, Judge. Counsel: Jessica C. Conner, Dean, Ringers, Morgan & Lawton, P.A., Orlando, for Appellant. Frantz C. Nelson, Font & Nelson, PLLC, Fort Lauderdale, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final summary judgment is hereby **AFFIRMED**. Appellee's Motion for Attorney's Fees and Costs Pursuant to Fla. R. App. P. 9.400 is hereby **GRANTED**. (BOWMAN, TOWBIN-SINGER, and RODRIGUEZ JJ., concur.)

* * *

KELLI MASSARD, Appellant, v. WESTPORT RECOVERY CORPORATION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-000462 (AP). L.T. Case No. COSO16-001388. November 5, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit Broward County; Michael Davis, Judge. Counsel: Aaron M. Cohn, Weinberg, Wheeler, Hudgins, Gunn & Dial LLC, Coconut Creek, for Appellant. Debra Greenberg, Friedman & Greenberg, P.A., Plantation, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

KATHALINA MONACELLI, Appellant, v. FORD MOTOR CREDIT COMPANY, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-010854 (AP). L.T. Case No. COWE11-015900 (82). October 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Jennifer Wigand Hilal, Judge. Counsel: Kathalina Monacelli, Fort Myers, Pro se, for Appellant. Michael J. Ingino, Moody, Jones & Ingino, PA., Plantation, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Officer who observed two vehicles stopped in roadway and was advised that defendant's vehicle had bumped other vehicle had authority to detain defendant to complete accident investigation despite not observing any damage on his initial inspection of vehicles—Trial court did not err in denying motion to suppress, although it did err in relying on officer's post-detention observations of indicia of impairment in doing so

MARK BRIAN BRUNO, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 20-20AP. L.T. Case No. 19-7551MMA. November 20, 2020. Appeal from County Court for Seminole County, Honorable Jerri L. Collins, County Court Judge. Counsel: Matthews R. Bark, for Appellant. Phil Archer, State Attorney, and Roger Walker II, Assistant State Attorney, for Appellee.

(ALVA, MARLENE M., J.) Appellant was charged with driving under the influence. He filed a motion to suppress the evidence alleging that he was unlawfully detained. The trial court denied the motion and Appellant entered a nolo contendere plea reserving the right to appeal the ruling. This appeal followed.

On August 31, 2019, Appellee was arrested for driving under the influence of alcohol. A motion to suppress hearing was held on December 10, 2019, during which the following facts were adduced:

On August 31, 2019, Officer Stanley Rubin was conducting stationary traffic enforcement. He looked up the roadway and observed two vehicles stopped in a traffic lane with people standing outside one of the vehicles. The individuals appeared to be taking photos of the license plate of the second vehicle. Believing that either an accident had occurred or one of the vehicles had broken down, Officer Rubin called in that he was out for a potential traffic crash and approached the vehicles with his emergency lights activated. When he arrived at the vehicles, he made contact with the occupants of the first vehicle, who were standing behind the second vehicle. They indicated that the second vehicle had bumped them. They also expressed concern because they believed the driver of the second vehicle might have been drinking. The driver of the second vehicle was Appellant, and Officer Rubin observed him behind the wheel of the vehicle. Officer Rubin made contact with Appellant and asked if he was okay. Officer Rubin told Appellant that he would be investigating the crash, but they needed to move the vehicles out of the roadway. Officer Rubin had them move to a nearby parking lot. Officer Rubin admitted on cross-examination that he did not observe any damage to either vehicle at the time he told them to move the vehicles. He also admitted that no one informed him of any damage or any injuries.

The State introduced into evidence as State's Exhibit 1 the dash cam video from Officer Rubin's patrol vehicle. The video shows that the two vehicles were stopped in the middle/left lane[1] of the roadway near an intersection. The vehicles were completely blocking the flow of traffic in that lane when Officer Rubin arrived. Two cars are seen changing lanes to go around the vehicles. In addition to blocking the middle lane, Appellant's vehicle was angled such that his vehicle partially obstructed the right lane as well. Vehicles can be seen traveling partially on the shoulder to avoid striking the rear end of Appellant's vehicle. Once the vehicles are in the parking lot, the video shows the occupants of vehicle one examining their rear bumper for damages. Later in the video, law enforcement officers are seen taking

a close look at the bumper of vehicle one in an apparent attempt to ascertain if there was any damage. The vehicle was dark in color and the incident occurred at night.

In denying the motion to suppress, the trial court relied upon Officer Rubin's observations of indicia of impairment. These observations were made after Officer Rubin detained Appellant by directing him to go to the parking lot. Therefore, the trial court could not use them to find that the detention was lawful. *See Baptiste v. State,* 995 So. 2d 285, 294 (Fla. 2008) [33 Fla. L. Weekly S662a] (citing *Florida v. J.L.,* 529 U.S. 266, 271 (2000); *Hiibel v. Sixth Judicial District Court of Nevada,* 542 U.S. 177, 185 (2004) [17 Fla. L. Weekly Fed. S406a]) ("the reasonableness of the officers' suspicion must be measured by the information that the officers knew before conducting the stop-and-frisk."). However, pursuant to the Tipsy Coachman doctrine, the ruling should be affirmed.

Appellant asserts that because Officer Rubin did not observe any damage during his initial cursory inspection of the vehicle, he did not have the authority to detain Appellant to conclude an accident investigation. Fla. Stat. § 316.061(1), requires the driver of a vehicle involved in a crash involving property damage to "immediately stop such vehicle at the scene of such crash or as close thereto as possible. . . and in every event shall remain at, the scene of the crash until he or she has fulfilled the requirements of s. 316.062." Fla. Stat. § 316.062(1) requires the driver of a vehicle involved in a crash resulting in injury or damage to property to provide certain information to "any person injured in such crash or to the driver or occupant of or person attending any vehicle or other property damaged in the crash and . . . any police officer at the scene of the crash or who is investigating the crash." In *Parrish v. State,* the First District Court of Appeal upheld the continued detention of the defendant when a deputy working an off-duty detail at a Wal-Mart observed a minor collision despite the fact that there did not appear to be any damage to the vehicles involved. *Parrish v. State,* 937 So. 2d 1231, 1233 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2425c]. Based upon *Parrish,* Officer Rubin had the authority to detain Appellant to complete his accident investigation despite not observing damage upon his initial inspection.

Accordingly, the trial court's ruling is AFFIRMED. (NELSON and CHASE, JJ. concur.)

[1]There were two lanes of traffic for traveling straight and a left turn lane. The vehicles were in the lane next to the left turn lane.

* * *

Criminal law—Contempt—Failure to recite facts on which contempt was based—Remand for entry of entry of judgment containing recitation of facts

JAMIE DWAYNE ROBINSON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 20-03 AP. L.T. Case No. 20-14 MM. November 12, 2020. Appeal from the County Court for Lee County; James R. Adams, Judge. Counsel: Heather Sutton-Lewis, Assistant Public Defender, Fort Myers, for Appellant. Kenneth J. Erickson, Assistant State Attorney, Fort Myers, for Appellee.

(PER CURIAM.) This appeal arose following the trial court finding Appellant in direct criminal contempt for slamming both the inside and outside doors of the courtroom as Appellant exited. The trial court, after providing Appellant and defense counsel with an opportunity to present evidence in mitigation, sentenced Appellant to five days in jail.

We reverse only to the extent the written judgment did not include a recital of the facts on which the contempt was based. Since contemptuous conduct may not be recorded, Fla. R. Crim. P. 3.830 requires that the written judgment include a recital of facts on which the adjudication of guilt for contempt is based. *Ward v. State*, 908 So. 2d 1138, 1139 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1917c].

Accordingly, we remand to the trial court to enter a written judgment pursuant to Fla. R. Crim. P. 3.830 which contains a recitation of the facts upon which the adjudication of contempt was based. (BRODIE, LABODA, and McGOWAN, JJ., concur.)

* * *

Criminal law—Violation of probation—Appeal of order finding defendant in violation of probation is not mooted by fact that defendant had served maximum sentence where there remain collateral consequences of potential incarceration costs and civil penalties—Finding that defendant violated probation by possessing or consuming alcohol or other illicit substances on date he failed to appear for random drug test was not supported by competent substantial evidence where there was no nexus between missed drug test and possession charge—Other findings of probation violations are affirmed

NICKOLAS WADE WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 18-14 AP. L.T. Case No. 17-504482 CT. June 17, 2020. Appeal from the County Court for Lee County; Archie B. Hayward, Jr., Judge. Counsel: Stacy L. Sherman, Assistant Regional Counsel, Fort Myers, for Appellant. Trevor D. Selph, Assistant State Attorney, Fort Myers, for Appellee.

(**PER CURIAM.**) On November 17, 2017, Appellant was arrested for Driving Under the Influence. On February 20, 2018, Appellant appeared in Court and entered a no contest plea to the charge of Driving Under the Influence. He was adjudicated guilty and sentenced to 6 months probation. Appellant's probation included multiple conditions, three of which he was charged with violating: "You will pay the Clerk of Court the amount of $50.00 per month toward the cost of your supervision, unless otherwise waived in compliance with Florida Statutes" (Condition 2), "You will submit to random drug and alcohol and drug screening and urinalysis at your own expense; no positive or diluted test results" (Condition 23), and "No possession or consumption of alcohol or illicit substances" (Condition 24).

A probation hearing was held on May 14, 2018 where Appellant was charged with five counts of violating probation. After hearing testimony at the hearing, several undisputed facts emerged. First, Appellant failed his first random drug test on March 13, 2018 by the presence of cocaine and THC in his system. Second, he was behind on his $50.00 per month supervision payments. Third, he missed his March 29, 2018 random drug screening.

To the extent Appellee argued the appeal was moot because Appellant had served the maximum sentence, and that the sentence was completed before the initial brief was filed, the Court finds that the appeal is not moot. Appellant identified potential incarceration costs and civil penalties as collateral consequences. *See*, *Wilson v. State*, 268 So.3d 820, (Fla. 2d DCA 2019) [44 Fla. L. Weekly D177b].

As to the remaining issues raised, the Court finds only the violation of condition 24 needs addressing. The Court affirms the other two issues related to the violations of conditions 2 and 23 without comment.

The review of a revocation of a probation case involves two steps. The first step requires a determination whether there was competent and substantial evidence that Appellant willfully and substantially violated probation. The second step is to determine whether the trial court abused its discretion in ruling on the violation of probation. *Savage v. State*, 120 So. 3d 619 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1858a].

The terms "competent" and "substantial" were defined by the Second District Court of Appeals in *Savage*. "Competent" evidence is evidence admissible in under the legal rules of evidence. The term "substantial" was defined as follows:

> Substantial requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

Savage, at 621

The term "abuse of discretion has been described as "if reasonable persons could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of abuse of discretion." *Savage*, at 619 *quoting Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In other words, we will not disturb the decision unless no reasonable person could have decided as the trial court.

As it relates to the alleged violation of condition 24, Appellant argued there was no "nexus" between the missed drug test on the 29th and the possession charge. Without a specimen to test, there was no way to show Appellant possessed any specific illicit substances or alcohol which would have violated condition 24 of his probation on March 29, 2018. Therefore, the court's decision violating Appellant's violation of the 5th allegation of the warrant, the violation of Condition 24 from March 29, 2018 is not supported by competent substantial evidence.

The county court's decision that the case is not moot is AFFIRMED.

The court's decision on violations of probation is AFFIRMED, IN PART, AND REVERSED, IN PART. It is AFFIRMED in finding probation violations of Condition 2, Conditions 23 and 24 committed on March 13, 2018, and Condition 23 on March 29, 2018 and REVERSED as to the court's finding of a violation of Condition 24 committed on March 29, 2018. (ADAMS, FULLER, and HAWTHORNE, JJ., concur.)

* * *

Criminal law—Search and seizure—Vehicle stop—Community caretaking—Officer did not have cause to stop vehicle that was traveling 20 mph below speed limit for welfare check where driving was not erratic and did not impede flow of traffic—Error to deny motion to suppress

ARTURO ONTIVEROS MARTINEZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 18-13 AP. L.T. Case No. 18-284 CT. August 6, 2020. Appeal from the County Court for Collier County; Michael J. Provost, Judge. Counsel: Jamie A. Aird, Fort Lauderdale, for Appellant. Brock R. Frazier, Assistant State Attorney, Naples, for Appellee.

(**PER CURIAM.**) This appeal stems from a final judgment and sentence rendered July 11, 2018. Appellant, Arturo Ontiveros Martinez, is appealing the denial of his motion to suppress. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). Appellate review of a trial court's ruling on a motion to suppress is a mixed question of fact and law. *State v. Busciglio*, 976 So. 2d 15 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D267c]. "The trial court's findings of fact are presumed correct and will be reversed only if they are not supported by competent, substantial evidence." *Id.* at 18. The appellate court's review of the trial court's application of the law to its determination of facts is *de novo*. *Id*; *Wyche v. State,* 987 So. 2d 23, 25 (Fla. 2008) [33 Fla. L. Weekly S509a]. We reverse.

Appellant argues that the Trial Court erred in denying the Motion to Suppress because the evidence gathered was due to an unlawful traffic stop. The Appellant contends that he did not commit a traffic violation when the officer initiated a traffic stop.

When determining whether a traffic stop is constitutional, an objective test is used, ignoring the officer's subjective knowledge, motivation, or intention, and asking only whether probable cause for the stop existed. *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. "The test is whether a police officer could have stopped the vehicle for a traffic violation." *Id.* According to Fla. Stat. §316.183, "No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. . . . A violation of this section is a noncriminal traffic infraction, punishable as a moving violation as provided in chapter 318." Fla. Stat. §316.183 (5) and (7).

In the instant case a review of the record reflects that the officer did not attest that the Appellant's speed was impeding the normal movement of traffic, and asserts that the reason he initiated an investigatory stop was to check on the welfare of the Appellant. The Trial Court "determined that observing a car at 1 a.m. that was weaving within a single lane [and] going 20 mph below the speed limit and that had crossed a dotted line was enough to permit a law enforcement officer to conduct a welfare check."

However, "even a stop pursuant to an officer's community caretaking responsibilities . . . must be based on specific articulable facts showing that the stop was necessary for the protection of the public." *Majors v. State*, 70 So. 3d 655, 661 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a]. The Second District Court of Appeal has addressed this issue regarding a traffic stop in which the defendant was traveling at 20 mph under the speed limit, and the officer conducted the stop due to the vehicle's slow rate of speed and because the low speed was allegedly impeding the flow of traffic. *Agreda v. State*, 152 So. 3d 114, 116-17 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2516a]. The court in *Agreda* noted that the officer did not see the car weave or drift in its lane, or notice anything to objectively suggest that there was a mechanical problem with the car or a medical problem with the driver, and held that the traffic stop was not justified in the absence of something more than simply driving more slowly than most motorists. *Id.* at 116. Additionally, in *People v. State*, 626 So. 2d 185, 186 (Fla. 1993) the court opined that for an investigatory stop be proper a police officer needs to have reasonable suspicion that an individual has committed or is about to commit a crime.

However, in this case the officer did not state that there was a reasonable suspicion that the Appellant was involved in any criminal activity. At the hearing, the officer only stated that the Appellant was driving 20 mph below the speed limit. The officer did not claim that the Appellant's driving put the public in danger, and did not even claim that the vehicle interfered with any traffic. Furthermore, the officer did not even give the Appellant a traffic citation pursuant to Fla. Stat. §316.183, nor did he indicate that the traffic stop was pursuant to a traffic violation.

We find that the officer did not have sufficient cause to conduct a welfare check because Appellant's driving was not erratic and the flow of traffic was not affected. Thus, the Trial Court should have granted Appellant's motion to suppress.

Accordingly, we REVERSE and remand to the trial court for further proceedings in accordance with this opinion. (KRIER, K. KYLE, and MASON, JJ., concur.)

* * *

Criminal law—Driving under influence—Evidence—Blood test—Trial court erred in suppressing blood test results based on argument that trooper lacked reasonable cause to request blood draw where motion to suppress only raised issue of voluntariness of defendant's consent to blood draw, and court did not afford state an opportunity to present evidence on newly-raised issue—No merit to argument that trial court's ruling should be affirmed as harmless error because court will rule in same manner on amended motion to suppress if case is remanded—Harmless error test is not applicable, and argument assumes that state would merely present same evidence at new hearing on amended motion

STATE OF FLORIDA, Appellant, v. JANARD WASHINGTON, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 19-10 AP. L.T. Case No. 18-2428 CT. May 7, 2020. Appeal from the County Court for Collier County; Blake Adams, Judge. Counsel: Sabsina N. Karimi, Assistant State Attorney, Naples, for Appellant. Christopher H. Brown, Fort Myers, for Appellee.

(**PER CURIAM.**) Appellant, State of Florida, is appealing the lower court's order granting Appellee's motion to suppress. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). When reviewing a motion to suppress, the trial court's factual findings must be affirmed if supported by competent, substantial evidence, while the trial court's application of the law to those facts is reviewed *de novo*. *State v. Battle*, 232 So.3d 493, 496 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2271a]. On appeal, such a ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. *Id*. We reverse.

On June 24, 2018, Appellee, Janard Washington, and a passenger in his vehicle were involved in a single vehicle accident in Immokalee, Florida. Appellee was the alleged driver of the vehicle. Appellee and passenger sustained injuries from the accident and were transported to local hospitals for further evaluation. Trooper David Rodriguez ("Trooper Rodriguez") of the Florida Highway Patrol was assigned to the accident investigation and arrived at the scene of the accident as the Appellee and passenger were being transported to the hospitals. As part of his investigation, Trooper Rodriguez went to North Naples Hospital to meet with the Appellee.

When Trooper Rodriguez arrived at the hospital, Appellee was sleeping in his room. Trooper Rodriguez alleged that he had to call out Appellee's name several times before Appellee woke up. While Trooper Rodriguez spoke to Appellee about the accident, he alleged that Appellee's speech was slurred and mumbled, his eyes were bloodshot and watery, and the odor of alcohol was radiating from Appellee's face. After Trooper Rodriguez completed his crash investigation, he informed Appellee that he was going to conduct a DUI investigation. Trooper Rodriguez read an implied consent warning to Appellee and Appellee allegedly consented to a blood test. Trooper Rodriguez provided an emergency room technician with a kit to draw blood from Appellee. After the blood was drawn, Trooper Rodriguez secured the blood samples so that they could be sent to the Florida Department of Law Enforcement ("FDLE") for further testing. Trooper Rodriguez then gave Appellee a voluntary blood draw form to sign. Trooper Rodriguez alleged that Appellee spent a few minutes looking at the form, mumbled something, and did not sign the form.

Trooper Rodriguez received the blood results from FDLE; the results allegedly showed that Appellee's blood alcohol content was .255 and .254. Appellant charged Appellee with DUI with a blood alcohol level of .15 or more, in violation of Fla. Stat. § 316.193. Appellee's counsel filed a motion to suppress the blood evidence Trooper Rodriguez obtained from Appellee. Appellee's counsel argued that the evidence should be suppressed because Appellee's consent was not knowing, freely, and voluntarily given.

At the hearing for Appellee's motion to suppress, Appellant called Trooper Rodriguez as a witness. Trooper Rodriguez testified that Appellee consented to the blood test after he read implied consent to Appellee from his agency issued card. Appellee's counsel asked Trooper Rodriguez how he knew that Appellee's consent was knowingly, freely, and voluntarily; Trooper Rodriguez answered by stating that Appellee said yes when he asked him if he would submit to the blood test.

After the testimony of the witnesses concluded, Appellee's counsel made an *ore tenus* argument that the blood evidence should be suppressed because Trooper Rodriguez did not have probable cause, or reasonable suspicion to believe a DUI occurred, therefore, Trooper Rodriguez should not have read Appellee the implied consent warning. In rebuttal, Appellant argued that the purpose of the hearing was to determine whether Appellee's consent was voluntary. The court found that Appellee did consent to the blood draw. However, the court granted the motion to suppress on grounds that Trooper Rodriguez did not have reasonable cause to believe that Appellee was involved in a DUI. Appellant objected to the court's ruling because its decision was based on an argument made by Appellee that was outside of the four corners of the motion, it did not have notice of Appellee's *ore tenus* argument, and it should be entitled to call additional witnesses to testify to the issues Appellee raised *ore tenus*. The court overruled Appellant's objection.

Appellant argues that the lower court erred in granting Appellee's motion to suppress on the grounds that Trooper Rodriguez lacked reasonable cause to request a blood draw because it was not raised in Appellee's motion to suppress. Therefore, Appellant was deprived of notice and opportunity to present evidence to that issue. A motion to suppress evidence obtained from an unlawful search must identify the evidence sought to be suppressed, the reasons for suppression, and a statement of facts on which the motion is made. Fla. R. Crim. P. 3.190(g)(2). The trial court should not entertain arguments made outside of the four corners of the motion because it contradicts the rigid requirements of Fla. R. Crim. P. 3.190(g)(2). *See State v. Christmas*, 133 So.3d 1093, 1096 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d]. The trial court must give the State an opportunity to rebut the Defendant's evidence when the Defendant raises an issue at a hearing without sufficient notice to the State. *Id*. We find that the trial court erred, as matter of law, when it granted Appellee's motion to suppress. The trial court made its ruling based on an argument made outside of the four corners of the motion, and it denied Appellant an opportunity to present evidence that Trooper Rodriguez had reasonable cause to believe Appellee was involved in a DUI.

Appellee concedes that the trial court erred in granting the motion to suppress. However, Appellee requests that the Court affirm the trial court's ruling because the trial court's error was a harmless error. Appellee argues that the trial court's ruling was a harmless error because if the case were to be remanded, Appellee would amend the motion to suppress to include the lack of reasonable cause argument. Therefore, the trial court will once again grant his motion because it already found that Trooper Rodriguez lacked reasonable cause to begin a DUI investigation. Appellee argues that "[t]he purpose of the harmless error analysis is to ['] conserve judicial labor by holding harmless those errors which, in the context of [a] case, do not vitiate the right to a fair trial and, thus, do not require a new trial.[']" *Special v. West Boca Medical Center*, 160 So.3d 1251, 1254-55 (Fla. 2014) [39 Fla. L. Weekly S676a] (citing *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986)). Appellee's reliance on *Special* is misguided as *Special* set forth the harmless error standard in civil cases. *Id.* at 1256.

In criminal cases, the harmless error test is used to determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967). "The harmless error test . . . 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 . . . ." *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986). Therefore, the harmless error test does not apply to the current case because Appellant did not benefit from an error made by the trial court. Additionally, Appellee's argument that the trial court would grant an amended motion to suppress relies on the assumption that Appellant's evidence will be identical to the evidence presented at the hearing on the motion to suppress.

Accordingly, we REVERSE the order suppressing evidence, and remand to the trial court for further proceedings in accordance with this opinion. On remand, Appellee may properly move to suppress the evidence. (B. KYLE, SHENKO, and L. PORTER, JJ., concur.)

* * *

Criminal law—Traffic infractions—Careless driving—State failed to prove that defendant was in actual physical control of vehicle where defendant had been transported to hospital before trooper arrived at scene of single-vehicle accident, there were no independent witnesses to accident, and trooper assumed that defendant was driver of vehicle because she was registered owner of vehicle

MARISSA SASO, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 19-17AP. L.T. Case No. 19-41205 TR. June 30, 2020. Appeal from the County Court for Lee County; Amanda Levy-Reis, Hearing Officer. Counsel: Timothy P. Culhane, Cape Coral, for Appellant. Kimberly N. Rubino, Assistant State Attorney, Fort Myers, for Appellee.

(**PER CURIAM.**) It is undisputed that Marissa Saso (Defendant/Appellant) was the owner of a vehicle involved in a one car accident on June 3, 2019. The record shows that Trooper J.R. Adams II of the Florida Highway Patrol issued a uniform traffic citation crash report charging Appellant with "careless driving, failed to operate vehicle in a careful and precise manner" pursuant to 316.1925(1). A box on the citation was checked which states that there was no injury to another. The citation also states that this is an "infraction which does not require an appearance in court" by way of another checked box on the citation. The citation was unsigned by Ms. Sosa but a box on the citation indicates that it was issued personally to her. An updated report was issued on June 27, 2019 by Trooper Adams. The report stated that Appellant's vehicle hit a light post and then came to rest at concrete barrier on County Road 884, Midpoint Memorial Bridge where he observed it. The report indicates that debris from the Sosa vehicle sprayed over the barrier and hit another vehicle moving in the opposite direction. A hearing was held on August 8, 2019 at which the citing trooper testified and Appellant was found guilty. Appellant then filed this appeal. A "Record of Appeal" was filed on September 26, 2019, which contains testimony of Trooper Adams.

In the initial brief, Appellant makes one argument, the State did not meet its burden of proof in that no evidence was produced to find that Appellant was in actual physical control of the vehicle at the time of the accident. It is undisputed that Appellant was the registered owner of the vehicle which was involved in a one car accident on June 3, 2019. In her brief, Appellant avers that the State did not meet the burden of proof required by statute and case law to prove that she "was in actual and physical control of the vehicle." *Dupont v. State,* 399 So.2d 438 (Fla. 5th DCA 1981). Appellant argues that she was improperly found guilty when there was no independent witness at the hearing and that State Trooper Adams testified that he assumed she was driving because she was the registered owner of the vehicle. Defendant avers that the Trooper never spoke with Appellant. She also argues that in order to be found guilty, there must be some evidence showing that the Defendant was in actual physical control of the vehicle at the time of the accident. Appellant further argues that if there was no identification of the alleged perpetrator, then acquittal is warranted, citing *Meisel v. State,* 10 Fla. L. Weekly Supp. 235b, (Fla. 15th Cir. Ct. Feb. 2003). Appellant, at the hearing, moved to dismiss the charges citing that actual physical possession had not been proven. Appellant avers that the Trooper testified that when arrived at the scene she had been transported by ambulance and there were no independent witness. Appellant avers that the State did not meet the burden of proof that Appellant was in actual physical control of the vehicle. In the Appellee brief, the State concedes that there was not enough evidence to sustain a conviction per the record provided.

The case law states there must be evidence of actual physical control for a charge of reckless driving. (*Id.*.) In *Dupont v. State,* 399 So.2d 438 (Fla. 5th DCA 1981), a defendant was found to be in actual physical control of a motor vehicle because he was found by the officer in the driver's seat behind the wheel even the though the engine was not running. The State has the burden to prove the elements of the infraction, including that the Defendant was in actual physical control of the vehicle at the time of the accident. (*Id.).* Additionally, in *Lee v. State,* 374 So.2d 1094 (Fla. 4th DCA 1979), the District Court of Appeal granted a Writ of Certiorari because there was no evidence presented in a careless driving case that the defendant was involved in the collision. Here, the officer who wrote the complaint stated at the hearing that he "assumed" that Appellant was the driver of the vehicle since she was the registered owner. It is unclear how the Officer knew that Appellant was at the hospital except that he testified that "she had been taken to the hospital by ambulance before he arrived at the scene." The Officer testified that he obtained Appellant's driver's license from a nurse at the hospital and that he never spoke to Appellant personally and did not know of any independent witnesses to the one car accident. *Griffin v. State*, 457 So.2d 438 (Fla. 5th DCA 1981).

Sufficient evidence was not presented to prove that Appellant was in actual physical control of the vehicle. In light of the absence of that evidence, and the State's concession, Reversal is warranted. (J. PORTER, FOSTER, and CUPP, JJ., concur.)

* * *

Volume 28, Number 10
February 26, 2021
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Dissolution of marriage—Jurisdiction—Residency requirement—Magistrate's finding that petitioner did not establish six-month residency requirement was supported by competent substantial evidence, and magistrate's recommendations were not clearly erroneous—Exceptions to report denied, as petitioner failed to provide record of hearing although report clearly advised her that exceptions would be denied if record was not provided

DANIELLE A. WALTER, Petitioner, and MICHAEL T. WALTER, Respondent. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 19-1233-DR. November 25, 2020. David Frank, Judge. Counsel: Danielle Walter, pro se, Petitioner.

ORDER DENYING EXCEPTIONS AND ADOPTING THE MAGISTRATE'S REPORT ON FINAL JUDGMENT ON PETITION FOR DISSOLUTION OF MARRIGAE WITH NO DEPENDENT OR MINOR CHILDREN

This matter came before the Magistrate on June 29, 2020, on petitioner Danielle Walter's Petition for Dissolution of Marriage with No Dependent or Minor Children that had been filed on December 16, 2019. The Magistrate issued his report on July 15, 2020, in which he concluded that the petitioner did not establish the six-month required residency to give the Court jurisdiction for the dissolution. Petitioner filed timely exceptions to the report on July 29, 2020.

The Magistrate did precisely what he is supposed to do. He made sure the petitioner had due notice of the final hearing, with plenty of time for her to prepare. He reviewed the court file, heard testimony, considered the evidence presented and issued his factual findings and conclusions of law.

The Magistrate's report advised petitioner, in bolded and capital letters, that she was "required" to provide a record of the hearing "or [her] exceptions will be denied." Petitioner never provided a record.

With no record to review, petitioner wants this Court to not just re-evaluate evidence, but apparently to add evidence to her case that she still does not have.

Although there is no record to review, the petitioner herself confirms in her filed exceptions that one piece of evidence, the "intake into the Florida Department of Corrections," showed that she was "3 days shy of 6 months prior to her filing." Petitioner, however, did not cite any evidence presented at the hearing that would tend to prove she was not shy of the mandatory jurisdictional time period.

This Court exercises limited authority in resolving exceptions to a magistrate's report and recommendations. A general master's findings of fact and conclusions of law come to the trial court clothed with a presumption of correctness. *Khata v. Belova*, 274 So.3d 1208, 1209 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1559a] (citations and quotations omitted). A trial court may only reject these findings and conclusions if they are clearly erroneous or if the general master has misconceived the legal effect of the evidence presented. *Id.* A trial court may not reweigh the evidence presented to the magistrate; it only can determine whether the magistrate's findings were supported by competent, substantial evidence. *Id.*

The Magistrate's factual findings were supported by competent, substantial evidence, and his recommendations were not clearly erroneous.

Accordingly, it is ORDERED and ADJUDGED that

The petitioner's exceptions are DENIED. The Magistrate's July 15, 2020 report and recommendations are hereby APPROVED, AFFIRMED, and ADOPTED as an order of this Court.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer who responded to report of van that veered into oncoming traffic and, after locating vehicle, observed it cross fog line twice, had reasonable suspicion for investigatory stop—Detention of defendant for 15 minutes without beginning investigation while awaiting arrival of DUI unit was unlawful—Motion to suppress is granted

STATE OF FLORIDA, v. MARK A. WASZAK, Defendant. Circuit Court, 5th Judicial Circuit in and for Lake County. Case No. 2017-CE-2410. July 12, 2018. Mark A. Nacke, Judge.

ORDER ON DEFENDANT'S AMENDED MOTION TO SUPPRESS UNLAWFULLY OBTAINED EVIDENCE

THIS CAUSE having come before this Court pursuant to the Defendant's Amended Motion to Suppress Unlawfully Obtained Evidence and the Court having heard the testimony of witnesses and argument of counsel, finds as follows:

On June 24,2017, the Lake County Sheriff's Department received a call from a motorist that a white service van had veered into oncoming traffic almost causing an accident. Deputy Holcomb was in the area and located a vehicle matching that description. Deputy Holcomb got behind the vehicle and followed it a short distance. On two occasions, Deputy Holcomb observed the vehicle veer toward the shoulder of the road crossing the white "fog" line. Deputy Holcomb, was suspicious that the driver could be under the influence and he stopped the vehicle. The Defendant was the driver and the only occupant of the vehicle. Deputy Holcomb interacted with the Defendant and noticed that his speech and movements were unusually slow, however, Deputy Holcomb did not notice an odor of alcohol. When asked to step out of the vehicle the Defendant was so unsteady on his feet that Deputy Holcomb had him sit on the bumper of the van. The Sheriff's Department DUI unit was asked to respond to the location where the Defendant was stopped. Corporal Chessher, of the DUI unit, testified that she arrived at the location in a little less than 15 minutes after the request. Nothing was done concerning the investigation of the DUI until Corporal Chessher arrived. Corporal Chessher was informed of the situation and made contact with the Defendant. After performing some field sobriety exercises the Defendant was arrested for DUI and taken to the Lake County Jail. The Defendant took a breath test for alcohol with negative results. The Defendant refused to provide a urine sample.

The Defendant argues that all the evidenced should be suppressed because Deputy Holcomb had no probable cause or reasonable suspicion to stop the Defendant and that he was unreasonably detained while waiting for the DUI unit to arrive.

In *State v. Carina,* 506 So.2d 495 (Fla. 5th DCA 1987), a law enforcement officer followed the vehicle driven by Mr. Carrillo and observed the vehicle, more than five times, weave from one side of his lane to the other touching the lane boundary lines, but not leaving his lane. Although, not a violation of the traffic laws, it did give the officer a "founded suspicion" that Mr. Carrillo was driving under the influence and a legal basis for an investigatory stop.

In this case, considering the caller; Deputy Holcomb finding a vehicle matching the description the caller gave; and Deputy Holcomb observing the Defendant's vehicle, on two occasions, within a short period of time, veer toward the shoulder of the road crossing the "fog line," Deputy Holcomb had a founded or reasonable suspicion that the Defendant was operating his vehicle while under the influence. Deputy Holcomb's stop was a valid investigatory stop, however, the detention of the Defendant while waiting for Corporal Chessher to arrive without beginning an investigation is an unlawful detention.

It is therefore, ORDERED AND ADJUDGED that the Defen-

dant's Amended Motion to Suppress Unlawfully Obtained Evidence is granted based upon the illegal detention.

* * *

Civil procedure—Complaint—Motion for more definite statement granted

USF FEDERAL CREDIT UNION, Plaintiff, v. GIOVANNI N. TOSTI, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-018328-CA-01, Section CA22. October 27, 2020. Beatrice Butchko, Judge. Counsel: Shera E.Anderson and Ofer Shmucher, Miami, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT

THIS CASE having come before the Court on October 27, 2020 at approximately 9:00am, or as soon thereafter as the case could be heard, at a hearing on the Defendant's Motion for a More Definite Statement, at which counsel for the Plaintiff and counsel for the Defendant were both present, and after having reviewed the materials before this Court, and after having heard argument from each party, the Court finds as follows:

1. The Plaintiff's Complaint is not plead in compliance with *Fla. R. Civ. P.* 1.110(b) insofar as it fails to contain sufficient factual allegations, fails to identify with specificity the cause of action associated with each count, and fails to plead all requisite elements for each cause of action.

It is therefore ORDERED AND ADJUDGED:

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

3. The Plaintiff shall file an amended complaint that conforms with *Fla. R. Civ. P.* 1.110(b) within twenty (20) days from the date of this Order.

4. The Defendant shall file a response to the amended complaint within ten (10) days after the amended complaint is filed.

* * *

Foreclosure—Home equity line of credit—Limitation of actions—Res judicata—Agreement underlying action was not a negotiable instrument, but was instead a contract subject to five-year statute of limitations under section 95.11—Summary judgment based on defendant's breach of agreement and on counterclaim seeking declaratory relief and to quiet title denied, as there is disputed issue of material fact as to when breach occurred—Further, disputed issue of material fact exists as to affirmative defense of res judicata

WILMINGTON SAVINGS FUND SOCIETY, FSB d/b/a CHRISTIANA TRUST AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST III, Plaintiff, v. BONNA PENG, et al., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-CA-008854-O, Division Div 35. December 6, 2020. Patricia L. Strowbridge, Judge. Counsel: Christian Savio, Law Offices of Mandel, Manganelli & Leider, P.A., Boca Raton, for Plaintiff. Adam H. Sudbury, Apellie Legal, Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT OF FORECLOSURE AND EQUITABLE SUBROGATION, ADJUDICATION OF COUNTERCLAIM AND FOR ATTORNEY FEES

THIS MATTER came before the Court on October 20, 2020, upon Plaintiff's Amended Motion for Summary Judgment of Foreclosure and Equitable Subrogation, Adjudication of Counterclaim and for Attorney Fees , and the Court, having considered the properly filed Motion and supporting affidavits, the Defendant's Affidavit in opposition, the respective memoranda of law filed by the attorneys, and being otherwise fully informed, does hereby:

CONSIDER, ORDER and ADJUDGE as follows:

Plaintiff asserts that Defendant's Affirmative Defenses and Counterclaim, supported by an affidavit in opposition, do not raise a dispute of material fact preventing the entry of summary judgment. Disputes of material fact have been raised by the Defendant, and they are not resolved by the Plaintiff's affidavits.

In particular, Plaintiff refers to the Equity Maximizer Agreement and Disclosure Statement as the "Note", but the referenced document is not a promissory note, nor is it a negotiable instrument, as asserted by Plaintiff. See, *Third Federal Savings and Loan Association of Cleveland v. Koulouvaris*, 247 So. 3d 652 (Fla. 2nd DCA 2018) [43 Fla. L. Weekly D1148a] and *Chuchian v. Situs Investments, LLC*, 219 So. 3d 992 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1288a].

All of Plaintiff's cited cases involve mortgage foreclosures with an underlying negotiable instrument, a promissory note. These cases support the assertion that each successive monthly payment constitutes a separate default, if not paid by the defendant, and therefore, the statute of limitations runs separately for each defaulted payment, and each defaulted payment constitutes a separate cause of action,. See, inter alia, *Bartram v. U.S. Bank National Association*, 211 So. 3d 1009 (Fla. 2016) [42 Fla. L. Weekly S326a].

The Equity Maximizer Agreement and Disclosure Statement, executed on January 31, 2007 is not a negotiable instrument because it doesn't meet the statutory criteria for that designation. Florida law establishes that a "negotiable instrument" is "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." § *673.1041(1), Fla. Stat. (2012).*

As Justice Lawson further explained in *Bollettieri Resort Villas Condominium Association v. Bank of New York Mellon*, the reasoning behind the *Bartram* ruling is fundamentally about understanding the manner in which suit can be brought on a promissory note, prior to when the promissory note matures, at the conclusion of the enumerated payments. 228 So. 3d 72 (Fla. 2017) [42 Fla. L. Weekly S847a]. The nature of the promissory note, and the manner in which enforcement occurs through acceleration of the sums owed, impacts how the statute of limitations is calculated. *Id*.

In this case, the Equity Maximizer Agreement and Disclosure Statement, is a contract subject to a five year statute of limitations under § 95.11, from the date of breach. The Complaint alleges a date of breach of October 20, 2012, but the affidavit of the Defendant asserts a breach date in 2008. This is a dispute of material which is material to both the stated cause of action, as well as to the Counterclaim seeking declaratory relief and to quiet title.

The Defendant has also raised the issue of *res judicata* in the affirmative defenses, based upon two prior cases alleging entitlement to relief on similar grounds. This is a disputed issue of material fact, as well. Therefore, summary judgment would not be appropriate at this time.

WHEREFORE, the Plaintiff's Amended Motion for Summary Judgment of Foreclosure and Equitable Subrogation, Adjudication of Counterclaim and for Attorney Fees is **DENIED**.

Plaintiff shall be responsible for serving a copy of this Order, by regular mail, to all parties not receiving service of court filings through the Florida Courts e-Filing Portal, and shall file a certificate of service in the court file within 3 business days.

* * *

Arbitration—Arbitrable issues—Limited liability companies—Direct/derivative claims—Motion to compel arbitration of plaintiff's direct claim seeking accounting against LLC in which plaintiff purchased membership unit is granted—Membership agreement contains clause requiring arbitration of any dispute arising out of, or relating to, membership; defendants did not waive right to arbitrate; and arbitration agreement, which incorporated commercial rules of AAA, demonstrated intent to have arbitrator rather than court decide issues of arbitrability—Shareholder derivative actions—Arbitration agreement entered into by nominal derivative plaintiff may not be relied upon to compel arbitration of derivative claims brought by nominal plaintiff where company on behalf of which claims are brought is not party to any agreement to arbitrate claims against its officers, directors or managers—Motion to compel arbitration of derivative claims is denied

CHUN LIU, derivatively on behalf of FLORIDA IMMIGRATION BUILDING FUNDING LLC, a Florida limited liability company, Plaintiff, v. FLORIDA IMMIGRATION BUILDING FUNDING LLC, a Florida limited liability Company; and WAI KIN BENNY LAM, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2020-22425 CA 01 (43). CHUN LIU, individually, Plaintiff, v. FLORIDA IMMIGRATION BUILDING FUNDING LLC, a Florida limited liability Company; and WAI KIN BENNY LAM, Defendants. Case No. 2020-23235 CA 01 (43). December 10, 2020. Michael A. Hanzman, Judge. Counsel: Alexis S. Read, Read Law PLLC, Miami, for Plaintiff. Michael R. Tein, Tein Malone PLLC, Coconut Grove, for Defendant.

ORDER ON MOTIONS TO COMPEL ARBITRATION

I. INTRODUCTION

Plaintiff, Chun Liu ("Liu"), filed the above captioned cases against Defendants Florida Immigration Building Funding, LLC ("FIBF" or "Company") and its manager Wai Kin Benny Lam ("Lam"). In case number 2020-22425 CA 01 Liu brings derivative claims on behalf of FIBF, and in case number 2020-23235 CA 01 Liu brings direct claims in his individual capacity.[1] Defendant FIBF moves to compel arbitration of the claims pled in both cases, insisting that each falls comfortably within the scope of an arbitration clause contained in Section 4.12 of the "Limited Membership Interest Subscription, Sale and Purchase Agreement" entered into on October 22, 2013 "by and between" FIBF and Liu. That provision provides in relevant part:

> Section 4.12. *Arbitration,* Any dispute, controversy or claim arising out of or relating to this Agreement, any relationship created herein, any amendment hereof, or any breach hereof, including but not limited to all issues regarding jurisdiction, existence, scope, validity, performance, interpretation, and termination, shall be determined by a single arbitrator in an arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

For the reasons discussed herein, the Court grants the Motion to Compel Arbitration of Liu's individual claims. The Court, however, denies the Motion to Compel Arbitration of the derivative claims brought by Liu in case number 2020-22425 CA 01 for a simple reason: the Company—on whose behalf the claims are brought—is not a party to *any* agreement to arbitrate disputes it may have against Lam and, as a result, the derivative claims are not arbitrable. This conclusion is not altered by the fact that those claims have been brought by Liu in a *derivative* capacity, as opposed to directly by the Company itself.

II. MATERIAL FACTS

As alleged in both complaints, in 2013 Liu paid approximately Five Hundred Fifty Thousand Dollars ($550,000.00) for one membership unit in FIBF. This investment was promoted as being compliant with the Federal EB-5 Program administrated by the United States Citizenship and Immigration Services—a program which offers foreign nationals an opportunity to obtain legal permanent residency in the United States by investing at least Five Hundred Thousand Dollars ($500,000.00) in a commercial enterprise that creates at least ten (10) qualified full time employment positions.

The funds invested by Liu (and others) were then loaned to an affiliate—Florida Fullview Immigration Building LLC—for purposes of financing the acquisition of three (3) contiguous commercial parcels of land located at 7880 Biscayne Boulevard. The property was to be improved and developed into a commercial mixed-use hotel and condominium complex (the Triton Center Project)—a venture which would qualify as the job creation entity that, pursuant to the EB-5 program, would provide Liu (and the other investors) an opportunity to secure legal permanent U.S. residency.

To memorialize Liu's purchase of a membership unit in FIBF, he and the Company entered into a "Limited Membership Interest Subscription, Sale and Purchase Agreement" which, as discussed earlier, contains a broad arbitration clause, covering "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, any relationship created herein, any amendment hereof, or any breach hereof, including but not limited to all issues regarding jurisdiction, existence, scope, validity, performance, interpretation and termination . . . ." The parties agreed that any dispute covered by this clause would be "determined by a single arbitrator in an arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules . . . ."

III. THE CLAIMS

A. The Derivative Claims

In case number 2020-22425 CA 01, Liu advances derivative claims "on behalf of" FIBF. He alleges, in Count I, that Defendant Lam—the Manager of the Company—breached his fiduciary duty to FIBF "as well as its members" by "putting his personal interests before the interests of FIBF and its members and taking actions and inactions adverse to FIBF and its members." Am. Compl. ("AC") ¶¶ 40-44. Through Count II, Liu seeks a "preliminary and permanent injunction" restraining Lam from continuing any acts of mismanagement.[2] Count III seeks a "Declaratory Judgment."

B. The Direct Claims

In case number 2020-23235 CA 01, Liu brings a direct claim seeking an "Equitable and Statutory Accounting" (Count I), alleging that he has been denied access "to the books and records of FIBF." He claims a right to such access pursuant to Florida Statute § 605.04091 and "common law," and requests "[a] full accounting of FIBF's financial records." AC ¶¶ 42-47.

I. GOVERNING LAW

"When considering a motion to compel arbitration, three factors need to be considered: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived." *Duty Free World, Inc. v. Miami Perfume Junction, Inc.,* 253 So. 3d 689, 693 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1822a] (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]). When considering these factors, "all doubts should be resolved in favor of arbitration," *CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc.*, 201 So. 3d 85, 90 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2110a]; the reason being that "[a]rbitration is a valuable right that is inserted into contracts for the purpose of enhancing the effective and efficient resolution of disputes." *Raymond James Fin. Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) [30 Fla. L. Weekly S115a].

While it is undeniable that arbitration provisions are now "favored" by courts, *Miami Marlins, L.P. v. Miami-Dade County*, 276 So. 3d 936, 938 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1772b], "[a]rbitration clauses are creatures of contract," *O'Keefe Architects,*

Inc. v. CED Const. Partners, Ltd., 944 So. 2d 181, 185 (Fla. 2006) [31 Fla. L. Weekly S673a], and the pro-arbitration policy furthered by the Federal Arbitration Act and analogous state statutes "only applies to disputes that the parties have agreed to arbitrate." *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C3a]. "No party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Seifert,* 750 So. 2d at 636; *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 297 (2010) [22 Fla. L. Weekly Fed. S593a] ("a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*") (emphasis in original); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("[a]rbitration . . . is a matter of consent, not coercion"). And because "[a]rbitration provisions are contractual in nature . . . [t]he intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration." *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013) [38 Fla. L. Weekly S67a].

As arbitration is a creature of contract, parties may also agree on "who decides" arbitrability questions—the court or arbitrator. *Doe v. Natt*, 299 So. 3d 599 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1661a]; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 938 (1995) ("[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon whether the parties agreed" about that matter); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) [27 Fla. L. Weekly Fed. S610a] ("[t]his Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence"). But as this Court explained in *Lumsden v. Origis Energy SA Inc.,* 26 Fla. L. Weekly Supp. 278b (Fla. 11th Cir. Ct., May 31, 2018), this does not mean that a party may be compelled to arbitrate the gateway issue of "whether a contract requiring arbitration exists *vel non*." Rather, *First Options* and its progeny (federal and state) all involved circumstances where an agreement to arbitrate clearly existed, but a dispute later arose over issues such as: (a) whether the arbitration clause was subject to a certain defense (*i.e.,* fraud in the inducement, unconscionability, etc.); or (b) whether the arbitration clause covered the claims being advanced (*i.e.*, scope issues). *See, e.g., Mercury Telco Group, Inc. v. Empresa De Telecommunicaciones De Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350 (S.D. Fla. 2009) (plaintiff argued that contract's arbitration agreement did not encompass claim for fraud in the inducement and that tortious interference claims were outside of the scope of the agreement); *Senior Services of Palm Beach LLC v. ABCSP Inc.*, 2012 WL 2054971 (S.D. Fla. June 7, 2012) (plaintiff argued that the arbitration agreement was unconscionable); *Ford Motor Credit Co., LLC v. Jones*, 549 S.W.3d 14 (Mo. Ct. App. 2018) (same). *Khraibut v. Chahal*, C15-04463 CRB, 2016 WL 1070662 (N.D. Cal. Mar. 18, 2016) (plaintiff argued that the agreement was unconscionable and ambiguous).

Conversely, no court has ever forced a party to arbitrate the threshold question of whether an extant arbitration agreement exists at all. That issue is always one for a court to adjudicate, and they routinely do just that. *See, e.g.*, *Careplus Health Plans, Inc. v. Interamerican Med. Ctr. Group, LLC*, 124 So. 3d 968 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2219c] (question of whether arbitration clause contained in parties' 2010 Agreement governed—and required arbitration of a dispute arising out of an alleged breach of 2004 Agreement—was properly decided by the court); *Gedimex, S.A. v. Nidera, Inc.*, 290 Fed. Appx. 311 (11th Cir. 2008) (though parties entered into agreement to arbitrate dispute arising out of one transaction, plaintiff could not be compelled to arbitrate dispute arising out of a separate oral contract that did not contain an arbitration clause); *HHH Motors, LLP v. Holt*, 152 So. 3d 745 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2509b] (refusing to compel arbitration because contract containing arbitration clause had been superseded by contract without an arbitration clause); *Fowler v. Watts*, 659 So. 2d 374 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1629a] (reversing order compelling arbitration where subsequent superseding agreement did not make reference to arbitration).

Finally, assuming the existence of an extant arbitration agreement which, like the one here, incorporates the Commercial Rules of the AAA, our appellate courts are split on the question of whether the incorporation of those rules reflects a "clear and unmistakable" intent to submit issues of arbitrability to the arbitrator(s). In *Glasswall, LLC v. Monadnock Const., Inc.*, 187 So. 3d 248 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D277b], our appellate court aligned itself with the "majority of federal courts" in holding that "where the AAA's arbitration rules have been incorporated by reference into" the parties arbitration agreement, it "sufficiently evidence[s] their intent to have arbitrators, not a court, hear and decide issues of arbitrability." *Id.* at 251. The Fifth District agrees. *See Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1522b] (incorporation of AAA Construction Industry Arbitration Rules grants arbitrators authority to resolve disputes over enforcement of arbitration agreement). The Second District recently disagreed, holding that a "broad, nonspecific, and cursory" reference to the AAA Rules "fell short of the clear and unmistakable evidence of assent" to delegate arbitrability questions to the arbitrator that "*First Options* requires." *Doe,* 299 So. 3d 599. This Court is bound by *Glasswall.*

II. ANALYSIS

Having laid out the general legal principles to be applied, the Court now turns to these specific cases.

A. Liu's Direct Claim—Case Number 2020-23235 CA 01

It is undisputed that Liu entered into a broad arbitration agreement, mandating arbitration of "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, any relationship created herein, any amendment hereof, or any breach hereof, including but not limited to all issues regarding jurisdiction, existence, scope, validity, performance, interpretation, and termination . . . ." That arbitration agreement is contained within the contract whereby Liu became a member of FIBF—membership which conferred upon him the statutory and common law rights he now seeks to vindicate through this individual action. The first *Seifert* factor is therefore undeniably satisfied, as a "valid agreement to arbitrate exists." *Duty Free World,* 253 So. 3d at 693; *Seifert,* 750 So. 2d at 636.

As for the third *Seifert* factor, Liu does not claim that Defendants waived their right to arbitrate. The only question, therefore, is "whether an arbitrable issue exists." *Id.* Liu says no "arbitrable issue exists" because his claims do not "arise out of" or "relate to" his subscription agreement and are therefore outside the scope of the arbitration clause.[3] He may (or may not) be correct, but *Glasswall* mandates that this issue of "arbitrability" (*i.e., Seifert* factor number two) be decided by the arbitrator(s) in accordance with Rule 7 of the AAA Commercial Arbitration Rules.[4]

Because: (a) Liu entered into an arbitration agreement requiring that he arbitrate any dispute "arising out of or relating to" his membership in FIBF; (b) Defendants did not waive their right to arbitrate; and (c) the arbitration agreement incorporates the Commercial Rules of the AAA, Defendants' Motion to Compel Arbitration of Liu's individual claim is well taken.

B. Liu's Derivative Claim—Case Number 2020-22425 CA 01

"In a derivative action, a stockholder seeks to sustain in his or her name, a right of action belonging to the corporation." *Kaplus v. First Cont'l Corp.*, 711 So. 2d 108, 110 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1021b]. "Accordingly, the corporation is the real party in interest with the stockholder being only a nominal plaintiff." *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] (citing *James Talcott, Inc. v. McDowell*, 148 So. 2d 36, 37 (Fla. 3d DCA 1962)); *Liddy v. Urbanek*, 707 F.2d 1222, 1224 (11th Cir. 1983) ("[t]he corporation is the real party in interest even though the corporate management has failed to pursue the action").

Shareholder derivative claims, which in most jurisdictions are now statutory, "were originally created by common law as a means to enable shareholders to police "faithless directors and managers" *Timko v. Triarsi*, 898 So. 2d 89, 90 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D417b], and are in the public interest, as shareholders lack standing to bring an action for injuries suffered by the corporation itself, and corporate insiders (who are often the targets of such claims as is the case here) will, for obvious reasons, not be motivated to direct the filing of a lawsuit against themselves. *See, e.g., Lewis on Behalf of Citizens Sav. Bank & Tr. Co. v. Boyd*, 838 S.W.2d 215, 221 (Tenn. Ct. App. 1992) (derivative actions are "an extraordinary . . . remedy available to shareholders when a corporate cause of action is, for some reason, not pursued by the corporation itself"). A derivative plaintiff stands in the shoes of the entity, advancing claims that belong *solely* to the entity. As the Eleventh Circuit explained in *Liddy:* "The plaintiff stockholder in a stockholder's derivative suit is 'at best the nominal plaintiff' . . . The corporation is the real party in interest even though the corporate management has failed to pursue the action . . . But as a practical matter, the corporation is initially named as a defendant. In this way the stockholder insures the presence of the corporation as an indispensable party." 707 F.2d at 1224.

In a derivative action the corporate entity—and *only* the corporate entity—is entitled to relief, as "it is the real party interest and the shareholders are merely redressing rights of action that belong to the corporation." *Regalado v. Cabezas*, 959 So. 2d 282, 287 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D939a]. The named plaintiff is again a "nominal plaintiff only." *James Talcott, Inc. v. McDowell*, 148 So. 2d 36, 37 (Fla. 3d DCA 1962). *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998) (". . . a shareholder derivative lawsuit presents a scenario entirely different from the one where a shareholder sues for his own loss . . . . The difference is that a shareholder's derivative suit is for the benefit of the corporation and alleges an injury that befalls the corporation directly, instead. of an injury to the nominal plaintiff who institutes the suit").

The question presented then, which appears to be one of first impression, is whether an "arbitration agreement" entered into by a nominal derivative plaintiff (here Liu) may be relied upon to compel the arbitration of derivative claims brought by that nominal plaintiff in order to advance "a right of action belonging to the" entity. *Kaplus,* 711 So. 2d at 110. In this Court's opinion the answer is no, as the named plaintiff is not pursuing *any* claim belonging to himself and, for that reason, an agreement to arbitrate any dispute/claim *he*/*she* may have is of no legal significance. A derivative claim is only subject to arbitration if the *entity*—on behalf of which the claim is brought—is a party to an arbitration agreement and, as a result, is contractually bound to arbitrate the dispute brought on its behalf—the precise scenario presented in *Ernst & Young Ltd. v. Quinn*, 2009 WL 3571573, at *10 (D. Conn. Oct. 26, 2009) (compelling arbitration of derivative claims because nominal plaintiff was bound by arbitration agreement the entity on whose behalf the claim was brought had "entered into with [Defendant] Ernst & Young").

Here, unlike in *Quinn*, FIBF is not a party to any agreement to arbitrate any claims it might possess against its officers/directors/managers, including claims against Lam. So if the corporation itself had brought these claims directly, there would be no basis upon which to compel arbitration, as arbitration is again strictly a matter of contract and FIBF has never contractually agreed to arbitrate any claims/disputes between itself and corporate insiders. The analysis is no different merely because Liu brought claims belonging to FIBF derivatively. They are FIBF's claims, and Liu's agreement to arbitrate any claims *he* might have arising out of his investment is of no moment, as Liu is not acting in an individual capacity, which is precisely why the Third District has held that a shareholder/member may not combine derivative and direct claims. *Lobree*, 199 So. 3d 1094. His personal arbitration agreement is therefore legally irrelevant.[5]

Because FIBF is not a party to *any* agreement to arbitrate claims against its officers/directors/managers, including Lam, there is no "valid agreement to arbitrate" the derivative claims brought in case number 2020-22425 CA 01 and *Seifert*'s first factor is not satisfied.

I. CONCLUSION

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

1. Defendants' Motion to Compel Arbitration of Liu's direct claim—case number 2020-23235 CA 01—is **GRANTED**. That case is stayed pending the conclusion of the arbitration.

2. Defendants' Motion to Compel Arbitration of the derivative claims—case number 2020-22425 CA 01—is **DENIED**.

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[1]Liu initially filed his derivative and direct claims in a single lawsuit. The Court required that he re-file the claims separately, as required by binding precedent. *See, e.g., Gen. Dynamics Corp. v. Hewitt*, 225 So. 2d 561, 563 (Fla. 3d DCA 1969) ("[o]ne cannot in the same action sue in more than one distinct right or capacity"); *Lobree v. ArdenX LLC*, 199 So. 3d 1094 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2095a] (derivative and direct claims are brought in separate capacities and may not be joined in a single suit).

[2]The injunction claim excessively and redundantly requests an order containing no less than twenty (20) decrees. AC ¶ 64. For purposes of this order, it will suffice to say that Liu seeks an injunction preventing Lam from continuing to mismanage the affairs of FIBF.

[3]Liu insists that the agreement containing the arbitration clause "is wholly irrelevant to the claim at issue," and that because his claim has no "significant relationship" to the contract it is not within the scope of the arbitration provision. Pls.' Resp. in Opp. pp 11-19, citing *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587 (Fla. 2013) [38 Fla. L. Weekly S67a]. In other words, he claims that no "nexus exists" between the contract and his claims because the "resolution of the disputed issue requires [neither] reference to, [nor] construction of, a portion of the contract . . ." *Jackson*, 108 So. 3d at 593; *see also In re Bateman*, 585 B.R. 618, 627 (Bankr. M.D. Fla. 2018) (". . . a 'relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties' "); *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1341 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1705a] ("the fact that a dispute could not have arisen but for an agreement does not mean that the dispute necessarily 'relates to' that agreement . . . Requiring a direct relationship between the claim and the contract is necessary because, [i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, it would have no limiting purpose because really, universally, relations stop nowhere") (internal citations omitted); *Seifert,* 750 So. 2d at 638 ("[d]isputes arise in many and varied contexts and the mere coincidence that the parties in dispute have a contractual relationship will ordinarily not be enough to mandate arbitration of the dispute"). Plaintiff sees it differently, insisting that the broad arbitration clause in play here encompasses "virtually all disputes between the contracting parties," including those claims pled in Liu's direct action. Mot. p. 3, citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (involving claims for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of state franchise investment law); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (holding that contractual language "[a]ny controversy or claims arising out of or relating to this Agreement, or breach thereof" is "easily broad enough to encompass" claim for fraud in inducement of contract); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (characterizing phrase "arise out of or related to" as broad arbitration clause "capable of an expansive reach"). The Court does not address this debate over the scope of the parties' arbitration clause because *Glasswall* compels it to

defer that question to the arbitrator.

[4]Rule 7 of the AAA Rules provides that: "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." As the Court pointed out earlier, despite this broad grant of authority a court must always determine whether an extant agreement to arbitrate exists. If an arbitration agreement is present, however, *Glasswall* holds that when the agreement incorporates the AAA Rules, disputes over its scope (*i.e.*, whether the claims advanced fall within the ambit of the clause) are to be decided by the arbitrator. In accordance with *Glasswall*, the arbitrator will decide whether Liu's individual claims fall within the scope of the arbitration clause. If he/she decides the claims are outside the scope of that clause, the matter will return to this Court.

[5]In support of the argument that derivative claims fall within the scope of Liu's personal arbitration agreement, Defendants cite *Quinn*, a case that undermines their position, as the court compelled arbitration not based upon an agreement to arbitrate entered into by the nominal derivative plaintiff, but rather because the nominal plaintiff was suing derivatively "on behalf of" an entity that had itself agreed to arbitrate any disputes with the Defendant, Ernst & Young. Defendants also rely upon *Greenville Hosp. Sys. v. Employee Welfare Ben. Plan for Employees of Hazelhurst Mgmt. Co.*, 628 Fed. Appx. 842 (4th Cir. 2015), an unpublished opinion involving not a "derivative" action brought on behalf of a corporate entity, but rather an action brought "derivatively" because the plaintiff's claims rested "on assignments" and, as a result, the plaintiff/assignee was bound by its assignor's agreement to arbitrate. *Anwar v. Fairfield Greenwich Ltd.*, 950 F. Supp. 2d 633 (S.D.N.Y. 2013), also cited by Defendants, compelled arbitration of plaintiff's claims against "SCBI on an individual basis" because the plaintiff—who attempted to bring a class action—had entered into an account agreement containing an arbitration clause that had "no provision . . . which contemplates class—arbitration." The only case cited by Defendants that did involve a true corporate "derivative" claim is *Wolff v. Westwood Mgmt., LLC*, 503 F. Supp. 2d 274 (D.C. Cir. 2007). There, the parties debated only the scope of the arbitration clause. Neither party raised, and hence the Court never addressed, the question of whether the arbitration agreement had any application at all because it was executed by the nominal plaintiff, not the corporate entity. In sum, it appears that no court has squarely addressed the issue presented here.

* * *

Insurance—Automobile—Insurer had no duty to defend or indemnify insured for bodily injury liability claims under policy at issue, which did not include bodily injury liability coverage, and no duty to defend or indemnify insured for property damage liability claims in excess of $10,000 policy limit

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DWAYNE LEE WILSON, individually, DWAYNE LEE WILSON, d/b/a DWAYNE WILSON TREE SERVICE, CHARLES THOMAS CHAMPLIN, ANNE PETION, JERRY LEON MOSLEY, JEFFERY RYAN ATKINSON, MARCELINO EDWARDO BOWEN, KEVIN LUKE BOYD, GEICO GENERAL INSURANCE COMPANY, PROGRESSIVE SELECT INSURANCE COMPANY, ESURANCE PROPERTY and CASUALTY INSURANCE COMPANY, and A BALES SECURITY AGENCY, INC., Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2019-CA-11376. May 14, 2020. Caroline T. Arkin, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. D. Lee Pitisci, Pitisci, Dowell, Markowitz & Murphy, Tampa, for Defendant Dwayne Lee Wilson and Dwayne Lee Wilson d/b/a Dwayne Wilson Tree Service.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDNANTS, DWAYNE LEE WILSON, individually AND DWAYNE LEE WILSON, d/b/a DWAYNE WILSON TREE SERVICE

THIS CAUSE having come before this Court at the hearing on May 4, 2020, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, DWAYNE LEE WILSON, individually and DWAYNE LEE WILSON, d/b/a DWAYNE WILSON TREE SERVICE, and the Court having heard argument of counsel, and the Court having reviewed the pleadings, motions and record evidence (including the Affidavit of Danielle Amodeo), and considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**.

a. This Court ***hereby enters Final Judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, DWAYNE LEE WILSON, individually and DWAYNE LEE WILSON, d/b/a DWAYNE WILSON TREE SERVICE;

b. This Court finds that the Plaintiff has presented ample evidence to support the Motion for Final Summary Judgment against the Defendants, DWAYNE LEE WILSON, individually and DWAYNE LEE WILSON, d/b/a DWAYNE WILSON TREE SERVICE, and thus, **GRANTS** the Plaintiff's Motion for Final Summary Judgment.

c. DWAYNE LEE WILSON did not pay any premium for bodily injury liability coverage for the policy of insurance, bearing policy # FLPA239021009;

d. DIRECT GENERAL INSURANCE COMPANY did not collect any premium for bodily injury liability coverage from DWAYNE LEE WILSON for the policy of insurance, bearing policy # FLPA239021009;

e. DIRECT GENERAL INSURANCE COMPANY did not collect any premium for bodily injury liability coverage for the policy of insurance, bearing policy # FLPA239021009;

f. On December 12, 2016, the policy of insurance provided the following coverages for the 2005 Ford F350 (VIN: 1FDWF36575EB30893): property damage liability and personal injury protection benefits;

g. There is no bodily injury liability insurance coverage provided by this policy of insurance, bearing policy # FLPA239021009;

h. DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify DWAYNE LEE WILSON for any bodily injury claim, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPA239021009, for policy period of October 3, 2016 through February 3, 2017;

i. Pursuant to an Arbitration award in Docket Numbers: A025-15262-18-00 and A025-15262-18-01, the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, paid $10,000.00, which exhausted the limits for property damage liability coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPA239021009;

j. Specifically, DIRECT GENERAL INSURANCE COMPANY paid $6,867.00 to Government Employees Insurance Company for the property damage claim of Jeffrey Atkinson. In addition, DIRECT GENERAL INSURANCE COMPANY paid $3,133.00 to Auto Owners Insurance Company for the property damage claim of Marcelino Edward Bowen. Thus, there is no additional coverage for any property damage claims as a result of the December 12, 2016 motor vehicle accident, as the limits for property damage liability coverage have been exhausted in the amount of $10,000.00;

k. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify DWAYNE LEE WILSON for any liability claims brought by any claimants, as the subject insurance policy does not provide bodily injury liability insurance coverage and the property damage liability coverage limits in the amount of $10,000.00 have been exhausted;

l. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify DWAYNE LEE WILSON for any liability claims brought by CHARLES THOMAS CHAMPLIN, including the bodily injury and property damage claims alleged in Case No.: 17-CA-010674, which is pending before the Circuit Court of Hillsborough County, Florida.

* * *

Landlord-tenant—Commercial property—Past due rent—Order requiring deposit of past due rent into court registry

MARLIN ROAD PARTNERS LLC, Plaintiff, v. PINK PRESSURE INC., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024968-CA-01, Section CA02. December 18, 2020. Alan Fine, Judge. Counsel: Mark

Goldstein, for Plaintiff. Ray Garcia, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT AND TO REQUIRE DEPOSIT OF PAST DUE RENT INTO THE COURT REGISTRY

This cause came before the Court for hearing on December 16, 2020, upon Plaintiff, Marlin Road Partners, LLC's Motion to Amend Complaint and to Require Deposit of Past Due Rent into the Court Registry, and the Court being advised of the consent of Defendant's counsel to Plaintiff amending the Complaint, and being otherwise fully advised in the premises, it is

Ordered as follows:

1. Plaintiff's Motion to Amend the Complaint is granted and the Amended Complaint attached to the Motion to Amend is deemed filed and served as of the date of this Order.

2. A hearing under Section 83.232, Fla. Stat., serves the sole purpose of determining a) "Whether the tenant has been properly credited by the landlord with any and all rental payments made," and b) "What properly constitutes rent under the provisions of the lease."

3. The statute is designed to remedy the problem of commercial tenants remaining on the premises for the duration of litigation without paying the landlord rent." *Premici v. United Growth Properties, L.P.,* 648 So.2d 1241, 1243 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D228c].

4. A tenant is obligated to pay the ordered amount into the registry to preserve his right to retain possession of the property; this obligation remains even if the court fails to specify a specific due date or fails to promptly file a written order. See *Tribeca Aesthetic Medical Solutions, LLC v. Edge Pilates Corp.,* 82 So.3d 899 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1353a]; *DTRS Intercontinental Miami, LLC v. A.K. Gift Shop, Inc.,* 77 So.3d 785 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2773b].

5. Pursuant to Section 83.232, Fla. Stat., the Defendant shall deposit into the Court Registry the delinquent rent of $48,221.82, by Monday, December 21, 2020. If the Defendant fails to make such timely deposit then the Plaintiff, upon the filing of an affidavit confirming that the deposit was not timely made, shall be entitled to an immediate judgment for possession of the premises. *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.,* 36 So.3d 811 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1192a]; *Kosoy Kendall Assocs. LLC v. Los Latinos Rest., Inc.,* 10 So. 3d 1168 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1075a].

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Volume 28, Number 10
February 26, 2021
Cite as 28 Fla. L. Weekly Supp. ____

COUNTY COURTS

Criminal law—Driving under influence—Due process—State's failure to preserve in-car video and audio recordings—Video recording from deputy who observed defendant's driving pattern prior to stop is not material exculpatory evidence where video would not have played significant role in ultimate issue of defendant's impairment, and passenger can provide corroborating evidence as to defendant's claims regarding his driving pattern—Audio track of video recording made by stopping deputy also was not materially exculpatory evidence that would have played significant role in determining defendant's innocence where there is full video recording of field sobriety exercises—Where lost recordings are not materially exculpatory evidence, and there is no claim of bad faith on part of deputies, denial of motion to dismiss is appropriate

STATE OF FLORIDA, Plaintiff, v. JEDEDIAH BATE GOODIN, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2020-CT-000358-CTAY, Criminal Traffic Division. December 14, 2020. Wesley R. Poole, Judge.

ORDER ON DEFENDANT'S MOTION TO DISMISS

This cause came on for hearing on Defendant's MOTION TO DISMISS FOR VIOLATION OF DUE PROCESS. Defendant seeks dismissal of the Information filed against him, charging him with Driving Under the Influence, pursuant to Rule 3.190(b), F.R.Cr.P. He also seeks suppression of any evidence regarding Defendant's performance of the field sobriety exercises, claiming they were not administered in accordance with the NHTSA standards.

On the evidence presented, the Court finds as follows:

a. On March 14, 2020, Sgt. Brandon Schmidt, of the Nassau County Sheriff's Office (NCSO), observed a vehicle being driven by Defendant, swerve from one lane to another and back, have trouble changing gears, and speeding 51 mph in a 45 mph zone. He followed the vehicle and later observed the defendant stop over the red light stop bar, in violation of the Uniform Traffic code.

b. As Sgt. Schmidt was sitting behind Defendant at the intersection of A I A/SR200 and Amelia Island Parkway, Deputy Richard Weigle, also of the NCSO, approached the intersection. At this point, Sgt. Schmidt yielded to Dep. Weigle.

c. Deputy Weigle received the radio call from Sgt. Schmidt relaying his observations of the above driving behavior, approached the intersection, followed the defendant and observed him stop past the stop bar at O'Neil/Scott Road. He then effected a traffic stop on A I A/SR 200 near Barnwell Road. Dep. Weigle did not observe any other traffic violations nor erratic driving behavior by the defendant.

d. Deputy Weigle approached Defendant's vehicle, detected a small odor of alcoholic beverage from Defendant's breath, and also observed Defendant to have bloodshot, watery eyes and slow, slurred speech. Defendant informed Dep. Weigle that he had a weapon, whereupon Dep. Weigle had the defendant exit his vehicle. Dep. Weigle testified that the defendant was unsteady on his feet and had difficulty following instructions.

e. Dep. Weigle informed Defendant he was conducting a DUI investigation, informed Defendant of his *Miranda* rights, and requested he perform field sobriety exercises, to which Defendant agreed. Upon completion of the exercises, Dep. Weigle arrested Defendant and charged him with driving under the influence.

f. Both deputies vehicles were equipped with dash cam video recorders. Sgt. Schmidt manually started his camera when he pulled behind Defendant after leaving the intersection of A1A and Sadler Road, where he had observed the defendant swerving from one lane to the other and back.

g. Dep. Weigle was wearing a body microphone during his interaction with the defendant, but there is no audio accompanying Dep. Weigle's video (Defendant's Exhibit 1). The body microphone is designed or programmed to come on automatically when the deputy activates his emergency lights. Dep. Weigle checked his equipment, including the microphone, at the beginning of his shift, and could not explain why the microphone did not work.

h. NCSO deputies' video (and audio) recordings are automatically uploaded to the Department's server, known as the Panasonic "Backend Client", as long as the deputy logs into the "Video Arbitrator Front End Client;" (Defendant's Exhibit 2). Videos are stored on the server for 90 days; (Defendant's Exhibit 3). All deputies are trained on how to use the agency's equipment.

i. Defendant served his Demand for Specific Discovery, requesting, among other things, the "DUI video," to the State on April 30, 2020. On the same date, the Defendant also served on the State Attorney his NOTICE OF DISCOVERY AND SPECIFIC DEMAND FOR INFORMATION, requesting, among other things all *Brady* materials and "audio/video surveillance."

j. The State's Response to Defendant's request, dated May 11, 2020, referenced Dep. Weigle's video, but made no reference to any video from Sgt. Schmidt. The State further advised that it had no *Brady* material.

k. Deputy Jeffrey Stull supervises the NCSO's Property and Evidence facilities. He testified that whenever a request is made for all video and/or audio recordings pertaining to a particular defendant's case, his facility will check for all deputies involved in the case and secure all recordings uploaded from the involved deputies, and include them in the response to the request. According to his records, his facility received a request on March 14, 2020, for Deputy Weigle's in-car video, for that date, but no others. Five months later, he received a request from the Public Defender's investigator for Sgt. Schmidt's video, but it had already been erased, in accordance with the policy.

l. The defendant, JEDEDIAH BATE GOODIN, testified, refuting Sgt. Schmidt's entire testimony about his driving pattern, as well as Dep. Weigle's testimony that he observed Mr. Goodin stop over the stop bar. Defendant submitted that the video from Sgt. Schmidt and audio from Dep. Weigle would contradict the officers' testimony and would have been materially exculpatory and would exonerate him.

Defendant thus argues that his due process rights were violated by the State's failure to maintain and produce (1) Sgt. Schmidt's in-car video and (2) Dep. Weigle's audio from his in-car video recording, and that the Information should be dismissed, citing *Arizona v. Youngblood,* 488 U.S. 51 (1988), *State v. Powers,* 555 So. 2d 888, 890 (Fla. 2d DCA 1990), and *Farell v. State,* 317 So.2d 142 (Fla. 1st DCA 1975), among others. Defendant does not assert any bad faith on the part of the deputies; rather, he maintains that the missing tapes constituted "material exculpatory evidence," the loss of which denied him due process.

As noted by Defendant, courts have afforded greater protection to "material exculpatory evidence," or "evidence that might be expected to play a significant role in the suspect's defense;" *State v. Powers,* 555 So. 2d 888, 891 (Fla. 2d DCA 1990). The issue of bad faith is irrelevant if the unpreserved evidence falls into this category; *State v. Muro,* 909 So.2d 448, 452 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1991a]; *Kelley v. State,* 486 So.2d 578, 581 (Fla. 1986). The Florida Supreme Court has explained: "material" in this sense means "the omitted evidence creates a reasonable doubt that did not otherwise exist." *State v. Sobel,* 363 So.2d 324, 327 (Fla. 1978)(citing *United States v. Agurs*, 427 U.S. 97, 109, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

On the other hand, In *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Court distinguished between "potentially useful" evidence and evidence that is both material and directly exculpatory, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law; *Id.* at 58, 109 S.Ct. 333.

"To meet this standard of constitutional materiality, evidence must both possess an exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Powers* at 891; *Bennett v. State,* 23 So.3d 782 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2428a]. In its conclusion, the *Bennett* Court opined as follows:

> "If the semen issue in *Youngblood,* which even in 1988 could have produced evidence excluding the defendant as the perpetrator, was not material exculpatory evidence to refute the young victim's identification because the outcome of tests on that semen was unknown and, thus, its value as exculpatory evidence was unknown, it would seem that a videotape of a field sobriety test is likewise not material exculpatory evidence unless the police admit that it contained evidence that supported the defendant's theory that he was sober. Until recent years, DUI cases were often a contest of credibility between the officer and the operator, and that contest did not create a due process issue. Thus, if Mr. Bennett is ultimately determined to have the burden of proof and persuasion on the issue of whether the lost videotape was exculpatory evidence, it would seem that he may need to convince the trial judge that he is telling the truth and the police officer is not." *Bennett, supra,* at p. 794.

Here, the missing video evidence is not of the field sobriety exercises, but Sgt. Schmidt's limited observation of the defendant's driving pattern. Assuming *arguendo* that it would have refuted the sergeant's testimony and bolstered the defendant's, it still would not have played a significant role in the ultimate issue of the defendant's impairment. In addition, the defendant's passenger can theoretically provide corroborating evidence as to Defendant's version of his driving pattern; see, e.g., *State v. Rivers,* 837 So.2d 594 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D461a] (State's loss of audio tape recording containing potentially exculpatory material did not violate defendant's due process rights, given that the transcript of the recording provided an alternative means of demonstrating defendant's innocence); *State v. Dunphy,* 6 Fla. L.Weekly Supp. 297c (Circ. Ct. 15th Circ., Palm Beach County, February 18, 1999)(Defendant's mother was with her at the time of the alleged offense and could testify at trial).

As to the missing audio from Deputy Weigle's video, the Court finds that it too would not have played a significant role in determining Defendant's innocence, given the full video recording of his performance of the field sobriety exercises. Like the Court in *Bennett,* this "Court cannot avoid noting the irony that the potential evidence most likely to prove [the defendant's] innocence would have been the breath test that he chose not to provide." *Bennett, supra,* at footnote 7.

In sum, the Court concludes that the missing video and audio tapes are not "material exculpatory evidence" and the deputies did not act in bad faith. As to Defendant's motion to suppress the field sobriety exercises, the Court finds this argument to be without merit.

It is, therefore,

ORDERED: Defendant's MOTION TO DISMISS FOR VIOLATION OF DUE PROCESS be, and the same is, hereby, **DENIED.**

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Tip—Citizen informant—Where tips that allegedly intoxicated defendant was driving vehicle towing boat while veering onto road shoulder and into oncoming traffic lanes was provided by two citizen informants whose identities were known, stop of defendant by deputies responding to BOLO was lawful—Detention of defendant and request that he perform field sobriety exercises were lawful where deputies had tips regarding defendant's driving pattern and fact that he was in possession of numerous empty beer cans, deputies observed that defendant had slurred speech and that truck bed contained empty beer cans, and defendant admitted to drinking beer—Deputies had probable cause for arrest based on tips, their own observations, and defendant's performance of exercises—Motion to suppress denied

STATE OF FLORIDA, v. JASON BYRD HANSON, Defendant. County Court, 5th Judicial Circuit in and for Marion County. Case No. 2020-CT-004233. December 11, 2020. R. James McCune, Judge.

AMENDED
ORDER DENYING DEFENDAT'S MOTION TO SUPPRESS

THIS CAUSE having come to be heard upon Defendant's Motion to Suppress and the Court having considered same, heard argument of counsel for both the Defendant and the State and being otherwise fully advised in the premises, this Court hereby finds and adjudges as follows:

On June 21, 2020, two calls were made to 911 about the Defendant by two callers that were being followed by the Defendant and who provided real-time information about the Defendant's conduct and driving pattern. Both of these 911 callers testified before this Court and the substance of their 911 calls were admitted as evidence for consideration by this Court.

The first call was a narrative report of the Defendant's driving. It provided specific details, including a general description of the Defendant and that the Defendant's vehicle was a black Chevrolet truck towing a boat. The first call reported that the Defendant was driving at multiple times with half of his vehicle completely off the road in the grass and then driving completely in the oncoming traffic lane. The second call reported their observations of the Defendant's vehicle stopped at a gas station beside the vehicle the callers were travelling in. The callers provided a description of the boat along with the boat's registration number and reported seeing the Defendant slide out of his truck causing some beer cans to fall out of the vehicle onto the ground and then seeing the Defendant pick up the beer cans and throw the beer cans into the bed of his truck while parked at the gas station. The callers continued to observe the Defendant's truck in real-time after leaving the gas station providing continuous information to 911 including specifics as to the Defendant's location. Such real-time information to 911 led law enforcement to locate the Defendant and conduct a traffic stop based upon the two caller's information. The callers testified to observing the Defendant until he was stopped by a Sheriff's car.

The stop of the Defendant based upon the information provided by the two callers was made by Deputy Billings of the Marion County Sheriff's Office (MCSO). Upon contact with the Defendant, Deputy Billings observed the Defendant to have slurred speech and, when asked, the Defendant admitted to drinking a number of beers a number of hours earlier. MCSO Deputy Palmateer subsequently arrived on the scene and made contact with the Defendant. Deputy Palmateer asked the Defendant if he had been drinking and the Defendant repeated what he had previously told Deputy Billings. At this point, neither Deputy detected an odor of alcohol, however, based upon the detailed call information provided by the two callers which included other indicators of impairment such as reckless driving pattern and the presence of empty beer cans, Deputy Palmateer asked the Defendant to participate in Field Sobriety Exercises (FSEs). The Defendant agreed to participate in the FSEs during which the Deputy observed what the Deputy considered to be some deficiencies and clues of impairment. Based upon the totality of the circumstances including the caller information, the slurred speech, the admission to drinking, the smell of alcohol detected to be coming from the person of the Defendant, the beer cans and the Defendant's performance on the FSEs, Deputy Palmateer determined that the Defendant was driving

a vehicle while under the influence. Based upon that determination, Deputy Palmateer arrested the Defendant and took him to the Marion County Jail.

The Defendant now alleges that the traffic stop in this case, based solely upon the "Be On The Look Out" (BOLO) alert from the two 911 callers, was illegal and that the MCSO Deputies involved in this case did not possess the requisite reasonable suspicion to conduct such a stop. The State argued that the 911 callers were "citizen informants" and as such the Deputies therefore possessed reasonable suspicion to stop the Defendant based on the information provided by those callers.

This Court agrees with the State and finds both 911 caller witnesses to be "citizen informants" based upon the fact that they identified themselves to the 911 operator and remained cooperative and engaged throughout the entire process of the Defendant's traffic stop even providing testimony before this Court. The Court notes that one of these callers testified to having once served as a traffic enforcement officer in the State of New Jersey who did not have arrest powers but whose training and experience was such that she knew to pay attention to details such that she gave many details about her observations of the Defendant during the subject two 911 calls. As the 911 callers in this case were "citizen informants," the Deputies in this case could reasonably rely upon the information provided to them by the 911 callers and conduct a stop on the Defendant based on the lengthy 911 calls detailing the Defendant's vehicle and boat it was pulling, the description of the Defendant, the description of the Defendant's conduct and driving pattern as well as a real-time report of the location of the Defendant's vehicle. Additionally, the callers stayed on the phone with 911 until the callers observed law enforcement initiate the traffic stop on the Defendant's vehicle. *See State v. Maynard,* 783 So. 2d 226 (Fla. 2001) [26 Fla. L. Weekly S182b]; *Diaz v. State,* 26 Fla. L. Weekly Supp. 451a (Fla. 5th Cir. Ct., Appellate, June 13, 2018).

Furthermore, this Court finds that even if the 911 callers do not qualify as "citizen informants," the calls to 911 possessed such sufficient indicia of reliability for the Deputies to consider the callers are tipsters and credit their information to be reliable. Such reliable information would have also provided the Deputies in this case with the required reasonable suspicion to stop the Defendant. *See Navarette v. California,* 134 S. Ct. 1683 (2014) [24 Fla. L. Weekly Fed. S690a]. Based upon the foregoing, this Court finds that the stop of the Defendant in this case was lawful and DENIES the Defendant's Motion to Suppress the Stop.

The Defendant further argues that if the stop was lawful, any further detention was unlawful as the Deputies lacked reasonable suspicion to detain him or to request that he perform FSEs. This Court disagrees. Prior to detaining the Defendant, both Deputies had information regarding the Defendant's driving pattern. Furthermore, the Deputies also had information that the Defendant was in possession of numerous empty beer cans. All such information was given to those Deputies from either "citizen informants" or a sufficiently reliable 911 call. In addition, Deputy Billings testified that he observed the Defendant's speech to be slurred, the bed of the Defendant's truck contained more than a few empty beer cans and the Defendant admitted to drinking beer on the day in question. Based upon such evidence, this Court finds that there was reasonable suspicion for the Deputies to suspect that the Defendant was driving while impaired and therefore the request that the Defendant perform FSEs was lawful. Based upon the foregoing, this Court DENIES the Defendant's Motion to Suppress both the Detention and the FSEs.

Finally, the Defendant contends that his arrest was effectuated without probable cause and thus was illegal. This Court again disagrees. Given the totality of the circumstances, including the information provided by the "citizen informants", the on-scene observations of both Deputies and the Defendant's performance on the FSEs, this Court finds that there was probable cause for the Defendant's arrest. Based upon the foregoing, this Court DENIES the Defendant's Motion to Suppress his Arrest.

* * *

Criminal law—Misdemeanor—Search and seizure—Warrantless arrest—Driving under the influence—Physical control of vehicle—Defendant observed urinating in parking lot outside of vehicle suspected of being operated by an individual under the influence—Arrest for DUI was unlawful under section 901.15(1) where, although circumstances suggested that defendant was the driver of the vehicle, arresting officer did not witness defendant driving or in actual physical control of the vehicle

STATE OF FLORIDA, v. MICHAEL F. McMASTER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019-303394 MMDB, Division 81. August 22, 2019. David H. Foxman, Judge. Counsel: Laura Rojas-Glad, Assistant State Attorney, for State. Flem K. Whited, III, Whited Law Firm, Daytona Beach, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

THIS CASE came before the Court for an evidentiary hearing on Defendant's Motion to Suppress Based on Illegal Arrest. The Court took testimony, received evidence, and heard legal argument. Having weighed the evidence and considered the case law submitted by the parties, the Court is fully advised and finds as follows:

Defendant is before the Court on a charge of driving under the influence. He moves to suppress on the ground that police arrested him without witnessing all elements of this misdemeanor offense, as required by state law. The evidence introduced at the hearing showed that the police officer was three cars behind a Jeep Wrangler which made an abrupt turn into the parking lot of a closed business. It was 9:15 p.m. and dark outside. The officer could not see into the Jeep. The officer drove past the parking lot and circled around the block. In so doing, he lost sight of the Jeep. He pulled into the parking lot moments later and observed Defendant standing outside the open driver's door, urinating on the ground. No one else was present. The ensuing encounter led to Defendant's DUI arrest.

Under Florida law, the police are required to observe all elements of a misdemeanor offense before making a warrantless arrest. § 901.15(1), Fla. Stat. (2018); *Carter v. State,* 516 So. 2d 312, 313 (Fla. 3d DCA 1987). An essential element of DUI is driving or being in actual physical control of a vehicle. § 316.193(1), Fla. Stat. (2018). Defendant contends that because the officer did not witness him driving or in actual physical control of the Jeep, the arrest was unlawful under Section 901.15(1). The Court agrees.

> Section 901.15(1), Florida Statutes (2006) provides, "A law enforcement officer may arrest a person without a warrant when . . . [t]he person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer." This provision has been strictly construed to require that the arresting officer actually see or otherwise detect by his or her senses that the suspect has committed the offense. *Horsley v. State,* 734 So. 2d 525, 526 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1289c]. Several opinions, including at least three from Volusia County, have recognized that a warrantless misdemeanor arrest for DUI is illegal where the officer fails to witness the defendant driving or in actual physical control of a vehicle. *See Steiner v. State,* 690 So. 2d 706 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a]; *Riehle v. Dept. of Hwy. Safety and Motor Vehicles,* 684 So. 2d 823 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1001b]; *Sawyer v. State,* 905 So. 2d 232 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1466c]; *Maher v. Dept. of Hwy. Safety and Motor Vehicles,* 13 Fla. L. Weekly Supp. 121a (Fla. 7th Cir. Ct. Nov. 18, 2005); *State v. Hewitt,* 12 Fla. L. Weekly Supp. 771a (Fla. Volusia Co. Ct. May 17, 2005); *State v. Wilbert,* 12 Fla. L. Weekly Supp. 1173a (Fla. Volusia Co. Ct. Sept. 6, 2005); *State v. Dunn,* 5 Fla. L. Weekly Supp. 190a (Fla. Broward Co. Ct. Nov. 17, 1997).

State v. Prest, 14 Fla. L. Weekly Supp. 663a (Fla. Volusia Co. Ct. Apr. 17, 2007).

"Actual physical control means a defendant **must be physically in or on the vehicle** and have the capability to operate the vehicle, regardless of whether defendant is actually operating the vehicle at the time." *Howell v. State,* 27 Fla. L. Weekly Supp. 17a (Fla. 11th Cir. Ct. Mar. 5, 2019)(emphasis added). In this case, the officer was unable to see who was driving the vehicle when it was in traffic. When he encountered the vehicle stopped in the parking lot, Defendant was outside the vehicle. Although the circumstances suggest that Defendant was the driver of the vehicle, the officer did not actually observe Defendant driving or in actual physical control. Therefore, the arrest did not comport with Section 901.15(1) because the officer did not witness an essential element of the offense.

WHEREFORE, it is hereby ORDERED AND ADJUDGED that Defendant's motion to suppress is GRANTED.

* * *

Criminal law—Driving under influence of controlled substance causing property damage—Evidence—Defendant's objection to testimony of law enforcement officers on ground that officers were cross-sworn as emergency medical technicians and were acting in their capacity as EMTs when they propounded questions attempting to assess defendant's physical and mental condition, so that responses to those questions were medical records or products of "physical or mental examination" which could be disclosed only upon issuance of subpoena with proper notice—EMTs do not fall within statutory definition of "health care practitioner," and state is not required to issue a subpoena for records produced as a result of examination by an EMT of the physical or mental condition of a person they encounter—Nothing in chapter 456 precludes an EMT from testifying about their assessment of a person's physical or mental condition—Based on totality of evidence, there is no reasonable doubt that defendant is guilty of driving motor vehicle while under influence of a controlled substance to the extent that her normal faculties were impaired and causing property damage to another vehicle—Double jeopardy—Because double jeopardy prohibits imposition of judgment for both "simple" DUI and DUI with property damage, count charging DUI is dismissed—Traffic infraction issued for following too closely is also dismissed

STATE OF FLORIDA, v. LOY SPRINGER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019-310319MMDB. December 1, 2020. Belle B. Schumann, Judge. Counsel: Nancy Simpson, Assistant State Attorney, for State. Jeffrey Higgins and Glen Reid, for Defendant.

JUDGMENT

This case comes before the Court on the nonjury trial conducted remotely via Zoom on September 24, 2020. The Defendant waived the right to trial by jury on July 20, 2020. Fla.R.Crim.P. 3.260. The Court being fully informed of the testimony, physical evidence and arguments of the attorneys, based on the factual findings and legal authority cited herein, hereby finds the Defendant Loy Springer GUILTY of the offense of driving under the influence of a controlled substance causing property damage as charged in the information and Uniform Traffic Citation A83HNDE.

On August 5, 2019, at about 3 o'clock in the afternoon, in the 3600 block of Atlantic Avenue in Daytona Beach Shores, Florida, the Defendant drove her Mercury Mariner vehicle into the rear of another car, a white Ford Expedition, driven by Mr. Robert Whitehurst, causing damage to the Ford in the amount of $2912.82. The first vehicle was traveling at about the posted speed limit of 30-35 miles per hour. Both vehicles were operable after the crash.

The air bag of Defendant's vehicle did not deploy. An open beverage in the Defendant's console did not spill. The passenger in the Ford immediately exited his vehicle and checked on the Defendant, who was conscious and said she was uninjured. These facts tend to refute the Defense argument that the signs of impairment were due to a concussion she suffered during the accident.

Sergeant William Frank of the Daytona Beach Shores Department of Public Safety arrived shortly thereafter to oversee the crash investigation. He observed that the Defendant was lethargic, with thick, slurred speech. He believed she could possibly be under the influence of a narcotic. The Defendant told Frank that she had taken Xanax.

Officer Laura Diedesch also responded to the scene of the crash. She confirmed that the Defendant was the registered owner of the Mariner. The Defendant complained of no injury other than chest pain. She apologized for causing the crash. EMS responded to the scene.

Diedesch observed indicia of impairment sufficient to cause the Defendant to participate in Field Sobriety Exercises. During the administration of the horizontal gaze nystagmus (HGN) test, Deidesch observed that the Defendant's pupils were constricted and equal in size. She struggled to focus and seemed confused. During the remainder of the exercises, the Defendant swayed, used her arms for balance, did not follow instructions, and displayed many other indicia of impairment. The Defendant was arrested for DUI causing property damage.

At the station, the Defendant agreed to take a breath test. During the twenty-minute observation period prior to the test, the Defendant fell off the chair while drinking water, but she did not lose consciousness and did not require medical attention. The breath test resulted in 0.00 readings for alcohol. The Defendant was cooperative and calm throughout the afternoon and evening.

Sargeant Medders of the Daytona Beach Shores Public Safety Department arrived to evaluate the Defendant at about 6:45 pm. Sgt. Medders is certified as a Drug Recognition Expert (DRE). During his evaluation of the Defendant, she told him he had taken Alprazolam and also stated that she had taken two 10 mg. pills of Oxycodone before noon that day. Her pupils were equal, constricted and tracked normally. She was "on the nod" frequently closing her eyes. Based on his evaluation, upon which he testified to in detail and at length, he concluded that she was impaired by a central nervous system depressant and an analgesic substance.

Ryan Warner of the FDLE laboratory testified that he conducted a test on the urine sample provided by the Defendant. This test revealed the presence of Oxycodone (for pain) and Alprazolam, an anti-anxiety medication, also known as Xanax. He testified that the effects of these substances last from four to six hours. The Defendant told the officers investigating the three pm crash that she took these medications before noon. Warner testified that the effects of a central nervous system depressant included slurred speech, loss of coordination, drowsiness and stumbling. Oxycodone caused pinpoint (constricted) pupils. He testified that when these two substances are taken together, their combined effect is greater than one substance taken alone.

The Court took judicial notice at the request of the Defense of the symptoms of a concussion. S90.202, Fla. Stat. (2020). The Center for Disease Control website indicates that the symptoms of a closed head injury like a concussion can include drowsiness, different sized pupils, seizures, confusion and loss of consciousness. A concussion can be caused by an automobile accident. According to the Mayo Clinic website, symptoms can include appearing dazed and confused, agitation or irritability, nausea or vomiting, problems with speech, drowsiness and dizziness.

The Defense raised an overarching objection to the testimony of all the testifying employees of the Daytona Beach Shores Public Safety Department based on the fact that they were all dually licensed as law enforcement officers and emergency medical technicians. Relying on

section 456.057, Florida Statutes (2018), the Defense argued that "any health care practitioner who generates a medical record after making a physical or mental examination" was precluded from sharing such records or discussing any conditions with anyone other than the patient. The only exception to this right of privacy in medical records in a criminal action is "upon issuance of a subpoena with proper notice" which was not done in this case.

The right to privacy in medical records is well established in Florida law, and failing to follow the process to subpoena these medical records requires exclusion of the records and testimony regarding the results of the physical or mental examination. *See, State v. Carter*, 177 So. 3d 1028 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2445b] (broad medical privilege); *Leka v. State*, 283 So. 3d 853 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2445a] (legislature balances patient privacy against legitimate access to patient medical records); *State v. Strickling*, 164 So. 3d 727 (Fla. 3d DCA 2015 [40 Fla. L. Weekly D1131a] (medical records must be excluded when State fails to make a good faith effort to comply with the statute to subpoena records). Excluding the results of any physical or mental examination through exercise of the exclusionary rule will "instill in those particular investigating officers, or their future counterparts, a greater degree of care toward the rights of a patient." *State v. Sun*, 82 So. 3d 866, 868 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1149a].

The Defense argued that it was immaterial whether the officers were acting as law enforcement officers or in their capacity as EMT's. Their uniforms bore the insignia of the statutorily approved EMT patch. Most of the questions propounded to the Defendant were attempts to assess her physical and mental condition. According to the Defense, the statute does not require the creation of a patient relationship, but instead begins the moment a question is asked concerning any physical or mental examination by a licensed health care practitioner.

It is undisputed that all of the officers in the Daytona Beach Shores Department of Public Safety are cross-sworn as emergency medical technicians, as well as firefighters. It is also undisputed that the State did not seek a subpoena for what the defense characterizes as medical records and other products of "any physical or mental examination." Without the testimony of these officers, the State cannot sustain its burden of proof. Since the error, if any, of failing to issue a subpoena was easily correctable, the Defense chose to raise this novel issue for the first time at trial.

Upon consideration at trial, the Court ruled that the officers were not acting in their capacity as EMTs but rather were acting as law enforcement officers. The Court permitted the officers to testify regarding the physical and mental condition of the Defendant, with the exception of the Officer who arrived to provide emergency medical treatment to the Defendant. Upon further consideration, examination and research, it appears that the Court reached the correct result, albeit for the wrong reason. Emergency medical technicians are not included in the statutory definition of "health care practitioner" in the statute upon which the Defense relies, section 456.057 Florida Statutes (2019).

Section 456.001(4) defines "health care practitioner" as any person licensed under Chapter 457, 458, 459. . ." and some fifteen other chapters, all listed in the statute. These license professionals include acupuncturists, physicians, optometrists, nurses, speech therapists, dieticians, and massage therapists. However, emergency medical technicians are excluded from this list of professionals. EMTs are licensed pursuant to section 401.23, Florida Statutes (2019), et seq. The standards for certification are contained in section 401.27, which even includes the specifications for the insignia for the badge worn on the uniform of these officers. Therefore, since the definition of "health care practitioner" under chapter 457 does not include persons licensed as emergency medical technicians pursuant to chapter 401, the State is not required to issue a subpoena for records produced as a result of the examination by an EMT of the physical or mental condition of a person they encounter. Nothing in chapter 456 precludes an EMT from testifying about their assessment of a person's physical or mental condition. This creative issue is ultimately determined to be unfounded.

The goal of statutory interpretation is to glean legislative intent. *Schoeff v. R.J. Reynolds, Inc*. 232 So. 3d 294 (Fla. 2017) [42 Fla. L. Weekly S951b]. It is a longstanding rule of statutory construction that the mention of one thing implies the exclusion of another, or in Latin, "*expressio unius exclusio alterius*." *See, Young v. Progressive Se.Ins.Co*, 753 So. 2d 80 (Fla. 2000) [25 Fla. L. Weekly S120a]. Courts must presume that the legislature purposefully excluded items not included in a list. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976). Therefore, the fact that EMTs were specifically excluded from the list of 18 licensed professionals in the definition of "health care practitioner" means they are not governed by chapter 456.

The Defense also argues that there is a reasonable doubt that the indicia of impairment unquestionably exhibited by the Defendant could have been the result of a concussion suffered during the automobile accident. The Court is persuaded by evidence tending to refute the bare suggestion that the Defendant suffered a concussion, including the fact that the airbags did not deploy and a drink in the driver's console did not spill, indicating that the crash occurred at a relatively low speed. She was conscious immediately after the accident, and did not complain of or exhibit common signs of a concussion or closed head injury like nausea or vomiting, different sized pupils, seizures, or loss of consciousness. She was calm and cooperative, not agitated or irritable. The FDLE chemist testified that the effects of Oxycodone and Alprazolam found in the Defendant's urine could last up to six hours, and she told the officers she took these drugs about three hours before the crash. The DRE testified that the Defendant demonstrated symptoms and conditions of impairment consistent with the controlled substances found in her urine, to wit: lethargy and an "on the nod" appearance, constricted pupils of equal size that tracked normally, early angle onset of horizontal gaze nystagmus prior to maximum deviation in both eyes, low blood pressure, and flaccid muscle tone.

Based upon the totality of the evidence, the Court has no reasonable doubt that Loy Springer is guilty of the offense of driving a motor vehicle while under the influence of a controlled substance to the extent that her normal faculties were impaired, and caused property damage to the other vehicle as a result of a crash she caused while driving in that impaired state, as alleged in the information and the Uniform Traffic Citation of A83HNDE.

Although the information alleges both DUI and DUI with property damage, double jeopardy prohibits imposition of judgment and sentence for both offenses as the criminal offense of DUI is wholly subsumed within DUI with property damage. §775.021(4), Fla. Stat. (2019). The crime of DUI is a degree variant of DUI with property damage. To prove all elements of DUI with property damage, the State must prove DUI plus the additional element of property damage; there is no element of DUI not included in DUI with property damage. *State v. McCloud*, 577 So. 2d 939, 941(Fla. 1991)(Double jeopardy violated when the greater offense necessarily includes the lesser offense); *State v. Weller,* 590 So. 2d 923, 925 (Fla. 1991)(a crime constitutes a necessarily lesser included offense if the defendant cannot possibly avoid committing the offense when the other crime is perpetrated); *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009) [34 Fla. L. Weekly S116a]. This is not a case where the State has alleged DUI with injury and a separate count of DUI with property damage. *See, eg. Velazco v. State*, 45 Fla. L. Weekly D394b (Fla. 3d DCA Feb. 19,

2020)(collecting cases). In other words, if charged differently, perhaps two convictions and sentences may have been legally permissible here without violating double jeopardy, one count alleging injury and one alleging property damage, but that was not done in this case. Instead, the count of DUI with property damage alleged in the information that the Defendant ". . .did cause damage *to the person or property* of J.E.P *and* Robert C. Whitehurst. . ."(emphasis added) Therefore, the judgment must be entered only for the greater of the two offenses, DUI with property damage. Count one, "simple" DUI, is dismissed by the Court as violating double jeopardy. Also dismissed by the Court is traffic infraction A83HNCE issued for following too closely.

WHEREFORE, based upon the foregoing findings of fact, the Court hereby finds the Defendant, Loy Springer, GUILTY of the offense of driving under the influence of controlled substances to the extent that her normal faculties were impaired, and while driving, caused damage to the property of Robert Whitehurst, as charged in count two of the information and Uniform Traffic Citation A83HNDE.

* * *

Criminal law—Immunity—Stand Your Ground law—Defendant charged with battery for forcibly ejecting boyfriend of female patron from his employer's bar—State failed to prove by clear and convincing evidence that defendant was not entitled to immunity where court finds that any reasonable, prudent person would believe that female patron of bar was in danger when her boyfriend, having failed to convince her to exit bar with him, re-entered bar, threatened defendant who tried to stop him, and angrily approached female patron—Defendant's motion for immunity and dismissal pursuant to section 776.032 is granted

STATE OF FLORIDA, v. ADAM DEGROFF, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 300510 MMDB, Charge: Battery. October 28, 2020. Judith D. Campbell, Judge. Counsel: Danyelle Alston, Assistant State Attorney, Daytona Beach, for State. Larry Avallone, New Smyrna Beach, for Defendant.

ORDER GRANTING DEFENSE'S MOTION TO CLAIM IMMUNITY FROM PROSECUTION FOR JUSTIFIABLE USE OF FORCE

THIS CAUSE having come to be heard on Defendant's Motion to Dismiss pursuant to Section 776.032, *Florida Statutes* (2019) and the Court having heard the testimony of witnesses, having viewed photographs and videos, having heard arguments of counsel, having reviewed decisional law and having been otherwise advised in the premises **finds**:

STAND YOUR GROUND LAW

Section 776.032(1), *Florida Statutes* (2019) states that a person who uses force as permitted by s.776.012 and s. 776.031 is immune from criminal prosecution. Section 776.012(1), *Florida Statues* (2019) states that a person is justified in using non-deadly force if that person reasonably believes non-deadly force is necessary to defend himself or another against another's imminent threat of unlawful force.

Section 776.031(1), *Florida Statutes,* (2019), states that a person can defend property that he has a legal duty to protect if he reasonably believes that force is necessary to protect the property.

In a criminal case, according to Section 776.032(4), *Florida Statutes* (2019), once the defendant has raised a prima facie claim of self-defense immunity, the State must prove by clear and convincing evidence that the defendant was not justified in using non-deadly force to protect himself, others, or property. "Clear and convincing evidence" requires that the State's evidence be of such weight that the trier of fact much have a firm conviction as to the truth of the testimony presented. *Derossett v. State,* 44 Fla. L. Weekly D2713a (Fla. 5th DCA 2019).

DEFENSE'S PRIMA FACIE CASE

Defendant called Officer Tanner Snow of the New Smyrna Beach Police Department. Officer Snow testified that Mark Mallo came to the New Smyrna Beach Police Department the morning after the alleged incident. Officer Snow stated that Mr. Mallo said he was battered by an employee at a local bar called Tayton O'Brien's. Officer Snow went to the bar and spoke with the manager and viewed videos of the incident. Initially, after his investigation, he decided not to forward the police report to the State Attorney Office. He felt Mr. Mallo's story was not consistent with the video and that the Defendant was within his rights to eject Mr. Malmo from the bar.[1]

The Court found that testimony was prima facie evidence of immunity from criminal prosecution as required by Section 776.032(4), *Florida Statutes,* (2019).

FACTS

On September 21, 2019 Mr. Mallo and his fiancé, Lisa Audley, were celebrating an anniversary. After eating dinner and watching fireworks at the Bandshell in Daytona Beach, they went to a bar in New Smyrna Beach called Peanuts. Several of Ms. Audley's friends were at Peanuts. The group then decided to go to another bar called Traders. Mr. Mallo drove the car and Ms. Audley and her girlfriends walked. The ladies changed their minds and went to a bar called Tayton O'Brien's instead. Ms. Audley phoned and texted Mr. Malmo to tell him of the change in venue. Mr. Mallo did not have his phone with him so he did not know of the change. He went into several bars looking for Ms. Audley. Worried and upset, he finally found her at Tayton O'Brien's.

Tayton O'Brien's is a small establishment. There is a bar to the right as you enter and a seating area to the left. The space from the door to the seating area is about six feet and the area from the bar to the seating area is about six feet. The Defendant, Adam Degroff, an employee of Tayton O'Brien's, has worked there for nine years doing various jobs. On the date of the incident, Mr. Degroff was checking identifications at the door, about five feet from where Ms. Audley was standing.

The video showed that Ms. Audley was in Tayton O'Brien's with her friends when Mr. Mallo approached Ms. Audley quickly. Her back was to him and he grabbed her waist. She turned around as she tried to take Mr. Mallo's hand off her waist. The two appear to be arguing. Mr. Degroff told Mr. Mallo and Ms. Audley to "take it outside". Mr. Mallo waved his arms in an angry manner as he was speaking with Ms. Audley and then walked to the door. Ms. Audley turned back around to re-engage with her friends. At the door, appearing intoxicated, Mr. Mallo motioned with his hand towards Ms. Audley as if asking her to come with him. She did not respond. Mr. Mallo re-entered the bar and marched back toward Ms. Audley. Mr. Degroff held out his arm trying to stop Mr. Mallo from approaching her. Mr. Mallo threatened Mr. Degroff, and ignored the signal to stop. Mr. Degroff then grabbed Mr. Mallo by the shirt with both hands. Mr. Mallo went limp and was ejected from the bar. After ejecting Mr. Mallo from the bar, Mr. Degroff went calmly back inside.

CONCLUSION

After reviewing all the evidence presented, the Court finds that the State did not meet its burden of proving, by clear and convincing evidence, that the defendant's use of non-deadly force was unjustified.

The standard for determining if a person is justified in using force against another is whether an objective, reasonable and prudent person would have reacted the same way under the same circumstances. *Garcia v. State,* 286 So.3d 348 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2859c].

In the instant case, Mr. Degroff was working at a small bar. There

were several women at the establishment in a group that appeared to be having a good time. Suddenly, a man came in and grabbed one of the women. The woman did not appear to be pleased with the man's actions. They appeared to be arguing. The man was told to leave. At this point, if the man had listened to Mr. Degroff and waited outside for the woman there never would have been an incident. Up to this point, Mr. Degroff was very low key but protective of the woman who appeared to want no contact with the man.

Instead, the man opened the door and motioned for the woman to follow him. She ignored him as she was talking to her group of friends. Then the man angrily approached the woman again. Now Mr. Degroff reached out his arm in an attempt to stop the man. The man did not stop. The man, instead, threatened Mr. Degroff and approached the woman. Mr. Degroff then ejected the man from the establishment and returned back inside.

The Court finds that a reasonable and prudent person would believe that the woman, Mr. Degroff as well as other patrons and the bar property were all in danger of harm. This was a small bar and an altercation could endanger the people and property that were inside. Mr. Degroff was protecting this woman from a man with whom a reasonable person would believe that she did not want to have contact.

This man's return into the bar would have caused concern to any reasonable, prudent person in Mr. Degroff s position.

Therefore, the Court finds that the State did not prove by clear and convincing evidence that Mr. Degroff did not have the right to use force against Mr. Mallo.

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[1]During the State's case, Officer Snow returned to the stand. The officer stated that upon initially seeing the videos and speaking to the manager he did not feel that the police report should be forwarded to the State Attorney's Office. However, a month later after reviewing the case with other officers, they felt that the case should be sent to the State Attorney's Office to let them determine whether formal charges should be filed. An Information was filed on January 13, 2020.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Where video recording shows that defendant was not within sight and sound of trooper at all times during twenty-minute observation period, lifted his hands to his face multiple times during period, and made noise that could have been burp immediately prior to providing first breath sample, motion to suppress breath test results is granted

STATE OF FLORIDA, v. GREGORY HART, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019 CT 902. August 21, 2020. D. Melissa Distler, Judge. Counsel: Raymond Dailey, Assistant State Attorney, Office of the State Attorney, for State. G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT TO EXCLUDE BREATH TEST RESULTS

THIS MATTER came to be heard on the Defendant's Motion to Exclude Breath Test results as a result of violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2). The Court, having heard testimony from Trooper Ken Montgomery, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

The Defendant GREGORY HART was arrested for DUI arising from a traffic crash that occurred in Flagler County, Florida. At the conclusion of the traffic crash investigation, Trooper Ken Montgomery properly switched hats and began conducting a criminal investigation. Trooper Montgomery arrested the Defendant for Driving Under the Influence after conducting modified field sobriety exercises. Thereafter, the Defendant GREGORY HART submitted to a breath test contained inside the trooper's vehicle administered by the trooper. The validity of this breath test due to alleged violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2) are the subject of this motion and Order.

The Defendant's interaction with law enforcement on the night in question is recorded on the trooper's in car video cameras, which were stipulated into evidence in advance of the hearing. There are multiple cameras within the vehicle with differing vantage points, all depicting the same events with the same time stamps.

During examination of the sole witness, Trooper Montgomery, the State asked questions about the twenty-minute observation. Trooper Montgomery testified that he began the twenty-minute observation at 822pm at the conclusion of the traffic crash investigation. Trooper Montgomery testified that the observation began at the time he read the Defendant *Miranda* warnings while transitioning from a crash to a DUI investigation, prior to the Defendant even being placed under arrest. The Breath Alcohol Test Affidavit was not admitted into evidence but was referred to during Testimony. No documents were admitted pertaining to the breath test.

Trooper Montgomery has previously provided testimony in other hearings, which has been codified in prior Orders of this Court and was referenced on cross-examination.[1]

The Trooper did testify that the Defendant GREGORY HART was always within his sight and sound. The Trooper did testify repeatedly that the Defendant GREGORY HART did not ingest or regurgitate anything. The Trooper did acknowledge that, at times, he did turn away from the Defendant, to type or interact with the machine. The Trooper further acknowledged that that Defendant lifted his hands to his face several times; Trooper Montgomery, however, insisted that such actions did not involve the Defendant's mouth and therefore did not impact the validity of the observation.

The Trooper, upon review of the video recordings, admitted that he walked around the front of his vehicle and remained in the driver side of his vehicle for over six minutes of the observation period; during this time, the Defendant was seated on the rear passenger side, with his feet outside the passenger door (facing away from the vehicle and therefore away from Trooper Montgomery). The Trooper testified that he would have been able to hear "burps or pukes." The Trooper insisted that the Defendant GREGORY HART was within his sight and sound at all times, which is contradicted by the video recordings in this case. Furthermore, on the video recording and per Trooper Montgomery's testimony, at no time did the he check the Defendant's mouth and at no time did the he ask the Defendant if he had dentures or the like.

On cross-examination, the Trooper was asked again, what time did he start the twenty-minute observation; and he responded the time he read the Defendant his *Miranda* warnings. Trooper Montgomery testified that he backs his time up to the switching of hats. On the video recordings, this time was 11:25 minutes into the interaction The Defendant GREGORY HART was placed under arrest at 21:57 minutes into the video. At 23:35, the Trooper requests the Defendant submit to a breath sample. Approximately one minute later, the Defendant is seated in the back of the patrol car. The first breath sample is provided 39:10 on the video recording.

Separately and distinct from the timing of the observation is the Defendant's repeated lifting of his hands to his face. This occurs multiple times without intervention or correction on the Trooper's part. The Defendant pointed out the following times on the recording when the Defendant lifted his hands to his face without intervention, mention, or correction by Trooper Montgomery: 34:55, 35:29, 36:09, 36:50, 37:13, 37:26. Upon review of the video recordings, the Defendant also touches his face at the following times: 33:09, 33:51, 33:55, 34:09; 34:30; 35:47; and 35:50. Furthermore, there is a distinct

noise made by the Defendant immediately prior to the first breath sample at 38:34. The Trooper characterized the noise as the Defendant clearing his throat. On cross-examination, counsel attempted to establish that the noise was actually a burp. The Court finds that the noise does not sound like clearing a throat; the Trooper does not even acknowledge the happening and immediately requests the Defendant to blow after the noises.

The Defendant's Motion to exclude admission of the Breath Test alleges an improper administration of the breath test under Florida Administrative Code 11D-008.007(3) due to a violation of the twenty (20) minute observation requirement. The Defendant cited and argued several county court cases, including this Court's *Povey* case cited in the footnote herein along with *State v. Kozlak,* 22 Fla. L. Weekly Supp. 607b (Fla. 7th Cir. Volusia 2013); *State v. Verdin,* 22 Fla. L. Weekly Supp. 371a (Fla. 7th Cir. Volusia 2014); *State v. Morrison,* 20 Fla. L. Weekly Supp. 277a (Fla. 1st Cir. Escambia 2012); *State v. Hutchinson,* Unpublished opinion 7th Circuit. The State cited *Kaiser v. State,* 609 So. 2d 768 (Fla. 2d DCA 1992).

Conclusions of Law:

The Court concludes that, based upon the video recordings in this case and the Trooper's testimony, the observation period in this case was NOT in substantial compliance with Florida Administrative Code 11D-008.007(3) and Florida Statute 316.1932(1)(b)(2) for the deficiencies set forth herein.

The Defendant's Motion to Suppress the breath test result is GRANTED. The State is precluded from admitting any evidence related to the breath test conducted on the Defendant GREGORY HART in this matter.

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[1]In *State v. Michael Povey*, 19CT766, the Court made the following findings of fact detailing Trooper Montgomery's testimony regarding his calculation of the twenty-minute observation period.

In response to the question, "when did you start the twenty-minute observation?" the Trooper gave the following answer:

"What I do is uh, it's going to be a long explanation sir. What I do with the twenty-minute observation is I use any uninterrupted time observed with him, so I generally back up my time. We are required to observe for 20 minutes prior to the breath test, so normally what I do is as soon they get out of the vehicle, as I get them out of the vehicle and start my investigation, they are under observation at that point. I usually make note of when I give them Miranda. I use that time, I usually back that time up, that time I will check his mouth and stuff like that in anticipation of a breath test. Of course we don't always get there. . . I always try to get everything and you know check their mouth and all that stuff when I start talking to them on the side of the road about the time when I do Miranda; so if they do agree to do the breath test, then I back up that time, any uninterrupted observation time to that point."

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Failure to maintain single lane—Where there is no evidence that defendant's failure to maintain single lane affected other traffic, and alleged violation of section 316.089(1) was sole basis for stop, stop was illegal—All evidence obtained after initiation of stop is suppressed

STATE OF FLORIDA, v. EDUARDO GALVAN, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 104647 MMDL, Division 70. November 10, 2020. David A. Cromartie, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS UNLAWFULLY OBTAINED EVIDENCE

THIS CAUSE came before this Court upon the Defendant's Motion to Suppress Unlawfully Obtained Evidence, and after a review of the Motion, the argument of counsel, the contents of the Court file and the applicable law, it is hereby ORDERED as follows:

FACTS:

On September 28, 2019, Deputy Johnson of the Volusia County Sheriff's Office observed a vehicle traveling northbound in the outside lane of Highway 17 near Deleon Springs. Deputy Johnson observed the vehicle weave over the fog lane and over the line dividing the two northbound lanes over a period of several minutes. Deputy Johnson testified the vehicle crossed the fog line 5 times and over the divided lane 7 times during this period. Deputy Johnson testified that he initiated a traffic stop due to the driver's violation of Florida Statute 316.089(1). Deputy Johnson testified that failing to maintain a single lane is a sign of impairment, but importantly did not testify that he initiated a stop of the vehicle to determine if the driver was ill, tired or impaired.

Deputy Johnson initiated the traffic stop based solely on an alleged violation of Florida Statute 316.089(1). Deputy Johnson made contact with the driver, Eduardo Galvan, and noticed signs of impairment including slurred speech, glassy, bloodshot eyes, slow movements, and a very strong odor of an alcoholic beverage. Deputy Johnson found an open container of beer and Mr. Galvan admitted to drinking a little bit. Deputy Johnson was a new officer and called for Deputy James, an officer more experienced in DUI investigations to conduct a DUI investigation. Deputies Blum and Donaldson arrived approximately eight and a half minutes after the stop was initiated. Deputy James arrived on scene approximately eighteen minutes and forty seconds after the stop. Deputy James was briefed and then conducted a DUI investigation. At the conclusion of the investigation, Mr. Galvan was arrested for DUI.

The Defense filed their Motion to Suppress Unlawfully Obtained Evidence and challenged the investigation on three grounds. First, the Defense challenges the legality of the traffic stop. Second, the Defense alleges that Deputy Johnson lacked reasonable suspicion of criminal activity to justify detaining Mr. Galvan to conduct an investigation. Finally, the Defense asserts that the detention was unreasonable because the investigation was paused until Deputy James arrived.

CONCLUSIONS OF LAW:

Based on the holdings in *Dobrin v. Dept of Highway Safety & Motor Vehicles,* 874 So.2d 1171 (Fla. 2004) [29 Fla. L. Weekly S275a], *Whren v. United States*, 116 S.Ct. 1789 (1996) and *Holland v. State,* 696 So.2d 757 (Fla. 1997) [22 Fla. L. Weekly S387a], there are two reasons an officer may legally stop a vehicle. First, a stop may be made if there is probable cause that a traffic violation has occurred. Second, a stop may legally be made if the officer has reasonable suspicion a crime is being or about to be committed.

In the instant case, Deputy Johnson initiated the traffic stop for a violation of Florida Statute 316.089(1). In order for there to be a violation of Florida Statute 316.089(1) the failure to maintain a single lane by the defendant must affect other traffic. See *Jordan v. State,* 831 So.2d 1241 (5th DCA 2002) [27 Fla. L. Weekly D2651a]. There was no testimony that Mr. Galvan's driving affected any other motorist. Furthermore. there was no testimony that Deputy Johnson was initiating the stop to determine whether the driver was ill, tired or impaired. Therefore, there was no violation of Florida Statute 316.089(1) and the stop was illegal.

The State may not use the fruits of the unlawful conduct of its agents, including any physical or intangible evidence obtained, thereby, and all such evidence must be suppressed. See *Wells v. State,* 975 So.2d 1235 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D735a]. Therefore, in the instant case all evidence obtained after the initiation of the stop is suppressed.

In that the stop motion has been granted, the Court does not form an opinion as to the validity of the other issues raised by the Defense.

* * *

Criminal law—Driving while license suspended, cancelled or revoked—Motion to dismiss DWLS charge is denied where motion recognizes that there are disputed facts regarding whether defendant was in motor vehicle, as opposed to automobile, and whether she was traveling rather than driving—Further, unsworn motion is legally insufficient—No merit to claim that defendant is not subject to Florida criminal laws and court because she is ambassador or minister of Aboriginal Republic of North America or is Moor American National citizen

STATE OF FLORIDA, Plaintiff, v. TARA LUCIFER SEKHMET XI ALI, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2019-CT-001883-A, Division III. February 3, 2020. Walter M. Green, Judge.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant's "Affidavit/writ to show cause seeking dismissal res judaca with prejudice for no adequate remedy Caveat," filed January 29, 2020. Based on the relief requested, the motion is being considered as filed pursuant to Fla. R. Crim. P. 3.190(c)(4). Upon consideration of the motion and the record, this Court finds and concludes as follows:

1. Defendant alleges that the Court does not have jurisdiction over her, or the above-captioned case, based on her assertion that she is an "indigenous, Aboriginal, free, Moor American National, Ambassador, Minister with the Aboriginal Republic of North America"; "an individual natural woman/man"; "a[n] Indigenous Aboriginal Moor American Flesh and Blood Woman"; and, that the State of Florida cannot impede her fundamental right to travel in an automobile[1] on the public highways and roadways of the State of Florida without a driver's license.

2. "The purpose of a motion to dismiss is to allow a pretrial determination of the law of the case when the facts are not in dispute." *State v. Pasko,* 815 So. 2d 680, 681 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D765c] (citing *Styron v. State,* 662 So.2d 965 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2198a]); *see also* Fla. R. Crim. P. 3.190(c)(4) ("[T]he court may at any time entertain a motion to dismiss on any of the following grounds: . . . There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which the motion is based should be alleged specifically and the motion sworn to."). Here, Defendant's motion not only fails to allege that there are no material disputed facts, it asserts that there are disputed material facts in dispute. In particular, she asserts that: (a) she was in automobile, not a motor vehicle; and, (b) she was traveling, not driving. Thus, Defendant's motion is legally insufficient. *See State v. Sammons,* 889 So. 2d 857, 858 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2646a] ("The motion is well taken only if no material facts are in dispute and the most favorable construction of the undisputed facts in favor of the State would not establish a prima facie case of guilt.").

3. Defendant's motion is also legally insufficient due to its being unsworn. *See Styron v. State,* 662 So. 2d 965, 967 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2198a] ("Failure to swear to a '(c)(4)' motion to dismiss is fatal.") (citing *State v. Crafton,* 575 So.2d 777 (Fla. 5th DCA 1991); *State v. Smith,* 575 So.2d 314 (Fla. 2d DCA 1991); *State v. Huggins,* 368 So.2d 119 (Fla. 1st DCA 1979)).

4. Even if this Court were to consider Defendant's motion under rule 3.190(b), the claim raised is still without merit.

5. This Court is not aware of any instance where the United States has recognized the so-called Aboriginal Republic of North America as a sovereign nation outside of the jurisdiction of the State of Florida and its criminal laws. *See Fullard v. Maryland,* CIV.A. PWG-14-3405, 2015 WL 1517393, at *1 (D. Md. Mar. 31, 2015) (noting that the United States has never recognized the so-called "Moorish/Muurish Nation" as a sovereign.); *Ferguson-El v. Virginia,* 3:10CV577, 2011 WL 3652327, at *3 (E.D. Va. Aug. 18, 2011) ("Ferguson-El seeks to avoid the consequences of his criminal conviction by suggesting he exists as two separate legal entities and that the State of Virginia does not have jurisdiction over both entities and thus must release him, 'the living breathing Man' . . . and pay him damages. Such a theory is legally frivolous.") (citing *Tirado v. New Jersey,* No. 10-3408(JAP), 2011 WL 1256624, at *4-5 (D.N.J. Mar. 28, 2011) (observing a similar argument "has absolutely no legal basis"); *Marshall v. Fla. Dep't Corr.,* No. 10-20101-CIV-GOLD, 2010 WL 6394565, at *1 (S.D. Fla. Oct. 27, 2010)); *Pitt-Bey v. D.C.,* 942 A.2d 1132, 1136 (D.C. 2008) ("[T]he Moroccan-American Treaty of Peace and Friendship, ratified by President Andrew Jackson on January 28, 1837 [Treaty of Peace and Friendship, U.S.-Morocco, Oct. 1, 1836, 1836 U.S.T. LEXIS 10] is one of 'Peace and Friendship' between the sovereign states of Morocco and the United States, and it provides that subjects or citizens of each country will be held safe by the other, as well as a protocol for any confrontations that might arise between the two countries while at sea, during trade or battle. *See id.* It does not contain any language suggesting that the United States, or any state or territory therein, does not have jurisdiction over a person violating the law within its jurisdiction. *See id.* Therefore, this treaty has no bearing on this case."). Defendant's "purported status as a Moorish American does not place [her] beyond the reach of federal or state law." *James-Bey v. United States,* CV 15-755, 2015 WL 3911335, at *1 (D.D.C. June 22, 2015) (citing *United States v. Toader,* 409 Fed.Appx. 9, 13 (7th Cir. 2010) (rejecting as frivolous arguments "that the federal courts lack subject matter jurisdiction over [the defendant] and that the laws he is charged with violating are inapplicable to him because he is a Native Asiatic Moorish National Citizen"); *Jones-El v. S. Carolina,* No. 5:13-CV-01851, 2014 WL 958302, at *8 (D.S.C. Mar. 11, 2014) ("The law is clear that Moorish Americans, like all citizens of the United States, are subject to the laws of the jurisdiction in which they reside.") (citing cases)). "Any claim that Plaintiff is an Aboriginal or of Moorish descent, entitles him to no relief." *Cush-El v. State,* 1:16CV176, 2016 WL 1212427, at *2 (M.D.N.C. Mar. 10, 2016), *report and recommendation adopted*, 1:16CV176, 2016 WL 1228626 (M.D.N.C. Mar. 28, 2016).

6. This Court further notes that in the Florida Constitution the people of the State of Florida established the statewide judiciary, which includes the county courts. Art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."); *see also* Art. V, § 6, Fla. Const. ("County Courts—(a) Organization.—There shall be a county court in each county. There shall be one or more judges for each county court as prescribed by general law. (b) Jurisdiction.—The county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state."). The county courts in Florida have jurisdiction over misdemeanor criminal traffic offenses, such as the one in the instant case. *See* § 34.01(1)(a), Fla. Stat. (2019) ("County courts shall have original jurisdiction. . . [i]n all misdemeanor cases not cognizable by the circuit courts. . . ."); *see also* § 900.03(1), Fla. Stat. (2019) ("Original jurisdiction in criminal cases is vested in the circuit courts and county courts.").

7. In addition, both the State of Florida and Alachua County have jurisdiction over the public roads and highways in Alachua County. *See* § 316.006, Fla. Stat. (2019); *see also Duval Lumber Co. v. Slade,* 2 So. 2d 371, 372 (Fla. 1941) ("The regulation of traffic on public streets or highways is in the exercise of the sovereign police power."). And, "the Sheriff's Office of each county has the vested authority to enforce all the traffic laws of the state on all state streets and highways." *Dean v. Rouillier,* 597 So. 2d 961, 962 (Fla. 5th DCA 1992).

8. Defendant is charged with committing the misdemeanor offense of Driving While Driver's License Suspended, Cancelled, or Re-

voked, in violation of section 322.34(2), Florida Statutes. *See also* § 322.39, Fla. Stat. (2019) ("It is a misdemeanor for any person to violate any of the provisions of this chapter, unless such violation is declared to be otherwise by this chapter or other law of this state. . . .").

9. Section 910.005(1)(a), Florida Statutes, states: "A person is subject to prosecution in this state for an offense that she or he commits, while either within or outside the state, by her or his own conduct or that of another for which the person is legally accountable, if. . . [t]he offense is committed wholly or partly within the state. . . ." There is no requirement that a person consent to the State of Florida's jurisdiction over him.

10. Although Defendant claims that she is not a "person," she does admit that she is an "individual." The Florida Supreme Court has used the terms "person" and "individual" interchangeably when applying the language of section 322.34, Florida Statutes. *See, e.g., State v. Miller,* 227 So. 3d 562 (Fla. 2017) [42 Fla. L. Weekly S831a]. Furthermore, section 322.01(17), Florida Statutes (2019), defines "Driver license" to mean "a certificate that, subject to all other requirements of law, authorizes an **individual** to drive a motor vehicle and denotes an operator's license as defined in 49 U.S.C. s. 30301." (emphasis added). Accordingly, Defendant is an individual who qualifies as a person as that term is used in section 322.34, Florida Statutes.

11. As used in the Florida Statutes, the term "Motor vehicle" has a meaning which includes "automobile." § 320.01(1)(a), Fla. Stat. (2019). Defendant admits in her motion that she was operating an automobile. Therefore, under she was operating a motor vehicle, as that term is used in section 322.34(2), Florida Statutes (2019), at the time of the traffic stop in this case

12. "Drive" is defined under Florida Statutes as to "operate or be in actual physical control of a motor vehicle in any place open to the general public for purposes of vehicular traffic." § 322.01(16), Fla. Stat. (2016). Defendant was operating an automobile, which is a motor vehicle, in a place open to the general public for purposes of vehicular traffic. Therefore, Defendant was driving a motor vehicle at the time of the traffic stop in this case.

13. In Florida, a person is required to have a driver's license to operate or be in actual physical control of a motor vehicle on the roads and highways. *See* § 322.03(1), Fla. Stat. (2019) ("[A] person may not drive any motor vehicle upon a highway in this state unless such person has a valid driver license. . . ."). Thus, Defendant was required to have a valid driver's license at the time of the traffic stop in this case.

14. There is no fundamental right to drive a vehicle on Florida's roads and highways without a valid driver's license. *See State, Dept. of Highway Safety & Motor Vehicles v. Degrossi,* 680 So. 2d 1093, 1094 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2183a] ("Driving is not a right, and as with many other activities, the government has the power to regulate the privilege to drive subject to the condition that the licensee will perform the activity safely and competently.") (citing *Thornhill v. Kirkman,* 62 So.2d 740 (Fla.1953)); *see also City of Miami v. Aronovitz,* 114 So. 2d 784, 787 (Fla. 1959) ("[T]he requirement of obtaining a driver's license and the exercise of the privilege of driving over the public highways, together with the correlative loss of the privilege under certain conditions, is a reasonable regulation of an individual right in the interest of the public good."); *Smith v. City of Gainesville,* 93 So. 2d 105, 106 (Fla. 1957) ("There can be no doubt that in the regulation of the use of automobiles on the public highways the State has ample power to require motor vehicle operators to obtain drivers' licenses."); *Chandler v. Sec'y of Florida Dept. of Transp.,* 695 F.3d 1194, 1199 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1578a] ("In Florida, a person's right and liberty to use a highway is not absolute; it may be regulated in the public interest through reasonable and reasonably executed regulations."). And, no court in the modem era has held "that it is an impermissible infringement upon a citizen's constitutional Right to Travel for the Legislature to decree that, unless exempted by statute, every person who operates a motor vehicle on public roads must have a valid operator's license. . . ." *City of Bismarck v. Stuart,* 546 N.W.2d 366, 367 (N.D. 1996); *see also* Roger I. Roots, J.D., Ph.D., *The Orphaned Right: The Right to Travel by Automobile, 1890-1950,* 30 Okla. City U.L. Rev. 245 (2005) ("Since 1950, no court has described driving an automobile as a 'right.' The constitutional right to travel became increasingly interpreted not as a right to locomotion by the means of one's choice, but as a mere right to emigrate between states.").

15. Defendant's "interest in the highway is common to that of every other user for whom the highways are constructed and there must be reasonable regulations to require or guide [her] in the use of them subject to the privilege of every other citizen to use them for the same purpose." *Thornhill v. Kirkman,* 62 So. 2d 740, 742 (Fla. 1953). Defendant has the right and liberty to use the public highways of the state as guaranteed by the Bill of Rights. At the same time, however, her right and liberty to use the public highways is not absolute and may be regulated in the public interest. *See id.* "It would produce an intolerable situation on the public highways to subscribe to a theory that they could not be summarily regulated in the interest of the public." *Id.* The Florida Supreme Court "has long held the view that reasonable regulation of an individual's right to drive is in the interest of public good." *Zarsky v. State,* 300 So. 2d 261, 263 (Fla. 1974).

16. Here, at the time that she was cited, Defendant was operating or in actual physical control of a motor vehicle on the roads and highways of Alachua County, Florida. Thus, she could be charged with Driving While Driver's License Suspended, Cancelled, or Revoked, in violation of section 322.34(2), Florida Statutes. As for Defendant's argument that the laws of Florida do not only apply to her, Defendant fails to provide any statutory authority or case law supporting her assertion which this Court finds to be either binding or persuasive. Accordingly, the claim raised is without merit.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that: Defendant's motion is hereby **DENIED**.

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[1]Defendant uses the term "automobile" in her motion to describe the vehicle that she was in at the time of the traffic stop. *See* Affidavit/writ to show cause seeking dismissal res judaca with prejudice for no adequate remedy Caveat at 4, para. 1 ("The florida traffic citation submitted as evidence by State's Prosecutor as Uniform Traffic Citations, in particular, allege State Witness Deputy jeff which shows that the **Automobile** in question was Non-Commercial") (emphasis added) (all typographical errors in the original). Accordingly, that term will be used here.

* * *

Contracts—Consumer law—Deceptive and unfair trade practices—Franchisee—Plaintiff is entitled to summary judgment as a matter of law on counts for breach of contract and violation of the Florida Deceptive and Unfair Trade Practices Act where defendant failed to provide plaintiff with a "prompt, full" refund after plaintiff properly cancelled parties' contract according to contract's cancellation provision—Defendant was not entitled to condition refund on plaintiff signing any release—By using forms furnished by its franchisor, defendant adopted those forms and is responsible for their terms and conditions

CHRISTINE GOODNOUGH, Plaintiff, v. BORDEN IMPROVEMENTS, LLC, d/b/a HANDYMAN CONNECTION OF WINTER PARK, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CC-010982-O. October 23, 2020. Gisela T. Laurent, Judge. Counsel: Taras S. Rudnitsky, Rudnitsky Law Firm, Longwood, for Plaintiff. Barton C. Mercer, Guardian Law, PLLC, Winter Park, for Defendant.

FINAL JUDGMENT AGAINST DEFENDANT

THIS CAUSE, having come before the Court on *Plaintiff's Motion*

for Summary Judgment and the Court having extensively reviewed the Court file, having heard argument of counsel on July 13, 2020, August 13, 2020, and October 14, 2020, and being otherwise fully advised in the premises:

The Court FINDS the following:

1. *Plaintiff's Motion for Summary Judgment* is GRANTED. There are no genuine issues of material fact as to either the claims or defenses, and Plaintiff is entitled to summary judgment as a matter of law.

2. Based on Plaintiff's affidavit and Defendant's admissions, and giving the contract terms their plain meaning, the promised start date and estimated start date are one and the same, namely June 10, 2019.

3. When Defendant did not start work by June 10, 2019, Plaintiff properly cancelled the contract according to the cancellation provision of paragraph N of the contract. Accordingly, Plaintiff was entitled to a "prompt, full refund" of her $5,000.00 deposit.

4. Defendant currently has possession of Plaintiff's $5,000.00 deposit.

5. Defendant's owner and representative, Brien Borden, testified under oath that Defendant owes Plaintiff a refund of her $5,000.00 deposit.

6. Defendant initially and materially breached the parties' contract by not providing a "prompt, full refund" to Plaintiff of her $5,000.00 deposit.

7. Defendant was not entitled to condition Ms. Goodnough's refund on her signing any release, much less one that required confidentiality or included a non-disparagement provision (gag clause). *E.g., FTC v. Roca Labs, Inc.,* 345 F. Supp. 3d 1375 (M.D. Fla. 2018).

8. The Court rejects Defendant's argument that it was only using forms furnished by its franchisor. By using them, Defendant adopted those forms and is responsible for their terms and conditions.

9. The undisputed evidence refutes Defendant's affirmative defenses:

a. Plaintiff did not breach the parties' contract and did not repudiate the contract.

b. Plaintiff properly cancelled the contract pursuant to its own terms.

c. The parties did not enter into any settlement agreement, but only exchanged offers and counteroffers which were not accepted.

d. There was no accord and satisfaction between the parties.

e. Defendant's representative, Brien Borden, conceded under oath that Defendant owes Plaintiff a refund of her $5,000.00 deposit.

10. Based on the undisputed evidence, Plaintiff is the prevailing party on Count I (Breach of Contract) and Count II (Violation of the Florida Deceptive and Unfair Trade Practices Act). In light of prevailing on those counts, Plaintiff's Count III for Unjust Enrichment, pled in the alternative, is moot.

11. Plaintiff is entitled to a full refund of her $5,000.00 deposit. Plaintiff is also entitled to prejudgment interest as an element of her damages. *E.g., Argonaut Ins. Co. v. May Plumbing Co.,* 474 So. 2d 212 (Fla. 1985); *Adam v. Versailles Sur La Mer Condo.,* 973 So. 2d 466, 467 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1741b]. Through October 20, 2020, the prejudgment interest totals an additional $448.20, representing 498 days between June 11, 2019 through October 20, 2020, at $0.90 per day.

12. Plaintiff is also entitled to her requested equitable relief as noted below. Fla. Stat. §501.211(1).

It is therefore ORDERED and ADJUDGED that:

13. Plaintiff Christine Goodnough ([address omitted]) shall recover the sum of $5,448.20 (five thousand four hundred forty eight dollars and twenty cents) from Defendant Borden Improvements, LLC d/b/a Handyman Connection of Winter Park ([address omitted]), which shall bear interest at the statutory rate, for which let execution issue forthwith.

14. If Defendant does not timely pay this judgment in full, it shall serve on counsel for Plaintiff a completed Fact Information Sheet pursuant to Fla. R. Civ. P. Form 1.977, including all documents noted therein, under oath and within 45 days of the entry of this judgment.

15. Defendant is enjoined and prohibited from asserting, or attempting to assert, any lien against Plaintiff or any of her property, including the property located at 1130 Quintuplet Drive, Casselberry, Florida 32707 in Seminole County, Florida, and bearing a parcel ID number of 09-21-30-5BP-0A00-0100.

16. Defendant is enjoined and prohibited from requiring any of its customers to sign a release not included in their contract, or which violates the Federal Trade Commission Act or the Florida Deceptive and Unfair Trade Practices Act.

17. Defendant is enjoined and prohibited from any future violations of Chapter 501 of the Florida Statutes.

18. The Court reserves jurisdiction as to the award of attorney fees and costs to Plaintiff and her counsel, and to enforce this judgment.

* * *

Insurance—Personal injury protection—Coverage— Chiropractic services—Medicare fee schedule—Private insurers are not entitled to 2% reduction in payment for chiropractic treatment implemented by Medicare—2% reduction is specifically reserved only for claims that Medicare is required to reimburse

ORLANDO CENTER FOR PHYSICAL MEDICINE, a/s/o Heraelle Saintine, Plaintiff, v. SECURITY NATIONAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-11867-O. November 17, 2020. Tina L. Caraballo, Judge. Counsel: Dave T. Sooklal, Anthony-Smith Law, P.A., Orlando, for Plaintiff. Taisha Easterling, Maitland, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING DEFENDANT'S IMPROPER REIMBURSEMENT FOR CPT CODES 98940, 98941, AND 98942 AND ENTRY OF FINAL JUDGMENT

This matter came before the Court on Plaintiff's, Motion for Summary Judgment Regarding Defendant's Improper Reimbursement For CPT Codes 98940, 98941, and 98942. After having reviewed the Plaintiff's Motion and relevant summary judgment evidence, as well as Defendant's Opposition to the same, and after having reviewed the applicable legal authority and argument of counsel, this Court hereby GRANTS Plaintiff's Motion for the reasons set forth below. Based on this Court's Order and rationale below, the Court further hereby enters a Final Judgment in favor of the Plaintiff.

LEGAL ISSUE

The sole issue in this case involves Plaintiff's claim for payment of additional Personal Injury Protection ("PIP") benefits for CPT Codes 98940, 98941, and 98942 for dates of service January 15, 2013, through April 9, 2013. Plaintiff alleges that the following are the allowable amounts for dates of service January 15, 2013, through February 28, 2013, under Medicare: $51.46 for CPT code 98940, $72.46 for CPT code 98941 and $92.70 for CPT code 98942. Defendant claims that the following are the allowable amounts for dates of service January 15, 2013, through February 28, 2013: $51.06 for CPT code 98940, $71.62 for CPT code 98941 and $91.46 for CPT code 98942. In addition, Plaintiff alleges that the following are the allowable amounts for the remainder of the dates of service from March 4, 2013, through April 9, 2013, under Medicare: $52.10 for CPT code 98940 and $73.08 for CPT code 98941. Defendant claims that the following are the allowable amounts for dates of service

March 4, 2013, through April 9, 2013: $51.06 for CPT code 98940, and $71.62 for CPT code 98941. There is no dispute as to the reasonableness, relatedness or necessity of the treatment at issue in this case.

FACTUAL BACKGROUND

In support of its position regarding the appropriate allowable amount to be reimbursed regarding the above mentioned dates of service, Plaintiff has filed pertinent portions of the federal register as well as the components utilized to calculate the appropriate allowable amounts pursuant to the Medicare Part B Physicians Fee Schedule including the relative value units ("RVU"), geographic price cost indices ("GPCI") and conversion factor for CPT Codes 98940, 98941, and 98942 for both 2012 and 2013. The 2012 figures apply to dates of service January 15, 2013, through February 28, 2013, while the 2013 figures apply to dates of service March 4, 2013, through April 9, 2013. *See* Fla. Stat. §627.736(5)(a)\(1) (the applicable fee schedule to be applied is the fee schedule in effect on March 1 of the year in which services are rendered). Thus, the 2012 fee schedule is the appropriate fee schedule to be utilized for dates of service January 15 through February 28, 2013, and the 2013 fee schedule is the appropriate fee schedule to be utilized for dates of service March 4, 2013, through April 9, 2013.

In support of its position regarding the appropriate allowable amount due pursuant to the Medicare Part B Physicians Fee Schedule, Defendant filed the 2013 Medicare Payment Amount File. Defendant did not file the Medicare Payment Amount File for 2012 or any other summary judgment evidence regarding the appropriate allowable amount due pursuant to the Medicare Part B Physicians Fee Schedule for 2012.

ARGUMENT BY THE PARTIES

The parties disagree as to the correct Medicare Part B Fee Schedule allowable amount for CPT code 98940, 98941, and 98942. Plaintiff contends that "fee schedule formula" issued by the Center for Medicare and Medicaid Services ("CMS") sets the appropriate allowable amount due pursuant to the Medicare Part B Physicians Fee Schedule for CPT codes 98940, 98941, and 98942. Defendant contends that it does not have to utilize the fee schedule formula. Instead, Defendant asserts that it can calculate its reimbursements to include a 2% reduction which is included in the Medicare Payment Amount File. Plaintiff asserts, that this reduction is improper because: 1) the RVU's utilized to calculate the fee schedule formula were never changed to include the 2% reduction as CMS made a conscious decision not to adjust the same whereby protecting the integrity of the fee schedule formula; 2) it solely applied to reimbursements between Medicare and Medicare Providers, neither of which apply to Plaintiff or Defendant; and, 2) though CMS implemented a 2% reduction, CMS expressly stated that the reduction was carved out *only* for claims that are to be paid by Medicare.

ANALYSIS

When properly invoked, the PIP statute allows an insurer to limit reimbursement of PIP claims according to a schedule of maximum benefits. That schedule is based on the type of provider and/or the type of services provided. As it relates to the Plaintiff, the appropriate fee schedule is 200% of Medicare Part B. Medicare reimbursements are determined via a mathematical calculation involving relative value units ("RVUs"), conversion factors and geographic adjustments. The formula originated in the Social Security Act reflected in §42 U.S.C. 1395w-4(b)(1) as follows:

> **(B) ESTABLISHMENT OF FEE SCHEDULES**
> **(1) IN GENERAL**
> Before November 1 of the preceding year, for each year beginning with 1998, subject to subsection (p), the Secretary shall establish, by regulation, fee schedules that establish payment amounts for all physicians' services furnished in all fee schedule areas (as defined in subsection (j)(2)) for the year. Except as provided in paragraph (2), each such payment amount for a service shall be equal to the product of—
>
> (A) the *relative value* for the service (as determined in subsection (c)(2)),
>
> (B) the *conversion factor* (established under subsection (d)) for the year, and
>
> (C) *the geographic adjustment factor* (established under subsection (e)(2)) for the service for the fee schedule area.

Based on the foregoing, the reimbursement value for any covered Medicare service in the United States can easily be calculated by multiplying the relative value for the service, the conversion factor for the year that the service was performed and the geographic adjustment factor applicable to the locality in which the service is provided.

Plaintiff's motion illustrates, and it is undisputed, that using the above referenced RVU formula results in the following allowable amounts pursuant to the Medicare Part B Fee Schedule:

I. 98940

a. 2012:

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(0.45 x 1) + (0.30 x 0.968) + (0.01 x 1.553)] x $34.0376 =

[(0.45 + 0.2904 + 0.01553)] x $34.0376 =

(.75593) x $34.0376 = $25.73

200% of this amount is $51.46

b. 2013

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(0.45 x 1) + (0.31 x 0.968) + (0.01 x 1.553)] x $34.023 =

[(0.45 + 0.30008 + 0.01553)] x $34.023 =

(.76561) x $34.023 = $26.05

200% of this amount is $52.10.

II. 98941

a. 2012

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(0.65 x 1) + (0.38 x 0.968) + (0.03 x 1.553)] x $34.0376 =

[(0.65 + 0.36784 + 0.04659)] x $34.0376 =

(1.06443) x $34.0376 = $36.23

200% of this amount is $72.46.

b. 2013

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(0.65 x 1) + (0.39 x 0.968) + (0.03 x 1.553)] x $34.023 =

[(0.65 + 0.37752 + 0.04659)] x $34.023 =

(1.0741) x $34.023 = $36.54

200% of this amount is $73.08.

III. 98942

a. 2012

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(0.87 x 1) + (0.46 x 0.968) + (0.03 x 1.553)] x $34.0376 =
[(0.87 + 0.44528 + 0.04659)] x $34.0376 =
(1.36187) x $34.0376 = $46.35
200% of this amount is $92.70.

As an initial matter, the Defendant did not submit any record evidence regarding the amount due pursuant to the 2012 Medicare Part B Fee Schedule, which is applicable to dates of service January 15, 2013, through February 28, 2013. *See* Fla. Stat. §627.736(5)(a)(1). Thus, Plaintiff has submitted the only record evidence regarding the appropriate allowable amounts due pursuant to the Medicare Part B Fee Schedule for dates of service January 15, 2013, through February 28, 2013, and there is no record evidence to rebut the same. As such, Plaintiff is entitled to summary judgment regarding dates of service January 15, 2013, through February 28, 2013.

The only record evidence filed by Defendant in opposition to Plaintiff's Motion for Summary Judgment are the 2013 Medicare *payment files* which only reflect a reimbursement value of $25.53 for CPT code 98940, 200 percent of which is $51.06, $35.81 for CPT code 98941, 200 percent of which equals $71.62, and $45.73 for CPT code 98942, 200 percent of which equals $91.46. Defendant maintains this is the maximum allowable amount. Plaintiff contends that the "payment" files do not reflect the allowable amount because the reimbursable amounts in the "payment files" were intentionally reduced by CMS by 2% with clear notice that the 2% reduction was specific to claims that Medicare would pay, and was for the specific purpose of reimbursing Medicare for the cost of a study relative to what services Medicare would cover. Specifically, the Department of Health and Human Services made it clear that the 2% reduction was only to be applied to Medicare claims:

> Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction *only in the payment files used by the Medicare contractors to process Medicare claims* rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs.

74 Federal Register No. 26, pp. 61927 (emph. added.).

In addition, this issue has been addressed in detail by numerous Federal Courts, which provide a detailed analysis of the history concerning the appropriate Medicare reimbursement for Chiropractic services. *See, e.g., Plantation Spinal Care Center, Inc. a/a/o Joseph Laban v. Direct General Insurance Company,* 2018 WL 3109631 (S.D. Fla. Apr. 2018). The Department of Health and Human Services commissioned a study to determine the feasibility of extending Medicare coverage to include additional Chiropractic treatment. The actual cost of performing the feasibility study exceeded the budgeted amount by 50 million dollars, which violated the requirement that Medicare remains "budget neutral." To recoup this unanticipated expense, CMS implemented a plan to reduce payment for Medicare Claims for Chiropractic treatment by 2 percent until it recouped the 50 million dollars.

Notice of this plan was published in the Federal Register on November 25, 2009. *See* 74 Federal Register No. 26, pp. 61926-61928. In this notice, Medicare advised that to preserve the integrity of its fee schedules, the reductions would *only appear in the payment files used by Medicare contractors,* and that *private payers should utilize the relative values published by Medicare to arrive at the correct payment.* In its notice, the Department of Health and Human Services made clear that the 2% reduction was only to be applied to claims that were submitted to Medicare. As such, Defendant could not rely on the same to determine its reimbursements in this case.

Where language is clear and unambiguous, judicial interpretation of statutes, regulations and insurance contracts requires that Courts construe said language according to its plain meaning. *Allstate Ins. Co. v. Holy Cross Hospital,* 961 So.3d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]. The plain language of §627.736 (5)(a) 2.f. *Florida Statutes* (2008) states that:

> 2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> f. For all other medical services, supplies, and care, 200 percent of the ***allowable amount*** under the participating physicians schedule of Medicare Part B.

The plain language of the aforementioned statute contains no language that would entitle a private payor, such as Defendant, to the 2% reduction that was specifically reserved for Medicare to recoup its cost overruns by claims that only Medicare is required to reimburse. Instead, the plain language of the statute mandates that the allowable amount be determined pursuant to the participating physicians fee schedule of Medicare Part B, which is calculated through the above mentioned fee schedule formula—which did not change during the time period that Medicare implemented the 2% reductions. Simply put: $51.46, $72.46 and $92.70 are the appropriate allowed amounts for CPT Codes 98940, 98941, and 98942 for 2012; and, $52.10, and $73.08 are the appropriate allowed amounts for CPT Codes 98940 and 98941 for 2013 as calculated pursuant to the RVU formula of Medicare Part B. Thus, Defendant has breached the subject policy of insurance by failing to allow the appropriate allowed amounts as reflected above, whereby entitled Plaintiff to summary judgment regarding the same.

CONCLUSION

Based on the foregoing analysis, this Court concludes that the appropriate allowable amounts for CPT codes 98940, 98941 and 98942 for 2012 is $51.46, $72.46, and $92.70; and $52.10 and $73.08 for CPT codes 98940 and 98941 in 2013. Plaintiff is therefore entitled to an additional $28.96 in underpaid benefits for the above mentioned codes, plus applicable prejudgment interest in the amount of $11.66 for a total due and owing to Plaintiff of $40.62.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to field sobriety exercises—Evidence regarding defendant's refusal to submit to field sobriety exercises is inadmissible where defendant was not informed of adverse consequences of refusal, and there is evidence that defendant's refusal was at least partially attributable to defendant's confusion regarding scope of *Miranda* warnings that were read to him

STATE OF FLORIDA, Plaintiff, v. HAMILTON JASPER BROWN, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case Nos. 2020 CT 135, 2020 CT 137, 2020 CT 139, 2020 TR 2442. December 9, 2020. Hal C. Epperson, Jr., Judge. Counsel: Garrett Lentz, Office of Assistant State Attorney, Kissimmee, for Plaintiff. Kendell Ali, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION IN LIMINE/MOTION TO SUPPRESS WITH REGARD TO REFUSAL TO SUBMIT TO FIELD SOBRIETY TESTS

This matter came before the court for hearing on December 3, 2020 on defendant's "Motion in Limine With Regard to Refusal to Submit to Field Sobriety Tests". In his motion, the defendant asks the court to prohibit the state from introducing evidence that the defendant refused to submit to field sobriety exercises on the basis that the refusal is not relevant or, alternatively, that any probative value of such refusal is outweighed by the danger of unfair prejudice. The state asserts that the defendant's refusal to submit to field sobriety tests is admissible to show consciousness of guilt.

MATERIAL FACTS

At hearing, the state offered the sworn testimony of City of St. Cloud Police Officers Mancayo and Mannix. Additionally, by

stipulation of the parties, an audio visual recording was admitted into evidence. Rather than providing an exhaustive recital of facts, the facts relevant to this particular motion are as follows: the defendant was detained following a traffic stop; during Officer Mancayo's conversations with the defendant he observed various indicia of impairment by alcohol and commenced a DUI investigation; during the course of roadside questioning, Officer Mancayo elected to inform the defendant of his *Miranda* rights and then asked the defendant, "having these rights in mind, do you wish to talk to me now?; the defendant responded, "No sir"; several minutes later, Officer Mancayo asked the defendant the following question, "would you mind doing some field sobriety tests for me?"; the defendant, in an obvious reference to the *Miranda* warnings previously read, responded, "no sir, you asked me not to talk (inaudible)"; Following this response by the defendant, there was no further conversation concerning the field sobriety exercises. Rather, Officer Mancayo proceeded to read the defendant Implied Consent and ultimately arrested the defendant for DUI. As suggested by the quotations above, most of the material facts upon which the instant motion hinge are available to the court by way of a roadside recording.

LEGAL ANALYSIS

It is typically the case that a DUI suspect's pre-arrest refusal to submit to field sobriety exercises is relevant and admissible evidence in a DUI prosecution on the grounds that such a refusal is indicative of consciousness of guilt. The "relevancy test" for evidence is not a rigorous one as all that is required is a showing that the particular evidence has a tendency in logic of proving or disproving a material fact. Section 90.401, Fla. Stat. (2020). When a motorist becomes aware that he is the subject of a DUI investigation and the investigator asks the defendant to submit to field sobriety exercises to determine impairment, a suspect's refusal to submit to these exercises might reasonably be viewed as consciousness of guilt under ordinary circumstances. Indeed, such refusals are routinely deemed admissible. However, evidentiary determinations of admissibility must be made, not upon routine, but upon the particular facts of each case.

In the instant case, Officer Moncayo elected, for whatever reason, to advise the defendant of his *Miranda* warnings during roadside questioning but arguably before formal arrest. (putting aside for purposes of the instant motion the arguments concerning *de facto* arrest due to retention of handcuffs). Moreover, these *Miranda* warnings were given to the defendant just moments before Officer Moncayo asked the defendant if he would mind doing field sobriety exercises. This is significant because, in declining to perform the field sobriety exercises, the defendant makes an obvious reference to the *Miranda* warnings, stating "no sir, you asked me not to talk". Apparently construing the defendant's response and reference to *Miranda* as being a committed refusal to perform field sobriety exercises, Officer Moncayo abandoned any further conversations concerning the field sobriety exercises and moved on to Implied Consent and the breath test.

It should be noted that providing *Miranda* warnings prior to requesting field sobriety exercises does not, *per se,* render a subsequent refusal to submit to field sobriety exercises inadmissible. Criminal law practitioners know that field sobriety exercises have been deemed non-testimonial in nature and therefore a DUI suspect does not have the right to legal counsel prior to the administration of these exercises. However, with respect to the defendant's refusal to perform the exercises, the state's theory of relevance and admissibility is rooted in the defendant's state of mind and the extent to which the refusal evidences consciousness of guilt. Laypersons do not necessarily have a practical grasp of the nuances of *Miranda* and its interplay with field sobriety exercises. When a layperson is read *Miranda* and told he has a right to remain silent, followed by a warmly worded question such as, "would you mind doing some tests for me?" that layperson might erroneously and yet rationally conclude that declining the tests is merely the non-incriminating exercise of a constitutional right. In this case, we don't have to speculate as to whether the defendant improvidently considered his refusal to be cloaked with constitutional protection because his own words reveal that he did when he stated, "no sir, you told me not to talk". Officer Mancayo took the defendant's comment and reference to the *Miranda* warning as a firm refusal and never sought clarification.

There is a body of case law prescribing a general analytical framework for assessing the relevance and admissibility of a suspect's refusal to submit to physical tests at the request of a law enforcement officer. As stated above, the theory of admissibility is that said refusals manifest a consciousness of guilt on the part of the refusing party, the notion being that the suspect possesses a unique awareness as to whether the test will yield incriminating results. However, despite the inherent logic in this proposition, Florida courts have held that for a refusal to be deemed relevant evidence of consciousness of guilt, the state must offer some evidence that the refusing defendant was either informed of adverse consequences attending his refusal or that the circumstances surrounding the refusal were such that adverse consequences flowing from the refusal would be reasonably presumed by the suspect. If, on the other hand, the circumstances surrounding a given refusal are such that the refusal could be fairly viewed as merely a desire to avoid further hassle or a desire to be left alone, then courts have held that the probative value of such a refusal as to showing consciousness of guilt would be outweighed by the potential of unfair prejudice, though frankly the cases lack a cogent explanation as to the basis of unfairness. *Menna v. State,* 846 So.2d 502 (Fla. 2003) [28 Fla. L. Weekly S340a]; Section 90.403, Fla. Stat. (2018). *Grzelka v. State,* 881 So.2d. 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a]; See also, *State v. Capozzi,* 20 Fla. L. Weekly Supp. 16a (Fla. 17th Cir. Ct. Aug. 28, 2012); *State v. McCoy,* 16 Fla. L. Weekly Supp. 450b (Fla. Hillsborough Cty. Ct. March 13, 2009); *State v. McKinnon,* 15 Fla. L. Weekly Supp. 520a (Fla. Brevard Cty. Ct. Feb. 17, 2008).

Particularly instructive for this court is the holding of the Ninth Judicial Circuit Court sitting in its appellate capacity in the decision, *Smart v. State of Florida, Department of Highway Safety and Motor Vehicles,* 13 Fla. L. Weekly Supp. 867a (Fla. 9th Cir. Ct. June 28, 2006). In *Smart,* the court essentially announced a rule concerning the admissibility of refusals to submit to field sobriety exercises, when it stated the following:

> "There is no indication in the charging affidavit that the Petitioner was informed of any adverse consequences of her refusal to submit to field sobriety testing. In addition, Officer Beasley testified that he requested Petitioner to submit to field sobriety tests and that when she refused there was no further conversation regarding the tests. Similarly, Officer Lawless testified that there was no other conversation regarding the field sobriety tests other than Officer Beasley's request and the Petitioner's refusal. Accordingly, the Petitioner was not informed of the adverse consequences of her refusal and therefore, the hearing officer erred in failing to strike the testimony and evidence regarding Petitioner's refusal." *Smart,* 13 Fla. L. Weekly Supp. at 867a.

Thus, the ninth circuit court sitting in its appellate capacity has held that a DUI suspect's refusal to submit to field sobriety exercises is irrelevant and inadmissible unless the DUI suspect is informed of at least one adverse consequence which would accrue from the refusal. This court is bound by a decision of the ninth judicial circuit court sitting in its appellate capacity.

Turning to the facts in this case, the salient facts for purposes of applying *Smart* are indistinguishable from those in *Smart.* The audio-

visual recording in evidence makes it clear that the defendant was not informed by Officer Mancayo of any adverse consequences of his refusal to submit to field sobriety testing. When the defendant refused to submit to the field sobriety exercises, there was no further conversation regarding the field sobriety exercises. Moreover, in this case, there is even record evidence that the defendant's refusal was, at least in part, attributable to his confusion concerning the scope of the Miranda warnings which had been read to him just moments before the request to submit to the field exercises. Under the holding of *Smart,* the defendant's refusal to submit to the field sobriety exercises in this case is inadmissible to show consciousness of guilt.

This court would humbly note, *in dicta,* its own assessment that the announced holding in *Smart* is overbroad and unnecessarily imposes upon law enforcement an affirmative duty to inform of adverse consequences as an absolute predicate for the showing of relevance of a refusal. It is this court's view that the relevancy of a suspect's refusal with respect to showing consciousness of guilt does not, as a matter of logic, necessarily hinge upon whether a law enforcement officer explicitly tells a refusing suspect there may be adverse consequences. The *Smart* holding presumes that a refusing suspect is incapable of reasonably inferring adverse consequences from his refusal in the absence of a law enforcement advisory. This does not, in this court's modest view, comport with reality. While informing a refusing suspect that his refusal may be used against him in court might heighten the persuasiveness of the state's argument concerning consciousness of guilt, the absence of such a warning does not necessarily nullify the relevancy of a refusal. In this court's judgment, relevancy should be determined on a case by case basis irrespective of whether a law enforcement officer has explicitly communicated a potential adverse consequence. The jury, as fact finder, can ascribe whatever relative weight to the refusal as the totality of circumstances may warrant and should not be deprived of evidence in the absence of a bona fide concern that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Section 90.403, Fla. Stat. (2020).

It is noteworthy that neither the *Smart* decision nor the other cases cited herein identify with substantive explanation which countervailing concern enumerated in the relevance statute substantially outweighs the probative value of the respective refusals in each case. Suppose hypothetically that a refusal to submit to a test has some tendency in logic, albeit a lightly weighted one, to demonstrate consciousness of guilt. By statute, this lightly weighted tendency in logic is sufficient for its admission unless substantially outweighed by one of the enumerated concerns, such as unfair prejudice. If the only unfair prejudice which can be contemplated is that the jury may ascribe a different quantum of weight to the refusal than the court, this is not a basis for exclusion. Exclusion on these grounds would constitute an improper substitution of judgment, that of the court in place of the proper judgment of the fact finder. The logic undergirding the relevancy of a defendant's refusal to submit to testing lies primarily in the fact that the defendant peculiarly knows the likely outcome of the test and therefore the refusal may be viewed as consciousness of guilt. In other words, a suspect conscious of his own guilt would be more inclined to eschew a test of disclosure than a suspect not conscious of his own guilt. While the probative weight of such a refusal may be enhanced by a host of factors, such as an explicit warning from a law enforcement officer, the absence of such a warning does not necessarily strip the refusal of all relevance. This court would entrust the jury with ascribing the proper probative weight to a DUI suspect's refusal in the absence of an articulable and legitimate concern that its admission would be substantially outweighed by the danger of *articulable* unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence. But this court's own assessment yields to controlling case law. Based upon the standard enunciated in *Smart,* the defendant's refusal to submit to field sobriety exercises is not relevant for the showing of consciousness of guilt.

WHEREFORE, the Defendant's Motion in Limine/Motion to Suppress with Regard to Refusal to Submit to Field Sobriety Tests is **GRANTED** and the State of Florida shall not be permitted to adduce testimony concerning the refusal and shall not be permitted to argue that the defendant's refusal to submit to field sobriety exercises be considered evidence of consciousness of guilt. This holding, however, does not necessitate that this portion of the audio-visual recording be redacted from publication should the evidence be admitted.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Insurer should have applied deductible to 100% of charges before making reductions under statutory fee schedule

NEW MEDICAL GROUP INC., a/a/o Jessica Salazer, Plaintiff, v. UNITED AUTOMOBILE INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2011-002945-SP-21, Section HI 01. January 30, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF MISSAPPLICATION OF POLICY DEDUCTIBLE

This Cause came before the Court on January 17, 2020, on Plaintiff's Motion for Partial Summary Judgment regarding Defendant, United Automobile Insurance Company's incorrect application of the deductible, and the Court, having reviewed the Plaintiff's Motion and supporting evidence, the entire Court file, case history and docket, relevant legal authorities, statutes and arguments of counsel, the Court hereby rules as follows:

BACKGROUND AND FACTUAL FINDINGS:

1. This case stems from a motor vehicle accident that occurred on August 5, 2009.

2. The claimant, Jessica Salazar was treated for injuries arising out of said car accident by the Plaintiff.

3. Plaintiff, as assignee of Defendants policy of insurance, submitted its bills for treatment of Jessica Salazar for payment of "PIP" benefits to Defendant, United Auto.

4. The parties agreed per stipulation that the treatment/CPT Codes rendered by the Plaintiff for dates of service: 8/6/09, 8/17/09, and 8/18/09 totaling $ 1,480.00 is related and medically necessary treatment:

8/6109 DATE OF SERVICE:

a) X-rays of the cervical spine billed under CPT code 72050 for $ 250.00;

b) X-rays of the thoracic spine billed under CPT code 72070 for $ 250.00;

c) X-rays of the lumbar spine billed under CPT code 72100 for $ 250.00;

d) Initial examination billed under CPT code 99203 for $ 250.00;

e) Hot/cold packs billed under CPT code 97010 for $ 50.00;

f) Electric stimulation billed under CPT code 97014 for $ 50.00;

g) Mechanical traction billed under CPT code 97012 for $ 40.00.

8/17/09 DATE OF SERVICE:

h) Hot/cold packs billed under to CPT code 97010 ($ 50.00);

i) Electric stimulation billed under CPT code 97014 ($ 50.00);

j) Ultrasound billed under CPT code 97035 ($50.00);

8/18/09 DATE OF SERVICE:

k) Hot/cold packs billed under to CPT code 97010 ($50.00);
l) Electric stimulation billed under CPT code 97014 ($50.00);
m) Ultrasound billed under CPT code 97035 ($50.00);
n) Mechanical traction billed under CPT code 97012 ($40.00).

Defendant's statutorily mandated Explanation of Review reflect that in processing Plaintiff's claim for these dates of service, Defendant first reduced Plaintiff's bills and then applied its insured's policy deductible in the amount of $ 1,000.00 to the reduced amounts, resulting in zero payment for said bills. Plaintiff's further argue that Fla. Stat. 627.739 (2) required Defendant to apply its insured's policy deductible to 100 percent of the expenses and losses received by Defendant or the face amount of Plaintiff's charges at which time its obligation to make payment of PIP benefits would have ripened; had Defendant properly applied the policy deductible to Plaintiff's bills, it would have been obligated to make payment of $ 152.42 for treatment rendered and billed under CPT codes 97010, 97014, 97012 for 8/6/09; CPT code 97010, 97014, 97035 for date of service 8/17/09; and CPT code 97010, 97014, 97035, 97012 for date of service 8/18/09.

Based on a review of Defendant's own Explanation of Review, the Defendant applied the $ 1,000.00 deductible as follows:

$ 1,480.00 in treatment charges ("TOTAL CHARGES") and reduced said total ("REDUCTIONS BILL REVIEW") by $ 799.94 leaving a balance of $ 680.06. Defendant then applied its $ 1,000.00 policy deductible to this reduced amount and paid nothing as a result.

The Defendant argued Plaintiff's motion was premature in that the parties would first have to have a trial by jury on the remaining "reasonable" issue in this case, and thereafter, make the appropriate calculations regarding the Defendant's admitted misapplication of the deductible and set off said amount. As a result, the Defendant either requests a denial of Plaintiff's Motion as premature or a stay on the deductible issue until trial.

LEGAL ANALYSIS:

Fla. Stat. 627.739(2) provides:

> *"Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $ 250., $500, and $ 1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $ 10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).*

Furthermore, binding Florida Supreme Court precedent requires that a PIP policy deductible "must be applied to 100 percent of the expenses and losses" or the face amount of Plaintiff's charges before making any reductions:

> Section 627.732 requires the deductible to be applied to the total medical charges prior to reduction under the reimbursement limitation in the PIP statute. . . . a plain reading of the statutory provision makes clear that the deductible must be subtracted from the provider's charges before the reimbursement limitation is applied. See *Progressive Select Ins. Co. v. Florida Hospital Medical Center*, 260 So.3d 219 (Fla. 2018).

As a result, Defendant should have applied its $ 1,000 policy deductible as follows:

1) Applied $ 250.00 of its policy deductible to 100% of the Plaintiff's bill for CPT code 72050 on 8/6/09 (bill totaling $ 250.00) for deductible total of $ 250.00;

2) Applied $ 250.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 72070 on 8/6/09 (bill totaling $ 250.00) for a deductible total of $ 500.00;

3) Applied $ 250.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 72100 on 8/6/09 (bill totaling $ 250.00) for a deductible total of $ 750.00;

4) Applied the remaining $ 250.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 99203 billed on 8/6/09 (bill totaling $ 250.00) for a deductible total of $ 1,000.00, meeting the final deductible threshold.

The proper application of the policy deductible triggers and ripens Defendant's obligation to make payment of PIP benefits.

As to treatment rendered and billed under CPT codes 97010, 97014, 97012 on 8/6/09, CPT codes 97010, 97014, 97035, for 8/17/09; and CPT codes 97010, 97014, 97035, 97012 for 8/18/09 per Defendant's explanation of Review, said treatment is not subject to the policy deductible. The billed amount for said treatment totals $ 480.00 and Defendant's allowed amount for these CPT codes total $ 190.52 ($ 480.00 - $ 289.48= $ 190.52).

The proper application of the policy deductible demonstrates Defendant's obligation to have made payment of PIP benefits in the amount of $ 152.42 for treatment rendered and billed under CPT codes 97010, 97014, 97012 for 8/6/09; CPT codes 97010, 97014, 97035 for 8/17/09; and CPT codes 97010, 97014, 97035, 97012 for 8/18/09. However, Defendant paid nothing for these codes based solely on its misapplication of the policy deductible.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *Volusia County v. Aberdeen At Ormond Beach, L.P.*, 760 So.2d. 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [citing *Menendez v. Palms West Condominium Ass'n*, 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; see also *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Moore v. Morris*, 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.*, 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the Plaintiff need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id.* at 601 [citing *Harvey Building, Inc. v. Haley*, 175 So.2d 780 (Fla. 1965)]; see also *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach*, 226 So.2d 866 (Fla. 4th DCA 1969).

With regards to Defendant's assertion that Plaintiff's motion is premature, the Court disagrees. There is no lawful basis or need to stay Plaintiff's Motion regarding this specific issue of misapplication of the deductible. As Florida Rule of civil procedure 1.510 clearly states: *"A party seeking to recover on a claim, counterclaim, crossclaim, or third-party claim or declaratory judgment, may move for a summary judgment in that party's favor on all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party."*

Additionally, the Defendant would not be entitled to a set-off to any amounts deemed to be compensable as a matter of law, such as the amounts owed to the Plaintiff by virtue of the Defendant's misapplication of the $ 1,000.00 policy deductible. The defense of set-off is an affirmative defense that must be pled. The failure to plead a set-off as an affirmative defense constitutes a waiver of such defense. See *Felgenhauer v. Bonds*, 891 So.2d 1043 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2049a]; see also *Jojo's Clubhouse, Inc. v. DBR Asset Management, Inc.*, 860 So.2d 503 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2739b]; and *Udell v. Udell*, 950 So.2d 528 (Fla. 4th DCA

2007) [32 Fla. L. Weekly D718a]. Here, the Defendant has not, nor has ever pled a "set off" defense.

Lastly, because Defendant's undisputed misapplication of the policy deductible is not a question for the jury, but rather a determination to be made by the Court as a matter of law, this Court finds that there is no genuine issue of material fact that the Defendant misapplied the policy's $ 1,000.00 deductible towards the Plaintiff's charges. Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment is Granted. Plaintiff is entitled to partial summary judgment against Defendant in the amount of $ 152.42, plus interest. This decision will be reflected in a Final Judgment ***only after*** all other outstanding issues and claims are resolved.

* * *

Attorney's fees—Insurance—Law of case—Where appellate court determined that insurer was entitled to appellate attorney's fees based on proposal for settlement, that ruling has become law of case, and insurer is entitled to award of trial level fees that are premised on same proposal for settlement

SILVERLAND MEDICAL CTR., LLC, a/a/o Merland Etienne, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-004319-SP-25, Section CG03. November 20, 2020. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Maury L. Udell and Katherine Arnholt, Beighley Myric Udell + Lynne, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S ENTITLEMENT TO ATTORNEYS' FEES

THIS CAUSE having come before the Court, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

This was a suit for Personal Injury Protection ("PIP") benefits stemming from an automobile crash that allegedly occurred on or about August 29, 2011, and involving Merland Etienne ("Claimant"). Since the beginning, Defendant has maintained that it was not liable as Claimant was not entitled to coverage because she was the owner of an uninsured vehicle or vehicles at the time of the loss. Defendant denied the claim on this basis, upheld said denial when it received a pre-suit demand, and maintained this position through litigation which ultimately culminated with a successful appeal and the appellate court's ruling that Defendant is entitled to its appellate attorneys' fees based on the proposal for settlement ("PFS") served on November 9, 2015. Prior to that ruling, Plaintiff filed its response to Defendant's Motion for Appellate Fees and therein argued that the PFS at issue was invalid and not made in good faith. The Eleventh Circuit Appellate Division granted Defendant's motion and stated that "[t]he case is to be remanded to the lower court to determine the amount of a reasonable fee."

Thereafter, Plaintiff sought rehearing, clarification and to correct legal error with the Eleventh Circuit Appellate Division, arguing that the Order granting entitlement should have been conditioned upon the trial court determining that the relevant PFS was valid and made in good faith, but the Eleventh Circuit denied Plaintiff's motion. Plaintiff then sought review by the Third District Court of Appeal, arguing (1) that the Eleventh Circuit's Order granting Progressive's entitlement violated clearly established law holding that entitlement to appellate fees based on a proposal for settlement is contingent upon a factual determination by the trial court, (2) that the order failed to afford procedural due process by arrogating unto itself the trial court's fact-finding role and granting Progressive entitlement to attorney's fees with neither a factual record in support nor the opportunity for Silverland to be heard, and (3) the order was a miscarriage of justice. Progressive's Response maintained that the Eleventh Circuit had the authority to determine if the proposal for settlement was enforceable, and pointed out that if any error had occurred, it was invited by Plaintiff's Response which argued it was nominal, not in good faith, lacked any reasonable foundation, and was deficient, and asked the appellate court to rule on its enforceability. The Third District denied Plaintiff's Petition, at which time Plaintiff filed a Motion for Clarification and/or Motion for Written Opinion, therein arguing that "[t]he Eleventh Circuit's Order awarding Progressive entitlement to appellate attorney's fees violated long-standing binding decision precedent. . . ." On January 29, 2020, the Third District Court of Appeal denied Plaintiff's Motion.

Defendant now asks this Court to determine a reasonable amount of appellate and trial level attorneys' fees, arguing that entitlement has been determined at the appellate level and remanded for this Court to simply determine the amount. Defendant argues that the appellate court determined that the Defendant is entitled to an award of appellate attorneys' fees based upon the PFS and that ruling has become the law of the case. Since the trial level fees are conditioned upon the same PFS, the law of the case dictates that Defendant is likewise entitled to its trial level fees. This Court agrees.

The Third District Court of Appeal has clearly explained the law of the case doctrine as follows:

> [T]he law of the case doctrine stands for the proposition that "questions of law that have actually been decided on appeal must govern the case in the same court and in the trial court through all subsequent stages of the proceedings." This doctrine includes "issues explicitly ruled [upon] by the court" and issues "which were implicitly addressed or necessarily considered by the appellate court's decision."

Boatarama, Inc. v. Gomes, 7 So. 3d 579, 581-582 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D487a] (citing *Borack v. Orovitz,* 963 So. 2d 802, 804 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1831c] (quoting *Specialty Rest. Corp. v. Elliott,* 924 So. 2d 834, 837 (Fla. 2d DCA 2005) [31 Fla. L. Weekly D67a])). "Pursuant to the law of the case doctrine, a lower court cannot change the law of the case, and a trial court must 'follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case.' " *United Auto. Ins. Co. v. Comprehensive Health Center,* 173 So. 3d 1061, 1065 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1839a] (citing *Fla. Dep't. of Transp. v. Juliano,* 801 So. 2d 101, 106 (Fla. 2001) [26 Fla. L. Weekly S784a]).

In *Arce v. Wackenhut Corp.,* 146 So. 3d 1236 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1932a], the Third District affirmed an order awarding appellate attorneys' fees and costs, reversed an order vacating an order of entitlement to trial court fees and costs, and remanded the case to the trial court to hold a hearing to fix the amount of fees and costs without consideration of any claim of lack of good faith. Like in the instant case, the issue of entitlement had been determined by the appellate court and became the law of the case. *Id.*

In *Silva v. U.S. Sec. Ins. Co.*, 734 So. 2d 429, 430 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D933b], another PIP case, the Third District had previously reversed a judgment entered against the insurer with instructions that judgment be entered in favor of said insurer. In that first appeal, the insurer moved for attorneys' fees based on a proposal for settlement, and the Third District granted the motion. *Id.* On remand, the insurer moved for its trial court fees as well, based on the same proposal. *Id.* At that point, the insured challenged the validity of the proposal, but the trial court granted the insurer's motion. *Id.* The Third District affirmed the trial court's order awarding trial court attorneys' fees to the insurer based on the fact that the previous appellate order and mandate awarding fees became the law of the case and precluded any re-litigation of the issues on remand. *Id.*

Based on the foregoing cases, this Court believes that that Defendant's entitlement to an award of attorneys' fees has been established

and is the law of the case. This Court has reviewed the cases cited by Plaintiff in opposition, but does not find them compelling or relevant. Likewise, this Court does not believe any exceptions exist which would allow it to disregard the law of the case. There have been no changes in the record of this case, nor have there been any intervening changes in the law or other exceptional circumstances which would allow the law of the case to be altered. Similarly, this Court is not persuaded by Plaintiff's argument that the denial of Plaintiff's Petition by the Third DCA without opinion would somehow disturb the law of the case. While it is true that a *per curium* decision without explanation has no precedential value, it can be relied upon for *res judicata*. *See State v. Swartz,* 734 So. 2d 448 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1117a]; *Department of Legal Affairs v. District Court of Appeal, 5th District,* 434 So. 2d 310, 313 (Fla. 1983); *St. Fort ex rel. St. Fort v. Post, Buckley, Schuh & Jernigan,* 902 So. 2d 244, 248 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1276a]. Regardless of its reasons, the Third DCA chose not to disturb the ruling of the Eleventh Circuit. The ruling of the Eleventh Circuit Appellate Division granting Defendant's entitlement to an award of attorneys' fees based upon the PFS is the law of the case, and the mandate by which this Court must abide is to simply determine the amount of a reasonable fee.

Even if the issue had not already been determined, this Court finds no evidence of bad faith. Absent a finding that a party's offer of judgment was not made in good faith, the trial court cannot disallow an entitlement to an award of fees. *See Bosem v. Commerce & Industry Ins. Co.*, 35 So. 3d 944 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D892a]. "The determination of whether an offer was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make the offer." *Talbott v. Am. Isuzu Motors, Inc.*, 934 So. 2d 643, 647 (Fla. 2d DCA 2005) [31 Fla. L. Weekly D2021b]. This Court believes the record in this case reveals such a foundation. Additionally, good faith is determined solely by the subjective motivations and beliefs of the offeror at the time the offer was made, not the reactions of the offeree, or the offeree's unilateral opinions of the case. *Wagner v. Brandeberry*, 761 So. 2d 443, 446 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1344b]. Plaintiff's disagreement with Defendant's motivations and beliefs does not equate bad faith on Defendant's behalf.

For the above and foregoing reasons, Defendant's Motion is GRANTED. Defendant is entitled to an award of trial and appellate attorneys' fees. An evidentiary hearing to determine the amount shall be set at a date and time mutually convenient to all parties.

* * *

Landlord-tenant—Discovery—Depositions—Failure to attend—Sanctions are imposed for failure of landlord and his counsel to attend deposition of tenant that was set at request of landlord

GUY VELIA, Plaintiff, v. MARIE DARCISE BUISSERETH, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-014911-CC-23, Section ND01. October 29, 2020. Motion for Reconsideration denied November 9, 2020. Myriam Lehr, Judge. Counsel: Charles Henry Groves, Law Office of Charles H. Groves, North Miami, for Plaintiff. Hegel Laurent, Laurent Law Office, P.L., Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S APRIL 8, 2020 MOTION FOR SANCTIONS: PLAINTIFF AND HIS COUNSEL'S FAILURE TO ATTEND PLAINTIFF'S OWN MUTUALLY COORDINATED DEPOSITION OF DEFENDANT

THIS CAUSE came on to be heard on DEFENDANT, MARIE DARCISE BUISSERETH's April 8, 2020 Motion For Sanctions and after considering the arguments of counsel for both parties at the October 24, 2020 Hearing on the matter and being otherwise fully advised in the Premises, the Court makes the following findings of facts and conclusions of law:

INTRODUCTION

1. At the request of Plaintiff's counsel, CHARLES H. GROVES, ESQ. attorney for the Plaintiff-Landlord, a deposition of the Defendant-Tenant was scheduled to take place on March 10, 2020. The deposition was to be taken at the Plaintiff's counsel's office and arrangements were made with Defendant's Counsel HEGEL LAURENT, ESQ., including making specific accommodations for the Defendant to take the day off from work to attend. The coordination was set by email and confirmed by telephone as well. After mutually setting the Deposition, Plaintiff's counsel filed a Notice of Taking Deposition on February 4, 2020 setting forth the pertinent details of the deposition.

2. On March 10, 2020, the Defendant's counsel as well as the Defendant herself appeared timely for the Deposition at Plaintiff's counsel's office. Neither the Plaintiff's Counsel nor the Plaintiff were present *at his own office for the deposition he set*, nor was there anyone at his office to provide entry into the office, nor was the Plaintiff there, nor was there any Court Reporter there, nor the agreed-upon Haitian-Creole Translator. After waiting outside of Plaintiff's counsel's office without any seating or welcome for the better part of an hour and receiving no response from the efforts to contact Plaintiff's Counsel, the Defendant and her counsel left.

3. Further, Defendant attempted to resolve this dispute with Plaintiff without the need for judicial intervention. The parties were unable to resolve the matter and the Defendant filed a Motion For Sanctions on April 8, 2020 and the Defendant responded with a filing over a month later on May 18, 2020.

MEMORANDUM OF LAW

4. Subsection (h)(1) of Florida Rule of Civil Procedure 1.310 denominated "Failure To Attend Or To Serve Subpoena; Expenses" allows a court to award reasonable expenses, including attorney's fees, incurred by another party when the party that notices a deposition, as pertinent here, fails to attend the deposition and the party being deposed appears accordingly.

5. In this case, Plaintiff, by and through his Counsel: mutually coordinated a deposition of the Defendant with the Defendant and her counsel, filed a notice for the deposition providing for the time and place of such, along with his Counsel, the Plaintiff failed "to attend and proceed therewith" as the Rule so states.

6. Importantly, unlike when the deponent fails to attend a deposition set by the opposing party which may be sanctioned by Rule 1.380 [Failure To Make Discovery; Sanctions], the Florida Rules of Civil Procedure do not provide any exemption, mitigation, or exceptions in this scenario since the party setting the deposition bears the risk of loss. Fla. R. Civ. P. 1.310 (h) [Failure To Attend Or To Serve Subpoena; Expenses] (providing no exceptions to sanctions for the party setting the deposition).

7. The deposition has never been re-scheduled by the Plaintiff.

CONCLUSION

8. At the October 24, 2020 hearing, this Court considered all of the above which is generally supported by the exhibits to the Defendant's Motion.

9. It has been more than half a year since the missed deposition, therefore, ***within ten (10) days of this Order, the Court finds it reasonable that:***

PLAINTIFF GUY VELIA shall pay Defendant's Counsel ***$750.00 (SEVEN HUNDRED AND FIFTY DOLLARS (USD)) TOTAL*** amount in legal U.S. tender by certified check or money order directly to the **LAURENT LAW OFFICE, P.L. TRUST ACCOUNT** at the attorney's current address with the Florida Bar, which is presently **Laurent Law Office, P.L., 930 South State Road 7, Plantation, FL 33317**.

The Plaintiff's failure to comply with this Order within ten (10) days of this Order shall subject the Plaintiff to additional sanctions including any attorney's fees and costs incurred as a result of the Defendant's reasonable efforts to obtain compliance. If addition if necessary for compliance, the Defendant may seek to reduce this Order to a Final Judgment.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS CAUSE having come on to be heard before the Court upon the Plaintiff, GUY VELIA's, Motion for Reconsideration, and the Court having reviewed said Motion, testimony of the Plaintiff's witness and having heard argument of counsel

IT IS HEREBY ORDERED AND ADJUDGED that said Motion be and the same is hereby denied.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Insurer should have applied deductible to 100% of charges before making reductions under statutory fee schedule

DOCTOR REHAB CENTER INC., a/a/o Luis A. Bonilla, Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2011-002973-SP-21, Section HI 01. January 30, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUE OF POLICY DEDUCTIBLE

This Cause came before the Court on January 17, 2020, on Plaintiff's Motion for Partial Summary Judgment regarding Defendant, United Automobile Insurance Company's incorrect application of the deductible, and the Court, having reviewed the Plaintiff's Motion and supporting evidence, the entire Court file, case history and docket, relevant legal authorities, statutes and arguments of counsel, the Court hereby rules as follows:

BACKGROUND AND FACTUAL FINDINGS:

1. This case stems from a motor vehicle accident that occurred on January 9, 2010.

2. The claimant, Luis A. Bonilla was treated for injuries arising out of said car accident by the Plaintiff.

3. Plaintiff, as assignee of Defendant's policy of insurance, submitted its bills for treatment of Luis Bonilla for payment of "PIP" benefits to Defendant, United Auto.

4. The parties agreed per stipulation that the treatment/CPT Codes rendered by the Plaintiff for dates of service: 1/11/10 through 1/20/10 totaling $ 1,205.00 is related and medically necessary treatment:

01/11/10 DATE OF SERVICE:

a) Initial examination billed under CPT code 99203 for $ 250.00;
b) Manual therapy billed under CPT code 97140 for $ 70.00;
c) X-rays of the cervical spine billed under CPT code 72050 for $ 250.00;

01/13/10 DATE OF SERVICE:

d) Therapeutic activities billed under to CPT code 97530 ($ 65.00);
e) Hot/cold packs billed under CPT code 97010 ($ 50.00);
f) Electric stimulation billed under CPT code G0283 ($50.00);

01/15/10 DATE OF SERVICE:

g) Manual therapy billed under to CPT code 97140 ($70.00);
h) Therapeutic activities billed under CPT code 97530 ($65.00);
i) Hot/cold packs billed under CPT code 97010 ($50.00);
j) Electric stimulation billed under CPT code G0283 ($50.00).

01/20/10 DATE OF SERVICE:

k) Manual therapy billed under CPT code 97140 ($ 70.00);
l) Therapeutic activities billed under CPT code 97530 ($65.00);
m) Hot/cold packs billed under CPT code 97010 ($50.00);
n) Electric stimulation billed under CPT code G0283 ($50.00)

Defendant's statutorily mandated Explanation of Review reflect that in processing Plaintiff's claim for these dates of service, Defendant first reduced Plaintiff's bills and then applied its insured's policy deductible in the amount of $ 1,000.00 to the reduced amounts, resulting in zero payment for said bills. Plaintiff's further argue that Fla. Stat. 627.739 (2) required Defendant to apply its insured's policy deductible to 100 percent of the expenses and losses received by Defendant or the face amount of Plaintiff's charges at which time its obligation to make payment of PIP benefits would have ripened; had Defendant properly applied the policy deductible to Plaintiff's bills, it would have been obligated to make payment of $ 112.77 for treatment rendered and billed under CPT codes 97140, 97530, 97010, and G0283 rendered on 01/20/10.

Based on a review of Defendant's own Explanation of Review, the Defendant applied the $ 1,000.00 deductible as follows:

$ 1,205.00 in treatment charges ("TOTAL CHARGES") and reduced said total ("REDUCTIONS BILL REVIEW") by $ 403.12 leaving a balance of $ 801.88. Defendant then applied its $ 1,000.00 policy deductible to this reduced amount and paid nothing as a result.

The Defendant argued Plaintiff's motion was premature in that the parties would first have to have a trial by jury on the remaining "reasonable" issue in this case, and thereafter, make the appropriate calculations regarding the Defendant's admitted misapplication of the deductible and set off said amount. As a result, the Defendant either requests a denial of Plaintiff's Motion as premature or a stay on the deductible issue until trial.

LEGAL ANALYSIS:

Fla. Stat. 627.739(2) provides:

"Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $ 250., $500, and $ 1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $ 10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

Furthermore, binding Florida Supreme Court precedent requires that a PIP policy deductible "must be applied to 100 percent of the expenses and losses" or the face amount of Plaintiff's charges before making any reductions:

> Section 627.732 requires the deductible to be applied to the total medical charges prior to reduction under the reimbursement limitation in the PIP statute.
>
> . . . a plain reading of the statutory provision makes clear that the deductible must be subtracted from the provider's charges before the reimbursement limitation is applied. *See Progressive Select Ins. Co. v. Florida Hospital Medical Center*, 260 So.3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a].

As a result, Defendant should have applied its $ 1,000 policy deductible as follows:

1) Applied $ 250.00 of its policy deductible to 100% of the Plaintiff's bill for CPT code 99203 on 01/11/10 (bill totaling $ 250.00) for deductible total of $ 250.00;

2) Applied $ 70.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97140 on 01/11/10 (bill totaling $ 70.00) for a deductible total of $ 320.00;

3) Applied $ 250.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 72050 on 01/11/10 (bill totaling $ 250.00) for a deductible total of $ 570.00;

4) Applied $65.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97530 billed on 01/13/10 (bill totaling $ 65.00) for a deductible total of $ 635.00.

5) Applied $50.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97010 on 01/13/10 (bill totaling $ 50.00) for a deductible total of $ 685.00;

6) Applied $ 50.00 of its poicy deductible to 100% of Plaintiff's bill for CPT code G0283 on 01/13/10 (bill totaling $ 50.00) for a deductible total of $ 735.00;

7) Applied $ 70.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97140 on 01/15/10 (bill totaling $ 70.00) for a deductible total of $ 805.00;

8) Applied $ 65.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97530 on 01/15/10 (bill totaling $ 65.00) for a deductible total of $ 870.00;

9) Applied $ 50.00 of its policy deductible to 100% of Plaintiff's bill for CPT code G0283 on 01/15/10 (bill totaling $ 50.00) for a deductible total of $ 920.00;

10) Applied $ 50.00 of its policy deductible to 100% of Plaintiff's bill for CPT code G0283 on 01/15/10 (bill totaling $ 50.00) for a deductible total of $ 970.00;

11) Applied the remaining $ 30.00 of its policy deductible to 100% of Plaintiff's bill for CPT code 97140 on 01/20/10 (bill totaling $ 70.00) for a deductible total of $ 1000.00, thereby meeting the deductible threshold.

The proper application of the policy deductible triggers and ripens Defendant's obligation to make payment of PIP benefits. The proper application as noted above leaves a balance of $ 40.00 9 $ 70.00 minus $ 30.00) on CPT code 97140 billed on date of service 01/20/10 for Defendant's consideration. Since this balance is less than the $ 56.46 amount allowed by Defendant for CPT code 97140, said CPT code is payable at 80% of $ 40.00 or $ 32.00.

As to treatment rendered and billed under CPT codes 97530, 97010, G0283 on 01/20/10 per Defendant's explanation of Review, said treatment is not subject to the policy deductible. The billed amount for said treatment totals $ 165.00 and Defendant's allowed amount for these CPT codes total $ 100.96 ($ 165.00 - $ 64.04 = $ 100.96).

The proper application of the policy deductible demonstrates Defendant's obligation to have made payment of PIP benefits in the amount of $ 112.77 ($ 32.00 for CPT code 97140 plus $ 80.77 for CPT codes 97530, 97010, G0283 billed on date of service 01/20/10. However, Defendant paid nothing for these codes based solely on its misapplication of the policy deductible.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So2d. 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [*citing Menendez v. Palms West Condominium Ass'n*, 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; *see also Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Moore v. Morris*, 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson leasing Corp.*, 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the Plaintiff need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id*. at 601 [*citing Harvey Building, Inc. v. Haley*, 175 So2d 780 (Fla. 1965)]; *see also Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach*, 226 So.2d 866 (Fla. 4th DCA 1969).

With regards to Defendant's assertion that Plaintiff's motion is premature, the Court disagrees. There is no lawful basis or need to stay Plaintiff's Motion regarding this specific issue of misapplication of the deductible. As Florida Rule of civil procedure 1.510 clearly states: *"A party seeking to recover on a claim, counterclaim, crossclaim, or third-party claim or declaratory judgment, may move for a summary judgment in that party's favor on all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party."*

Additionally, the Defendant would not be entitled to a set-off to any amounts deemed to be compensable as a matter of law, such as the amounts owed to the Plaintiff by virtue of the Defendant's misapplication of the $ 1,000.00 policy deductible. The defense of set-off is an affirmative defense that must be pled. The failure to plead a set-off as an affirmative defense constitutes a waiver of such defense. *See Felgenhauer v. Bonds*, 891 So.2d 1043 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2049a]; *see also JoJo's Clubhouse, Inc. v. DBR Asset Management, Inc.*, 860 So.2d 503 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2739b]; and *Udell v. Udell*, 950 So.2d 528 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D718a]. Here, the Defendant has not, nor has ever pled a "set off" defense.

Lastly, because Defendant's undisputed misapplication of the policy deductible is not a question for the jury, but rather a determination to be made by the Court as a matter of law, this Court finds that there is no genuine issue of material fact that the Defendant misapplied the policy's $ 1,000.00 deductible towards the Plaintiff's charges. Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment is Granted. Plaintiff is entitled to partial summary judgment against Defendant in the amount of $ 112.77, plus interest. This decision will be reflected in a Final Judgment ***only after*** all other outstanding issues and claims are resolved.

* * *

Insurance—Personal injury protection—Jurisdiction—Priority—Motion to stay county court PIP case based on fraud action previously filed in federal court between same parties is denied—Federal and county court do not have concurrent jurisdiction, and claims and theories of recovery in cases are wholly different—No merit to arguments regarding prejudice resulting from denial of stay and judicial economy

CEDA ORTHOPEDICS & INTERVENTIONAL MEDICINE OF F.I., a/a/o Christopher Tillit, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-026348-SP-25, Section CG01. December 3, 2020. Linda Melendez, Judge. Counsel: Jonathan A. Greenberg, Spencer Morgan Law, Miami, for Plaintiff. Joanne Torrey Lopez, Roig Lawyers, Deerfield Beach, for Defendant.

ORDER ON STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF A RELATED FEDERAL ACTION

THIS MATTER came before the Court on November 18, 2020, upon Defendant, State Farm Mutual Automobile Insurance Company's Motion to Stay Proceedings Pending Resolution of a Related Federal Action, and this Court having considered argument of counsel, having reviewed the pleadings, the legal memoranda and authorities cited, as well as having conducted independent research and being otherwise fully advised in the premises finds as follows:

On September 10, 2019, Plaintiff filed a one count Complaint with this Court alleging a breach of contract against State Farm Mutual Automobile Insurance Company (hereinafter "State Farm" or

Defendant) for personal injury protection insurance benefits in the amount of $499 related to a motor vehicle accident that allegedly occurred on August 28, 2015. On March 13, 2020, Defendant filed a Motion to Stay Proceedings pending resolution of an allegedly related and earlier filed Federal action.

Defendant relies on the "principles of priority" in requesting entry of a stay based on a previously filed action pending in federal court between these same parties. However, Florida courts have settled that the "principle of priority" only applies when two courts share "concurrent jurisdiction" over substantially similar claims. *See Sanchez Vicario v. Santacana Blanch,* 45 Fla. L. Weekly D1985a, 2020 WL 4810743 (Fla. 3d DCA Aug. 19, 2020)("In general, where courts within one sovereignty have **concurrent jurisdiction** over substantially similar parties and claims, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case.")(citation omitted, emphasis added)(emphasis added); *Perelman v. Estate of Perelman,* 124 So. 3d 983, 986 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2261a] ("Under the 'principle of priority,' where courts within one sovereignty have **concurrent jurisdiction**, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case.") (emphasis added) *(citing Siegel v. Siegel,* 575 So.2d 1267, 1272 (Fla.1991)).

Concurrent jurisdiction "is a well-known term of art long employed by Congress and courts to refer to **subject-matter jurisdiction**, not personal jurisdiction." *BNSF Ry. Co., v. Tyrrell,* 137 S.Ct. 1549, 1557 (2017) [26 Fla. L. Weekly Fed. S612a] (emphasis added). It is settled that when two courts with related cases do not share concurrent subject matter jurisdiction, the principle of priority does not provide a valid basis to enter a stay. *See U.S. Borax, Inc. v. Forster,* 764 So.2d 24, 29 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1220a]("Because the federal and state courts did not have concurrent jurisdiction, we find that the rule of priority, relied upon by Borax, **does not apply in this case**.")(emphasis added).

This Court and the federal court do not share concurrent jurisdiction with respect to the instant claim for personal injury protection benefits that do not exceed $5,000; therefore, the "principle of priority" does not apply in this case. *See U.S. Borax, Inc.* 764 So. 2d at 29; *Fla. Stat. § 627.736(1),(15)*; *Fla. Stat.§ 34.01(1)(c)* (exclusive jurisdiction in County Court for claims of *$30,000 or less*); *28 U.S.C.§ 1332* (District Courts have jurisdiction over state law claims where there is complete diversity of citizenship and amount in controversy *exceeds $75,000*); *DNA Ctr. For Neurology & Rehab. v. Progressive Am. Ins. Co.,* 13 So.3d 74, 75 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D978c] (Holding Circuit Court did not have subject matter jurisdiction over PIP suit, which was within the "exclusive jurisdiction" of the County Court); *Derius v. Allstate Indem. Co.,* 723 So. 2d 271, 274 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] ("Whether a given medical service is 'necessary' under section 627.736(1)(a) is a question of fact for the jury. . . decided by fact-finders **on a case by case basis. . .**") (emphasis added); *and see Path Medical LLC aao Kristie Aguirre v. GEICO Indemnity Company*, Case No: 18-60820 (S.D. Fla. April 26, 2018)(Order remanding PIP claim from federal court back to County Court for lack of subject matter jurisdiction as amount in controversy did not exceed $75,000). For this Court and the federal court in which the parties are litigating separate claims to have concurrent jurisdiction, it would require that the instant small claim for breach of a single insurance contract could have originally been brought and decided in federal court. It could not. *See Id.* The amount in controversy in this case could never approach the $75,000 minimum required under 28 U.S.C. §1332. *See Id.*

In addition to the absence of concurrent jurisdiction, the principle of priority does not apply here because the instant small claim involving a single insured's contract for insurance benefits is "wholly different" from State Farm's claims and theories of recovery in the federal action. *Path Medical LLC aao Ada Valentin v. GEICO Indemnity Company*, Case No: 18-60886-UU (S.D. Fla. April 23, 2018)(Order remanding PIP suit back to County Court, holding "Defendant [Insurer] points to a different lawsuit where it sued Plaintiff [PIP clinic] and others for $15,000,000 for fraud. **But that case is wholly different** from the present insurance contract dispute**,** which **involves one individual's claim** for coverage.")(emphasis and brackets added).

This Court is not convinced by any of Defendant's other reasons offered including, but not limited to, claims of prejudice by the denial of their motion and concern for judicial economy. State Farm's suit in federal court is to recover for amounts it alleges it has already wrongly paid. Plaintiff's suit here is to recover additional amounts it alleges is due and owing pursuant to the underlying insurance contract and the Florida Motor Vehicle No-Fault Law. As a federal court addressing this issue has already ruled, if Plaintiff recovers against State Farm before the conclusion of the federal action, then State Farm still possesses the opportunity to recover the amounts paid here should it ultimately prevail in federal court. *See State Farm Mut. Auto. Ins. Co. et al., v. Mark Cereceda, D.C., et al,* Case No. 19-CV-22487-SMITH/LOUIS (S.D. Fla., March 16, 2020) (Smith, J.) (Order Denying Motion for All Writs Injunction, finding "even if a state court [such as this County Court] did adjudicate an unfavorable decision to [State Farm] before th[e] [federal] Court did, any monies that were paid to [the health care provider] entities during the pendency of the instant [federal] case would also be recoverable through [State Farm's] fraud counts [in federal court] if it were determined that they were obtained by fraud.") (brackets added); *and see Sanchez Vicario v. Santacana Blanch,* 45 Fla. L. Weekly D1985a, 2020 WL 4810743 *3 (Fla. 3d DCA Aug. 19, 2020)(A trial court is not always required to stay proceedings when prior proceedings involving the same issues and the same parties are pending before a court in another jurisdiction).

What State Farm seeks is a de facto injunction, all without State Farm having to make a showing of irreparable injury, likelihood of success on the merits, an inadequate remedy at law, and without having to post a bond for Plaintiff's protection should State Farm not prevail. For example, Plaintiff could be irreparably damaged if the benefits at issue here exhausted during any stay imposed, leaving Plaintiff without a remedy. *See GEICO Indem. Co. v. Gables Ins. Recovery, Inc.*, 159 So. 3d 151, 154 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a]. To obtain a temporary injunction, State Farm would first need to prove "(1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy at law; and (4) that the public interest will be served." *JonJuan Salon, Inc. v. Acosta,* 922 So. 2d 1081, 1083 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D838a]. State Farm would also need to post a bond. *See Fla. R. Civ. P. 1.610(b)*; *Burke v. Sunco Title & Escrow Co.*, 219 So. 3d 967, 969 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1260a] ("An injunction bond is 'conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined.' "); *see also Florida ex rel. Bondi v. U.S. Dept. of Health & Human Services,* 780 F. Supp. 2d 1307, 1316-17 (N.D. Fla. 2011) (Discussing a "de facto injunction" and motion to stay, finding that both require the movant to address the same four factors: "(1) whether the applicants have made a strong showing that they are likely to prevail; (2) whether the applicants will be irreparably injured if a stay is not granted; (3) whether granting the stay will substantially injure the other parties interested in the proceeding; and (4) "where the public interest lies.") (citation omitted).

Accordingly, it is ORDERED AND ADJUDGED that upon

reviewing the applicable authorities and considering argument of counsel the Defendant's Motion is hereby DENIED.

* * *

Landlord-tenant—Eviction—Default—COVID-19 defense to eviction was untimely where defense was filed after tenants statutorily defaulted and final judgment of eviction was entered—Motion to vacate default is denied

NEW AGE RENTALS LLC, Plaintiff v. MICHAEL MIRANDA, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-017424-CC-25, Section CG02. November 10, 2020. Elijah A. Levitt, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff. Michael Miranda, Pro se, Coral Gables, Defendant.

ORDER DENYING: DEFENDANTS' MOTION TO VACATE DEFAULT—DOCKET ENTRY NO. 19 (OCT.30.2020)

THIS CAUSE came on to be heard on Defendants' Motion To Vacate Default Judgment and after considering the argument of both parties at the November 6, 2020, Hearing on the matter and being otherwise fully advised in the Premises, the Court finds the following:

1. After conducting an evidentiary hearing, the Court finds that the September 18, 2020, "Answer" filed by Defendants was not a Motion to Determine Rent as provided by Florida Statute. Thus, default was properly entered. The Court notes that a Spanish-speaking certified court interpreter was present during the hearing and translated a portion of the "Answer" for the Court.

2. The Defendants' CDC Declaration, per the Federal Center For Diseases Control And Prevention's *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, Doc. No: 2020-19654 (Sept. 4, 2020), is untimely as it was filed after the Defendants statutorily defaulted and Final Judgment was entered.

3. The Defendants' Motion To Vacate is **DENIED,** and the Plaintiff is authorized to seek forthwith the issuance of a Writ of Possession, which the Clerk of Court shall issue.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Where identical parties have previously litigated identical issue of reasonableness of medical provider's charges for same CPT codes, parties had full and fair opportunity to litigate issue and did litigate issue in prior proceedings, and issue is critical and necessary part of litigation, all elements necessary for application of doctrine of collateral estoppel are met—Provider is entitled to judgment on reasonableness issue as matter of law

DOCTOR REHAB CENTER, INC., a/a/o Frank Otero, Plaintiff v. UNITED AUTOMOBILE INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-003510-SP-25, Section CG03. September 3, 2020. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Ari Neimand, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AND ORDER PRECLUDING DEFENDANT FROM CONTESTING THE REASONABLENESS OF PLAINTIFF'S CHARGES

[Prior Adjudication of CPT codes: 99203, 99212, 99213, G0283 (97014), 97010, 97012, 97035, 97112, 97124, 97140, 97530, 98940, 98941]

THIS CAUSE came before the Court on August 5, 2020 on Plaintiff's Amended Motion for Order Precluding Defendant from Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel as well as Plaintiff's Amended Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel.

The parties were represented by counsel at the hearing who presented arguments to this Court. Ari Neimand, Esquire appeared on behalf of the Defendant, United Automobile Insurance Company, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff, Doctor Rehab Center, Inc.

The Court having reviewed Plaintiff's motions with supporting evidence, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby enters this Order GRANTING Plaintiff's Amended Motion for Order Precluding Defendant from Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel as well as Plaintiff's Amended Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

On 04/12/11 the parties appeared before this Court on a pre-trial conference wherein the Defendant stipulated that Plaintiff's treatment is medically necessary and related to subject automobile accident.

As such, the sole remaining issue in this case is the reasonableness of Plaintiff's charges. If Plaintiff's charges are established to be reasonable in price, Defendant is obligated to pay 80% of that charge. *Fla. Stat. 627.736 (2009)*.[1]

The record before this Court reflects that Plaintiff previously litigated the reasonableness of its charges through final judgment in *Doctor Rehab Center, Inc., a/a/o Julian Grillo v. United Auto. Ins. Co.*, Case No. 11-01877 SP 26 ("Doctor Rehab Lawsuit # 1"), thereby adjudicating the reasonableness of its charges for CPT codes 99203 ($250), 99212 ($125), 99213 ($150), G0283 (97014) ($50), 97010 ($50), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 97140 ($70), 97530 ($65), 98940 ($85), 98941 ($95).

The record before this Court reflects that Plaintiff also litigated the reasonableness of its charges through Defendant's confession of judgment[2] in *Doctor Rehab Center, Inc., a/a/o Jose Miranda v. United Auto. Ins. Co.,* Case No. 11-01982 SP 26 ("Doctor Rehab Lawsuit # 2"), thereby adjudicating[3] the reasonableness of its charges for CPT codes 99213 ($150), G0283 (97014) ($50), 97010 ($50), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 97140 ($70), 97530 ($65), 98940 ($85), 98941 ($95).

The record before this Court further reflects that the CPT codes and charges at issue in the instant case are the very same CPT codes and charges previously adjudicated in *Doctor Rehab Lawsuit # 1* and *Doctor Rehab Lawsuit # 2* as noted above: 99203 ($250), 99212 ($125), 99213 ($150), G0283 (97014) ($50), 97010 ($50), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 97140 ($70), 97530 ($65), 98940 ($85), 98941 ($95). That is, the very same CPT codes and charges that were previously litigated and adjudicated to be reasonable in price by a court of competent jurisdiction in prior lawsuits between the same parties are at issue in the instant case.

The issue presented for this Court's determination is whether the doctrine of Collateral Estoppel (Issue Preclusion) precludes Defendant from re-litigating the reasonableness of Plaintiff's charges in this case, where the very same charges were previously adjudicated to be reasonable in price before a court of competent jurisdiction in a prior action between the same parties.

LEGAL ANALYSIS

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (citing to *Mobil Oil Corp. v. Shevin,* 354 So.2d 372, 374 (Fla.

1977); *see also*, *Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976) (approving the District Court of Appeals' affirmance of lower court's grant of partial summary judgment as to issue of liability based on doctrine of collateral estoppel or estoppel by judgment); *Weiss v. Courshon,* 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a] (applying the doctrine of collateral estoppel to prevent relitigating an action for accounting and breach of fiduciary duties, which was decided in federal Court).

"The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute". *Id*. (citing *Zimmerman v. State of Florida Office of Ins. Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a]). The doctrine "serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *United States v. Mendoza,* 464 U.S. 154, 158 (1984) (citing *Allen v. McCurry,* 449 U.S. 90, 94 (1980)).

"The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (quoting *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977)).

The Third District Court of Appeals has articulated and held that the following elements must be met for the application of the doctrine of collateral estoppel: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding. *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] (citing to *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a]; *see also Carnival Corp. v. Middleton,* 941 So.2d 421 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2480a].

As it pertains to the *first element,* the record before this Court reflects that in *Doctor Rehab Lawsuit # 1* and *Doctor Rehab Lawsuit # 2,* the identical parties to this action previously litigated the reasonableness of Plaintiff's charges for the very same CPT codes at issue in this case: 99203 ($250), 99212 ($125), 99213 ($150), G0283 (97014) ($50), 97010 ($50), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 97140 ($70), 97530 ($65), 98940 ($85), 98941 ($95). As such, the first element for application of the doctrine has been met.

As it pertains to the *second and fifth elements,* the record before this Court reflects that in the prior cases litigated between the parties they had a full and fair opportunity to fully litigate the issue of reasonableness of Plaintiff's charges and the issue was actually litigated through final adjudication after extensive motion practice, discovery, presentation of evidence, and service of affidavits and record evidence as to the central issue of reasonableness of Plaintiff's charges. As such, the second and fifth elements for application of the doctrine have been met.

As it pertains to the *third element,* [a]n issue is a critical and necessary part of the prior proceeding where its determination is essential to the ultimate decision." *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474, 478 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (citing *Porter v. Saddlebrook Resorts, Inc.,* 679 So.2d 1212, 1215 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1881a]). In the context of PIP litigation, the issue of reasonableness of charges is not only "a critical and necessary part" of the litigation, but same is in fact part and parcel of Plaintiff's prima facie burden of proof. *See Derius v. Allstate Indemnity Co.,* 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. As such, the third element for application of the doctrine has been met.

As it pertains to the *fourth element,* the parties to the instant action are clearly the identical parties in *Doctor Rehab Lawsuit # 1* and *Doctor Rehab Lawsuit # 2* where the issue of reasonableness of Plaintiff's charges was litigated through final judgment. As such, the fourth element for application of the doctrine has also been met.

Binding decisional precedent holds that once the elements are met, a court is obligated to apply the doctrine of collateral estoppel. *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel); *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (remanding action to trial court with directions to have action by oil companies dismissed under doctrine of collateral estoppel since the issue pertaining to Attorney General's authority was previously adjudicated adversely to the companies by the Fifth District Court of Appeal).

The identical issue before this Court pertaining to the application of the doctrine of Collateral Estoppel (Issue Preclusion) to preclude Defendant from re-litigating the reasonableness of Plaintiff's charges was recently decided in an appeal between the same parties. In *United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Juliet Fernandez,* Case No. 18-228 AP 01 (Fla. 11th Cir. App., April 14, 2020)[28 Fla. L. Weekly Supp. 466b][4] the Eleventh Judicial Circuit, sitting in its appellate capacity, specifically held that Defendant is "precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel" citing to *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b]. Defendant thereafter filed a petition for writ of certiorari and the Third District Court of Appeal denied same finding that the Eleventh Judicial Circuit had "applied the correct law" citing to both *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] as well as *R.D.J. Enters., Inc. v. Mega Bank,* 600 So.2d 1229, 1232 (Fla. 3d DCA 1992). *See United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Juliet Fernandez,* Case No. 3D20-737 (Fla. 3d DCA, July 22, 2020) [45 Fla. L. Weekly D1766a] ("we conclude Petitioner is not entitled to the writ because the circuit court. . .applied the correct law").

Based on the foregoing, this Court finds that Plaintiff is entitled to judgment as a matter of law as to the reasonableness of its charges for CPT codes 99203 ($250), 99212 ($125), 99213 ($150), G0283 (97014) ($50), 97010 ($50), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 97140 ($70), 97530 ($65), 98940 ($85), 98941 ($95) and Defendant is precluded from re-litigating same. To hold otherwise would circumvent the purpose and intent of the doctrine, result in unnecessary repetitious litigation, undermine the parties' reliance on prior adjudication, allow inconsistent decisions, and needlessly expend otherwise scarce judicial resources.

Furthermore, this Court finds that Plaintiff is entitled to entry of final judgment in its favor and against Defendant in the principal amount of $2,726.03, said sum representing the total amount of Plaintiff's bills for the CPT codes at issue ($12,440.00) at 80% less prior payments made by Defendant for these bills ($7,225.97).

CONCLUSION

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Amended Motion for Order Precluding Defendant from Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel as well as Plaintiff's Amended Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel is GRANTED.

IT IS ADJUDGED that Plaintiff, DOCTOR REHAB CENTER, INC., recover from Defendant, UNITED AUTOMOBILE INSURANCE COMPANY, the sum of $2,726.03 on principal and prejudg-

ment interest in the sum of $1,638.94 that shall bear interest at the rate of 6.03% per year, for which let execution issue. Plaintiff's counsel is entitled to an award of attorney's fees and costs associated with this action and the Court reserves jurisdiction to determine the amount of same.

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[1]The record before this Court reflects that Plaintiff's charges for the treatment and/or CPT codes at issue total $12,440.00 and that the Defendant made payments to Plaintiff totaling $7,225.97 for these bills which is less than 80% of the charges.

[2]Where an insurance company pays on a claim after the insured files suit but before judgment is rendered, the payment constitutes a "confession of judgment or verdict in favor of the insured." *Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 685 (Fla. 2000) [25 Fla. L. Weekly S1103a].

[3]The fact that in *Doctor Rehab Lawsuit # 2* Defendant, after extensive litigation, opted to confess to judgment does not make the prior final adjudication any less binding upon the parties. *See e.g., Eastern Shores Sales Co. v. City of North Miami Beach,* 363 So.2d 321 (Fla. 1978) ("[t]he fact that the [prior] decree. . .was by consent did not make it any less conclusive or binding on the parties"); *Hay v. Salisbury,* 92, Fla. 446, 109 So. 617 (Fla. 1926) ("[a] judgment by default or upon confession is, in its nature, just as conclusive on the rights of the parties before the court, as a judgment upon demurrer or verdict"); *In re Zoernack,* 289 B.R. 220 (M.D. Florida, 2003) (federal court applying Florida law on the doctrine of collateral estoppel found that a consent to judgment is treated the same as any other judgment and carries issue preclusion under the doctrine); *Arrieta-Gimenez v. Arrieta-Negron,* 551 So.2d 1184 (Fla. 1989) (rejecting argument "attempt[ing] to differentiate between a consent judgment and a final judgment entered after trial on the merits" and finding that a consent judgment is entitled to preclusive effect); *see also*, *Cabinet Craft, Inc. v. A.G. Spanos Enterprises, Inc.,* 348 So.2d 920 (Fla. 2d DCA 1977) ("for purposes of res judicata, a judgment entered upon default is just as conclusive as one which was hotly contested").

[4]*See also*, *United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Dainier Zaldivar,* Case No. 18-067 AP 01 (Fla. 11th Cir. App., May 28, 2020) [28 Fla. L. Weekly Supp. 283b].

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Medical provider's motion for summary judgment on issue of reasonableness of charges is denied where insurer elected statutory fee schedule and put insured on notice of election—Affidavits of provider's records custodian are insufficient to authenticate records where one affidavit is in Spanish without a certified translation and other affidavit is in English but does not indicate that it was translated to language understood by affiant, who does not read, write, or speak English—Consequently, records attached to affidavit of provider's medical expert have not been authenticated and are not admissible—Factual issues raised by affidavits, including question of whether services were actually rendered, preclude summary judgment as to relatedness and medical necessity of treatment

CENTRAL THERAPY CENTER, INC. a/a/o Alexis Garcia Dominguez, Plaintiff, v. PROGRESSIVE SELECT INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-002964-SP-26, Section SD05. November 20, 2020. Michaelle Gonzalez-Paulson, Judge. Counsel: Maria M. Corredor, for Plaintiff. Maury L. Udell, Beighley Myrick Udell + Lynne, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING MEDICAL TREATMENT AS REASONABLE, RELATED, AND NECESSARY

THIS CAUSE having come before this Court on October 22, 2020, on Plaintiff's Motion for Summary Judgment, and this Court, having reviewed the Motion, the entire Court file and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised of the premises, it is hereby,

ORDERED AND ADJUDGED as follows:

ANALYSIS AND FINDINGS OF FACT

Plaintiff filed a motion for summary judgment on the issue of reasonable, related, and medically necessary services ("RRN") as to the medical services allegedly provided to Alexis Garcia Dominguez, ("Claimant") by Plaintiff. In support, Plaintiff filed the affidavit of its expert, Kevin Wood, D.C., and two affidavits of its records custodian Carlos Sanchez in English and Spanish. In opposition to Plaintiff's Motion, Defendant filed the affidavit of Gene Jenkins, Jr. D.C., the deposition of Plaintiff's employee Belkys Hernandez, and multiple other documents, including the policy of insurance.

"It is a well-settled principle of Florida jurisprudence that summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999) [24 Fla. L. Weekly S216a] (citing *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)); *see also Babul v. Golden Fuel, Inc.*, 990 So. 2d 680, 684 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2235a] (holding that conflicting affidavits concerning the identity of contracting parties to an ambiguous contract precluded summary judgment); *Smith v. Harr*, 571 So. 2d 575, 577 (Fla. 5th DCA 1990) (observing that an affidavit in opposition to summary judgment motion "need only raise a material issue of fact to survive the motion") (citing *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782-83 (Fla. 1965))).

First, it is undisputed that the policy of insurance clearly and unambiguously elects the fee schedule. Numerous Florida Courts have made it clear that Insurers must specifically notify insureds of the election to use the Medicare Fee Schedule in determining a "reasonable" amount under the statute. *See generally, Geico Gen. Ins. Co. v. Virtual Imaging Servs. Inc.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]; *DCI MRI, Inc. v. Geico Indem. Co.,* 79 So. 3d 840, 842 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D170e]; *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 67 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]. Here, Defendant properly elected the permissive fee schedule and put the insured on notice of such an election. *See* Policy of Insurance, Amendatory Endorsement A085 at 1-2, filed October 20, 2020; *see also Virtual Imaging Servs. Inc.*, 141 So. 3d 147. Accordingly, Plaintiff's motion with respect to reasonableness is **DENIED**, as Defendant properly elected the permissive fee schedule.

Furthermore, the Court finds that the two affidavits of Plaintiff's records custodian, Carlos Sanchez, are insufficient to authenticate the records. It is well settled that Court documents are required to be in the English language and where a document is in another language, failure to include a certified translation has the same effect as including no document at all. *Diaz v. Bell Microproducts-Future Tech, Inc.*, 43 So. 3d 138, 140 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1931a]. By Sanchez's own admission, he does not he does not read, write, or speak English. *See* Dep. of Carlos Sanchez, 4:12-13; 23:8-9 (June 21, 2016). The English language affidavit filed by Plaintiff does not indicate that it was ever translated to a language which the affiant understands. Moreover, the English and Spanish language affidavits are not certified translations and are different on their face. English is the official language in the State of Florida, the submission of the untranslated affidavit is insufficient summary judgment evidence.

Accordingly, the records attached to the affidavit of Plaintiff's expert, Dr. Wood, have not been authenticated because attaching documents which are not "sworn to or certified" to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. P. 1.510(e). *See Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1325a]; *Toyos v. Helm Bank, USA*, 187 So. 3d 1287 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D913a]. Rule 1.510(e) by its very language excludes from consideration on a motion for summary judgment any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit. *Bifulco*, 693 So. 2d 707. The expert may not be used as a conduit for the admission of

evidence for purposes of a motion for summary judgment where the sole purpose is to introduce inadmissible hearsay evidence through an affidavit to establish Plaintiff's prima facie case for a claim for PIP benefits. *See* Fla. Stat. § 90.403; *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1384a]; *Hayes v. Wal-Mart Stores, Inc.*, 933 So. 2d 124, 127 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1547a]; *Kelly v. State Farm Mut. Auto Ins.*, 720 So. 2d 1145 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2500b].

Regardless, the parties have submitted conflicting expert affidavits which are diametrically opposed on virtually every issue of material fact, and pursuant to Florida Rule of Civil Procedure 1.510, summary judgment would be improper. *See James v. Pneuma Const. Corp.*, 190 So. 3d 678, 680 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1027e]; *Garcia v. First Comm. Ins. Co.*, 241 So. 3d 254, 257 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D671a] (holding that the trial Court erred in granting summary judgment where the conflicting reports of the parties' experts established that there was a genuine issue of material fact).

"On summary judgment, the trial court may neither adjudge the credibility of the witnesses nor weigh the evidence." *Gidwani v. Roberts*, 248 So. 2d 203 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a]. Accordingly, where conflicting affidavits are submitted, a Court cannot conclude a party is entitled to a summary judgment without first impermissibly resolving material issues of fact, presented by such affidavits. *See James,* 190 So. 3d at 680 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1027e]; *see also Grant Builders Group, Inc. v. S. Bay Ace Hardware Lumber and Painting Co.,* 58 So. 3d 348 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D683c]; *Charles E. Burkett & Assocs., Inc. v. Vick,* 546 So. 2d 1190, 1191 (Fla. 5th DCA 1989); *Goodman v. Anthony,* 269 So. 2d 756, 757 (Fla. 3d DCA 1972).

Further, multiple panels of the 11th Judicial Circuit sitting in its appellate capacity have determined that it is error to accept a Plaintiff's affidavit while rejecting a defendant's conflicting affidavit on whether the medical bills at issue were reasonable in price, related and medically necessary. *State Farm Mut. Auto. Ins. Co. v. Gables Ins. Recovery, Inc. a/a/o Nelson Vanegas*, FLWSUPP 2807VANE, 2018-187-AP-01 (Fla. 11th Cir. Ct. Sept. 4, 2020) [28 Fla. L. Weekly Supp. 591a]; *see also State Farm Mutual Ins. Co. v. Gables Ins. Recovery a/a/o Alexis Revollo,* 28 Fla. L. Weekly Supp. 453b (Fla. 11th Cir. Ct. Aug. 13, 2020); *United Auto. Ins. Co. v. Miami Dade MRI a/a/o Bermudez,* 28 Fla. L. Weekly Supp. 299a (Fla. 11th Cir. Ct. June 3, 2020); *State Farm Mut. Ins. Co. v. Gables Ins. Recovery a/a/o Yuderis Rego,* 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20, 2019); *United Auto. Ins. Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo,* Case No. 2017-326-AP-01 (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Auto. Ins. Co. v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo,* 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. App. July 30, 2019); *United Auto. Ins. Co. v. Miami Dade Cnty MRI, Corp. a/a/o Javier Rodriguez,* 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. July 25, 2019); *United Auto. Ins. Co. v. Miami Dade Cnty MRI, Corp. a/a/o Rene Dechard,* 27 Fla. L. Weekly Supp. 226a (Fla. 11th Cir. Ct., August 12, 2019); *United Auto. Ins. Co. v. Millennium Radiology, LLC a/a/o Javier Rodriguez,* 25 Fla. L. Weekly Supp. 911b (Fla. 11th Cir. Ct. July 19, 2019). In coming to their ultimate and contradictory conclusions, both experts in the instant case did the same thing—namely they reviewed only the purported medical records of the claimant as **neither expert treated the patient.** This demonstrates the existence of a genuine issue of material fact, precluding summary judgment.

Lastly, there is a genuine issue of material fact as to whether the services were rendered at all, precluding summary judgment. Defendant submitted the deposition testimony of Belkys Hernandez, the office manager of Central Therapy who was employed during the period in which the Claimant purportedly treated. Hernandez testified at her deposition that during her employment with Plaintiff, she witnessed ongoing and pervasive fraud. *See* Hernandez Dep. (Aug. 15, 2017). Specifically, she stated that 98% of the bills were inflated. *Id.* at 25:16-26:6. There is no dispute that Hernandez worked at Plaintiff during the claim at issue in this case.

Where a medical provider has provided a false or misleading statement relating to a claim for PIP benefits, the insurer does not owe the provider PIP benefits for any of the claims pursuant to Fla. Stat. §627.736(5)(b)(1)(c). *See Chiropractic One, Inc. v. State Farm Mut. Auto.*, 92 So. 3d 871 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1565a]. Specifically, in *Chiropractic One*, the Fifth District Court of Appeals held:

> the plain language of section 627.736(5)(b)(1)(c) supports the invalidation of the claims. **The statute relieves both the insurer and the insured from paying the claims of 'any person who knowingly submits a false or misleading statement relating to the claim or charges.'** Although 'claim' and 'charges' are not defined by the PIP statutes, and no cases have been suggested to us that define those terms in the context of PIP claims, it is **logical to conclude that the Legislature established that dichotomy to be certain that not only the specific individual offensive "charges" were invalidated, but also that the entire "claim,"** i.e., the collective of all charges, was invalidated, as well.

(Emphasis added). The Fifth District further stated that "[a]ny knowingly misleading or false charge, **by definition, is unreasonable, not medically necessary, and in excess of permitted amounts**." *Id.* at 874; *see also Bosem v. Commerce and Industry Ins. Co.*, 35 So. 3d 944 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D892a] "Fraud provisions are enacted to provide a disincentive to individuals considering the commission of such misrepresentations. **Allowing for payment of one portion of a claim would nonsensically allow an insured to engage in a 'cost-benefit analysis' with respect to the contemplation of such fraud.** The "arising from" and 'relating to" language [under §627.736] clearly seeks to encompass all claims pertaining to a single event resulting in purported losses."). Thus, in light of the sworn testimony regarding the pattern of fraud described by Plaintiff's own employee, there is a genuine issue of material fact as to whether the treatment was rendered at all. Accordingly, Plaintiff's motion for summary judgment is also **DENIED** as to relatedness and medical necessity.

* * *

Criminal law—Search and seizure—Traffic stop—Because driver making left turn is allowed to leave intersection in any lane of travel legally available to traffic traveling in that direction, officer did not have probable cause to stop defendant for turning left into center lane—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. RONALD E DAVENPORT, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 582020MM005610XXXANC. December 1, 2020. Erika N. Quartermaine, Judge. Counsel: Kevin Hindson, Assistant State Attorney, for Plaintiff. Retley G. Locke, Assistant Public Defender, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This matter came for hearing on November 23, 2020 on the Defendant's Motion to Suppress. The Court has considered the Motion to Suppress, the testimony of Detective Dreznin and Officer Stoll and the arguments of counsel and has been otherwise advised in the premises.

I.

On May 12, 2020 officers were behind Defendant's vehicle in the

left turn lane of Martin Luther King Jr. Way in Sarasota, FL. The officers followed the Defendant's vehicle as it turned left onto northbound Highway 301. The Defendant entered the center lane of travel and not the left lane. Believing there was probable cause that the Defendant violated section 316.151(1)(b) of the Florida Statutes, because the Defendant did not enter the left most lane of travel, the officers initiated a traffic stop. After the law enforcement officer activated the emergency lights, the Defendant sped up and slowed down prior to pulling over.

The law enforcement officers arrested the Defendant for Resisting Without Violence as a result of this traffic stop. The Defendant seeks suppression all evidence obtained during the traffic stop claiming that no traffic violation had occurred.

II.

Pursuant to § 316.151 (1)(b), a vehicle turning left from the left most lane is permitted to enter any legally available lane of travel upon leaving the intersection. Specifically, this statute states: ". . .the left turn shall be made so as to leave the intersection in a lane lawfully available to traffic moving in such a direction upon the roadway being entered." The center lane of Highway 301 was a legally available lane of travel for the Defendant's vehicle. Therefore, the officers lacked probable cause for the traffic stop and any evidence law enforcement obtained as a result of the stop is suppressed.

It is therefore ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is **GRANTED**.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer who observed defendant remain stopped at green light for five seconds and fail to maintain her lane when driving away from light had probable cause to stop defendant for violation of laws that require obedience to traffic control devices and prohibit stopping in roadway and reasonable suspicion to stop defendant to determine if she was impaired or ill—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. KATEARIA M. BUTLER, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2020 CT 263. October 2, 2020. Renee Inman, Judge.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court on August 14, 2020 for a hearing on the Defendant's Motion to Suppress, filed May 5, 2020. Present at the hearing was all parties and counsel. Having heard the parties' presentations, reviewed the court file and being otherwise duly advised in the premises, the Court finds and rules as follows.

1. The Defendant is charged with driving under the influence with .15 or higher, in violation of section 316.193(4), Florida Statutes.

2. The Defendant moves to suppress "all evidence obtained after the traffic stop." In support thereof, the Defendant argues she did not commit the traffic infraction she was stopped for under Florida law. The State objects and asks that the motion be denied.

3. The parties agreed to the Court reviewing and considering the Supplement Notes authored by Lieutenant Brad Johnson, the MSO deputy who stopped the Defendant. Those notes provide, in pertinent part:

> On the incident date, I was traveling SB on 14th St. W approaching 53rd Ave W. As I approached the intersection, the light was green. A blue vehicle . . . was in the far left hand SB lane at a complete stand still with a green light. The light had been green for at least 5 seconds. I pulled in behind it and the vehicle went into gear; the rear lights lit up as if being put into gear. The vehicle then began to travel SB on 14th St. W. Almost immediately the vehicle began to move towards the center lane with the passenger tires crossing over the dotted white line. The vehicle moved back into the center of the lane and then the driver side tires crossed over the driver side solid yellow line. This pattern repeated 3 times as the vehicle traveled SB along 14th St W. In the 5800 block, the vehicle almost struck a pedestrian island that was located in the center turn lane. The vehicle stopped at a red light at 6000 14th St. W and I initiated the traffic stop once the light turned green . . . . *** I . . . asked her to pull over into the Target parking lot. She asked, "Why?" I told her that she was failing to maintain a lane. *** I issued the defendant [a traffic citation] for the failure to maintain. ***

4. Lieutenant Johnson was the only witness that testified at the hearing:

> a. On January 19, 2020, Lt. Johnson was on duty as the District 2 night shift lieutenant.
>
> b. At approximately 3:08a.m., Lt. Johnson was heading southbound on 14th Street West, Bradenton. As he approached the intersection with 53rd Ave. West, he observed that, although the light was green and had been green for about five seconds, there was a vehicle in the far-left southbound lane "at a standstill." At this portion of 14th Street, there are three southbound lanes, three northbound lanes, and a center turn lane. There was not a lot of traffic, given the time of day, but there were vehicles traveling in the northbound lanes. Lt. Johnson did not recall seeing any pedestrian or bicycle traffic, but did recall that there was little enough traffic heading southbound that he easily changed lanes to be behind the vehicle.
>
> c. Almost as soon as he got behind the vehicle, it "immediately went into gear [as if it had been in park] and started driving." He did not recall seeing any movements inside the vehicle.
>
> d. He followed the vehicle, and observed it weave such that it touched the lines of the center lane (to its right), then back to the left crossing over the solid line. This pattern continued "three or so times" as they traveled down 14th Street. Lt. Johnson testified he followed the vehicle from about the 5300 block to the 6000 block of 14th Street, about 7 blocks. There was "very light traffic," and the vehicle was not impeding traffic.
>
> e. Lieutenant Johnson testified that, not only was there a "stop standing" (*i.e.,* a vehicle stopped at a green light), once the vehicle went into gear there was also a failure to maintain lane. He testified that he was also concerned there was possible impairment. He testified that for all of these reasons, he decided to initiate the stop.
>
> f. Shortly after Lt. Johnson observed the vehicle's wheels almost hit the center pedestrian median, he actually initiated a stop of the vehicle. On cross examination, he agreed he did not see any pedestrians or bicycles on the median, and did not recall seeing any other traffic near the median.
>
> g. Lieutenant Johnson's vehicle is not equipped with a camera, and he does not have a body camera.

5. The Defendant argues there was no legitimate basis for the stop, as the reason stated in Lt. Johnson's supplement notes, *i.e.* failure to maintain lane, was not committed. She argues that there were no other cars, bicycles, or pedestrians in her vicinity. The Defendant relies on *Majors v. State,* 70 So. 3d 655 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a], *Hurd v. State,* 958 So. 2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a], *State v. Esparza,* 17 Fla. L. Weekly Supp. 1033a (Sarasota Cty. 2010), and *State v. Shulze,* 15 Fla. L. Weekly Supp. 725b (Sarasota Cty. 2007).

6. The State argues that, even if a failure to maintain lane had not been committed, the Defendant did commit an infraction of stopping/standing at a green light, a violation of section 316.074 and 075, and there was reasonable suspicion to believe the driver may have been impaired or ill. The State relies on *Harrington v. Dep't of Highway Safety and Motor Vehicles,* 136 So. 691 (Fla. 2nd DCA 2014) [39 Fla. L. Weekly D273b] (Altenbernd, J., concurring) and *State v. Montgomery,* 19 Fla. L. Weekly Supp. 677a (Fla. 6th Circ. Ct. April 26, 2012).

7. The Court finds that, by both his written and testimonial

accounts, Lt. Johnson had before him, at the time of the stop:

a. It was 3am;

b. A vehicle sat at a green light for about five seconds;

c. Before the vehicle moved forward at the green light, the car shifted into gear;

d. When the vehicle started driving, it weaved, touching and crossing over the lane lines "three or so times" over the course of seven blocks;

e. The vehicle's wheels almost hit a center pedestrian median.

8. "In examining the validity of a traffic stop under the Fourth Amendment, the correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *State v. Young,* 971 So. 2d 968, 971 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D133b], *citing Dobrin v. Fla. Dep't of Highway Safety and Motor Vehicles,* 874 So. 2d 1171 (Fla. 2004) [29 Fla. L. Weekly S275a]. *See also State v. Boston,* 267 So. 2d 463, 465 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D252a]; *State v. Hebert,* 8 So. 3d 393, 395 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D538b]; *State v. Wimberly,* 988 So. 2d 116, 118 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a]

9. In applying this objective test, "generally the only determination to be made is whether probable cause existed for the stop in question." *Boston,* 267 So. 2d at 465. "The constitutional validity of a traffic stop depends on purely objective criteria. The objective test asks only whether any probable cause for the stop existed, making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Id. See Ornelas v. U.S.,* 517 U.S. 690, 696 (1996) ("[t]he principal components of a determination of reasonable suspicion or probable cause will be . . . viewed from the standpoint of an objectively reasonable police officer . . . ."); *Bender v. State,* 737 So. 2d 1181, 1181 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1680a] ("[w]hether an officer has probable cause to make a traffic stop is judged not by the officer's subjective belief, but by an objective standard based on the observed violations").

10. "[I]n considering whether a decision to make a traffic stop is 'reasonable' under the Fourth Amendment, generally the only determination to be made is whether probable cause existed for the stop in question."

11. Having reviewed the evidence, the Court finds Lt. Johnson had probable cause to believe that the Defendant had committed a traffic infraction. *See* §§ 316.074, 316.075, and 316.1945, Florida Statutes. The Court also finds that Lt. Johnson had reasonable suspicion to stop to determine if the driver was impaired or ill.

For all of the foregoing reasons, the Defendant's Motion to Suppress is **DENIED**.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Tip—Officer responding to BOLO regarding impaired driver based on 911 call from an identified tipster had reasonable suspicion to stop defendant's vehicle, which matched tag number and description of vehicle and occupants and which officer located almost immediately after receiving BOLO—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. PETER HUNSADER, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 20 CT 3071 NC. August 24, 2020. Erika Nikla Quartermaine, Judge. Counsel: Kevin Hindson, State Attorney, for Plaintiff. Gregory Hagopian, for Defendant.

ORDER ON MOTION TO SUPPRESS

This matter came for hearing on August 19, 2020 on the Defendant's Motion to Suppress. The Court heard the testimony from Deputy Nichols and Deputy Sanders. The Court has considered the arguments of counsel and has been otherwise advised in the premises. The Court makes the following findings of fact and conclusions of law.

The Defendant seeks suppression of the traffic stop arguing that the officer did not have reasonable suspicion to stop the vehicle.

While on patrol, Deputy Nichols received a call from dispatch relaying information from a 911 call from a manager of Gecko's, a bar and grill. Dispatch relayed to Deputy Nichols to be on the lookout for a vehicle driven by a male with a female passenger. Dispatch further relayed that the vehicle had just left Gecko's and provided a license plate number. Dispatch stated that the 911 caller reported the driver was impaired and had just left Gecko's. Deputy Nichols was nearby and located the vehicle almost immediately. He identified the plate number, a male driver and a female passenger and, based upon this information, initiated a traffic stop. Deputy Nichols did not observe any traffic infractions or a driving pattern that would indicate the Defendant was ill, tired, or impaired. Upon making contact with the Defendant, Deputy Nichols observed an odor of alcohol and that the Defendant had slurred speech and watery eyes. Additionally, during this initial contact, the Defendant told Deputy Nichols he knew that someone from Gecko's had contacted law enforcement about him.

The Court admitted Deputy Nichols' recitation of the contents of the dispatch or "BOLO" call finding that it was not hearsay because the State did not offer it for the truth of its contents but instead offered it to establish the effect on Deputy Nichols. *S.D.T. v. State,* 33 So. 3d 779, 780 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D879b]; *State v. Littles,* 68 So. 3d 976 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1952b]. *See also Lara v. State,* 464 So. 2d 1173 (Fla. 1985) (holding that hearsay is usually admissible at a hearing on a motion to dismiss).

It is axiomatic that an officer may stop a vehicle and temporarily detain the passengers if the officer has a reasonable, articulable suspicion that the individuals has committed or is committing a crime. *Terry v. Ohio,* 392 U.S. 1 (1968). Based upon the undisputed facts adduced during the hearing, the Court finds that Deputy Nichols indeed had a reasonable suspicion that criminal activity was afoot. The Supreme Court of Florida has enumerated four factors to consider when assessing the legitimacy of a stop pursuant to a BOLO: (1) the length of the time and distance from the offense; (2) route of flight; (3) specificity of the vehicle and its occupants; and (4) the source of the BOLO information. *Hunter v. State,* 660 So. 2d 244 (Fla. 1995) [20 Fla. L. Weekly S251a]. In this case, the 911 caller identified himself. Deputy Nichols found the vehicle almost immediately upon receiving the call from dispatch, and Deputy Nichols was able to identify the specific tag number, type of vehicle and occupants. See *Berkowitz v. State,* 737 So. 2d 1179 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1666d] (finding reasonable suspicion to justify a traffic stop that was 40-45 miles from the crime location where the BOLO contained the identification of the reporting person, and the make, model, and color of the subject vehicle); *State v. Vance,* 692 So. 2d 270 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1069c] (holding that a call from dispatch with specific details about the vehicle and passengers coupled with a close temporal nexus between the call from dispatch and the officer's locating of the vehicle is sufficient to establish reasonable suspicion and stop the vehicle); *State v. Goebel,* 804 So. 2d 1276 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D273a].

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Motion to Suppress is **DENIED**.

* * *

Insurance—Coverage—Personal injury protection—Failure to timely afford coverage—Declaratory action—Motion to dismiss is denied

FLORIDA WELLNESS, CENTER INC., (a/a/o Rodolfo Perez), Plaintiff, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 20-CC-052933. December 8, 2020. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before the court on November 18, 2020 on Defendant's Motion to Dismiss. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Plaintiff filed this Declaratory action seeking a declaration of coverage based upon Defendant's failure to timely afford PIP coverage.

2. Defendant's Motion to Dismiss alleges that the proper cause of action for Plaintiff is a breach of contract action and that Plaintiff's Complaint is not plead with the required specificity.

3. Defendant's Motion to Dismiss is HEREBY DENIED. Defendant shall file its answer within twenty (20) days.

* * *

Insurance—Coverage—Declaratory action

LIVING WELL HEALTH GROUP, LLC, (a/a/o Junise Burnett), Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-034932. December 8, 2020. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before the court on November 10, 2020 on Defendant's Motion to Dismiss and Defendant's Motion for Protective Order. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Plaintiff filed this Declaratory action seeking a declaration of coverage based upon Defendant's denial of coverage.

2. Defendant's Motion to Dismiss alleges that the proper cause of action for Plaintiff is a breach of contract action and that Plaintiff's Complaint is not plead with the required specificity.

3. Defendant's Motion to Dismiss is HEREBY DENIED. Defendant shall file its answer within twenty (20) days.

4. Defendant's Motion for Protective Order is HEREBY GRANTED in part. The deposition of Defendant's Corporate Representative shall re-set within thirty (30) days for a deposition to occur within sixty (60) days.

* * *

Insurance—Personal injury protection—Default—Vacation—Excusable neglect—Counsel for insurer established excusable neglect for failure to timely respond to complaint based on breakdown in usual system for distributing lawsuits to counsel due to pandemic, compliance with work-at-home mandate issued by governor, and unexpected increase in lawsuits against insurer—Where insurer's counsel filed motion to vacate default within 6 days of learning of default and has filed answer establishing meritorious defenses, motion to vacate default is granted

MRI ASSOCIATES OF PALM HARBOR INC., a/a/o Noel Cortes, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-042398, Division K. November 19, 2020. Jessica G. Costello, Judge. Counsel: Matthew D. Brumley, FL Legal Group, Tampa, for Plaintiff. Catherine V. Arpen and Christopher S. Dutton, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO VACATE DEFAULT

THIS MATTER came before the Court on November 10, 2020, on Defendant's Motion to Vacate Default, and this Honorable Court having heard argument of counsel, and reviewed the applicable case law and being otherwise duly advised in the premises, the Court hereby makes the following findings:

FACTS

1. Plaintiff filed a PIP suit, as assignee of Noel Cortes, against Defendant on July 21, 2020. The Complaint was served on the Defendant via service of process to the Department of Financial Services on July 28, 2020.

2. Defendant forwarded the service to its defense counsel's law firm on July 30, 2020, via a non-attorney staff member that serves as a liaison between the Defendant and the law firm.

3. Defendant's Answer was due August 17, 2020.

4. Having not received an Answer, Plaintiff filed a Motion for Clerk's Default on August 31, 2020, and Default was entered on September 3, 2020.

5. On September 10, 2020, defense counsel received the Complaint and Summons from the non-attorney staff member.

6. On September 10, 2020, defense counsel filed its Notice of Appearance and Motion for the Extension of Time to Respond to Plaintiff's Complaint and discovery requests.

7. On September 16, 2020, defense counsel filed its Answer citing meritorious defenses, it's Motion to Vacate Default, and a Request for Judicial Notice, with exhibits from the Florida Department of Financial Services website, Jimmy Patronis Florida's Chief Financial Officer Service of Process Reports for the months of January 2020 through August 2020.

8. On September 17, 2020, defense counsel filed its Notice of Filing Affidavit of Erika Rodriguez Schack in Support of the Motion to Vacate Default.

9. Defense counsel reached out to Plaintiff's counsel requesting the default be set aside, but Plaintiff did not agree.

10. The subject hearing was then scheduled for November 10, 2020.

11. Defense counsel filed its hearing notebook with supporting case law on November 4, 2020, and Plaintiff filed its supporting case law on November 9, 2020.

CONCLUSION OF LAW

Defaults are not generally favored by the law; courts are reasonably liberal in granting a motion to vacate; and case law supports proceeding on the merits. *Lloyd's Underwriter's at London v. Ruby, Inc.,* 801 So.2d 138 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2765a]. *Coggin v. Barfield,* 8 So. 2d 9 (Fla. 1942); *McAlice v. Kirsch,* 368 So. 2d 401 (Fla. 3d DCA 1979); *Allstate Ins. Co. v. Ladner,* 740 So. 2d 42 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D840d]. *Torrey v. Leesburg Reg'l Med. Ctr.,* 769 So. 2d 1040 (Fla. 2000) [25 Fla. L. Weekly S911a]. To prevail on a motion to vacate default, a defendant must establish three requirements: 1) that the failure to act in the cause is excusable neglect; 2) that it has a meritorious defense to the action; and 3) that it has acted with due diligence in moving to set aside the default in a reasonable time. See *Lehner v. Durso,* 816 So.2d 1171 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1106a].

A. Excusable Neglect

"Courts are inclined to find excusable neglect 'when the error occurs due to a breakdown in the mechanical or operational practices of the attorney's office equipment or staff'." *Madill v. Rivercrest Cmty. Ass'n,* 273 So.3d 1157, 1160 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1461a]; *Hovercraft of S. Fla., LLC v. Reynolds,* 211 So.3d 1073, 1077 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D367a]; *citing Boudot v. Boudot,* 925 So.2d 409, 416 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D942a]. "Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, or system gone awry[,] or any other of the foibles to which human nature is heir.' " *Elliott v. Aurora Loan,* 31 So. 3d 304, 307 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D785a]; *quoting Somero v. Hendry*

Gen. Hosp., 467 So.2d 1103, 1106 (Fla. 4th DCA 1985).

Here, defense counsel filed an affidavit of a non-attorney member of their law firm who serves as a liaison between the Defendant insurance carrier and the law firm. This liaison is responsible for logging the lawsuits, identifying important dates, reviewing the claim file for payments, verifying the lawsuit is open, requesting both indemnity and medical payments PIP log, and requesting any missing documents. In addition to these responsibilities, there are other various responsibilities that are time-consuming and very important to ensuring the security and confidentiality of the information and systems are maintained.

The liaison's affidavit stated she received the lawsuit from the Defendant on July 30, 2020 but did not distribute the lawsuit to the defense counsel until September 10, 2020. The affidavit stated the reason for the delay in distributing the lawsuit to defense counsel was due to a convergence of three unforeseen activities: (1) the COVID-19 pandemic, (2) Governor Ron Desantes' declaration of a state of emergency urging people to work remotely, and (3) an unexpected increase in lawsuit filings against the Defendant carrier during the months of June, July, and August of 2020. Specifically, the law firm immediately complied with the work-at-home mandate, which involved unexpected mechanical and technical maneuvering of equipment, internet, and other methods to maintain the security and privacy of the information of their clients. Thus, a system that was running well for years . . . went awry.

Defense counsel filed a Request for Judicial Notice providing Department of Financial Services Service of Process Reports showing the number of lawsuits filed historically since January of 2020 and the increase that occurred during the months of June, July, and August of 2020. Prior to the hearing, the parties stipulated to the Request for Judicial Notice, this was confirmed by Plaintiff's counsel at hearing, and the Judge took judicial notice of the data contained within the reports. The data confirmed that there was a substantial increase in the number of lawsuits filed against the Defendant during the work-at-home mandate.

Defense counsel argued at hearing that, prior to this 3-prong convergence of unforeseen events, the law firm had a history of timely answers and no defaults. And now, after taking measures to address the problems, the law firm's non-attorney staff is able to timely distribute the lawsuits to defense counsel, who are continuing to answer timely and defaults are no longer being issued. Based on the evidence presented in the affidavit of the law firm's liaison and the data judicially noticed, this Court finds that defense counsel has established excusable neglect for not timely responding to Plaintiff's Complaint.

B. Due Diligence

Plaintiff argued that the delay in distribution of the lawsuit to defense counsel, once received by the liaison at the law firm, should be evaluated with a due diligence standard, and not excusable neglect. Case law from the Second District Court of Appeal confirms that the due diligence standard is applied to how quickly defense counsel acted once it "learned" of the default. See *Coquina Beach Club Condominium Ass'n v. Wagner,* 813 So. 2d 1061 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D873a]; *Lindell Motors, Inc. v. Morgan,* 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D667a]; *Goodwin v. Goodwin,* 559 So. 2d 109 (Fla. 2d DCA 1990); *Marshall Davis, Inc. v. Incapco, Inc.,* 558 So. 2d 206 (Fla. 2d DCA 1990); *Ponderosa, Inc. v. Stephens,* 539 So. 2d 1162 (Fla. 2d DCA 1989). In these cases, one day, three days, six days, seven days, and 15 days were acceptable time frames for the attorney to file its Motion to Vacate Default, *after learning of the default,* and did establish due diligence in seeking to set aside the default.

In the present case, defense counsel filed its Motion to Vacate Default only six days after "learning" of the default. This time frame was established by evidence presented in the affidavit of the law firm's non-attorney liaison. This immediate action by defense counsel follows the rulings of the Second District Court of Appeal, and for this reason, defense counsel has established it acted with due diligence when moving to set aside the default.

C. Meritorious Defense

In the present case, defense counsel filed an Answer to Plaintiff's Complaint and cited affirmative defenses. Thus, the Court finds that defense counsel has established a meritorious defense to the Plaintiff's lawsuit and the case has merits upon which to proceed.

* * *

In conclusion, this Court finds that Defendant has established all three requirements necessary to vacate a Default. Defendant presented an affidavit of the person with the most knowledge of the delay in distribution of the lawsuit to defense counsel once received from the Defendant insurer, and presented specific reasons for the delay including a breakdown in the mechanical and operational systems due to the convergence of three unforeseen events: the COVID-19 pandemic, the work-at-home mandate by the Governor of Florida, and the sudden and unexpected number of lawsuits filed against the Defendant. For the reasons stated above, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant's Amended Motion to Vacate Default is GRANTED. The Answer and Affirmative Defenses shall be as filed.

* * *

Insurance—Personal injury protection—Declaratory action—Motion to dismiss declaratory action regarding insured's duty to attend examination under oath after insurer has paid all medical bills is denied

FABIAN SINCLAIR, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-047459. December 10, 2020. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR PROTECTIVE ORDER

THIS MATTER having come before the court on November 2, 2020 on Defendant's Motion to Dismiss Plaintiff's Complaint and Defendant's Motion for Protective Order. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action seeking a declaration regarding the Plaintiff's doubt about his duty to attend an EUO subsequent to Defendant having paid all the subject medical bills.

2. Based upon the standard in ruling on a Motion to Dismiss, the Court's analysis is confined to the four (4) corners of the complaint. Further, Plaintiff has properly plead its Petition for Declaratory Judgment. As such, Defendant's Motion to Dismiss is **HEREBY DENIED**.

3. Defendant's Motion for Protective Order **HEREBY DENIED** in part. Plaintiff has agreed to limit the scope of the deposition of Defendant's Corporate Representative to the issues as framed by Plaintiff's Petition. Said deposition will occur within sixty (60) days.

4. Defendant shall file its answer within twenty (20) days.

* * *

Insurance—Personal injury protection—Default—Vacation—Excusable neglect—Counsel for insurer established excusable neglect for failure to timely respond to complaint based on breakdown in usual system for distributing lawsuits to counsel due to pandemic, compliance with work-at-home mandate issued by governor, and unexpected increase in lawsuits against insurer—Where insurer's counsel filed motion to vacate default within 5 days of learning of default and has filed answer establishing meritorious defenses, motion to vacate default is granted

SPINE AND ORTHOPAEDIC SPECIALIST, PLLC, d/b/a TRINITY SPINE CENTER, PLLC, a/a/o Douglas Wooton, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-042944, Division K. November 19, 2020. Jessica G. Costello, Judge. Counsel: Matthew D. Brumley, FL Legal Group, Tampa, for Plaintiff. Catherine V. Arpen and Christopher S. Dutton, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO VACATE DEFAULT

THIS MATTER came before the Court on November 10, 2020, on Defendant's Motion to Vacate Default, and this Honorable Court having heard argument of counsel, and reviewed the applicable case law and being otherwise duly advised in the premises, the Court hereby makes the following findings:

FACTS

1. Plaintiff filed a PIP suit, as assignee of Douglas Wooton, against Defendant on July 23, 2020. The Complaint was served on the Defendant via service of process to the Department of Financial Services on August 5, 2020.

2. Defendant forwarded the service to its defense counsel's law firm on August 7, 2020, via a non-attorney staff member that serves as a liaison between the Defendant and the law firm.

3. Defendant's Answer was due August 25, 2020.

4. Having not received an Answer, Plaintiff filed a Motion for Clerk's Default on September 1, 2020, and Default was entered on September 3, 2020.

5. On September 11, 2020, defense counsel received the Complaint and Summons from the non-attorney staff member.

6. On September 11, 2020, defense counsel filed its Notice of Appearance and Motion for the Extension of Time to Respond to Plaintiff's Complaint and discovery requests.

7. On September 16, 2020, defense counsel filed its Answer citing meritorious defenses, and it's Motion to Vacate Default.

8. On September 17, 2020, defense counsel filed its Request for Judicial Notice, with exhibits from the Florida Department of Financial Services website, Jimmy Patronis Florida's Chief Financial Officer Service of Process Reports for the months of January 2020 through August 2020.

9. On September 21, 2020, defense counsel filed its Notice of Filing Affidavit of Erika Rodriguez Schack in Support of the Motion to Vacate Default.

10. Defense counsel reached out to Plaintiff's counsel requesting the default be set aside, but Plaintiff did not agree.

11. The subject hearing was then scheduled for November 10, 2020.

12. Defense counsel filed its hearing notebook with supporting case law on November 4, 2020, and Plaintiff filed its supporting case law on November 9, 2020.

CONCLUSION OF LAW

Defaults are not generally favored by the law; courts are reasonably liberal in granting a motion to vacate; and case law supports proceeding on the merits. *Lloyd's Underwriter's at London v. Ruby, Inc.,* 801 So.2d 138 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2765a]. *Coggin v. Barfield,* 8 So. 2d 9 (Fla. 1942); *McAlice v. Kirsch,* 368 So. 2d 401 (Fla. 3d DCA 1979); *Allstate Ins. Co. v. Ladner,* 740 So. 2d 42 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D840d]. *Torrey v. Leesburg Reg'l Med. Ctr.,* 769 So. 2d 1040 (Fla. 2000) [25 Fla. L. Weekly S911a]. To prevail on a motion to vacate default, a defendant must establish three requirements: 1) that the failure to act in the cause is excusable neglect; 2) that it has a meritorious defense to the action; and 3) that it has acted with due diligence in moving to set aside the default in a reasonable time. See *Lehner v. Durso,* 816 So.2d 1171 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1106a].

A. Excusable Neglect

"Courts are inclined to find excusable neglect 'when the error occurs due to a breakdown in the mechanical or operational practices of the attorney's office equipment or staff'." *Madill v. Rivercrest Cmty. Assn,* 273 So.3d 1157, 1160 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1461a]; *Hovercraft of S. Fla., LLC v. Reynolds,* 211 So.3d 1073, 1077 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D367a]; *citing Boudot v. Boudot,* 925 So.2d 409, 416 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D942a]. "Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, or system gone awry[,] or any other of the foibles to which human nature is heir.' " *Elliott v. Aurora Loan,* 31 So.3d 304 , 307 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D785a]; *quoting Somero v. Hendry Gen. Hosp.,* 467 So.2d 1103, 1106 (Fla. 4th DCA 1985).

Here, defense counsel filed an affidavit of a non-attorney member of their law firm who serves as a liaison between the Defendant insurance carrier and the law firm. This liaison is responsible for logging the lawsuits, identifying important dates, reviewing the claim file for payments, verifying the lawsuit is open, requesting both indemnity and medical payments PIP log, and requesting any missing documents. In addition to these responsibilities, there are other various responsibilities that are time-consuming and very important to ensuring the security and confidentiality of the information and systems are maintained.

The liaison's affidavit stated she received the lawsuit from the Defendant on August 7, 2020 but did not distribute the lawsuit to the defense counsel until September 11, 2020. The affidavit stated the reason for the delay in distributing the lawsuit to defense counsel was due to a convergence of three unforeseen activities: (1) the COV1D-19 pandemic, (2) Governor Ron Desantes' declaration of a state of emergency urging people to work remotely, and (3) an unexpected increase in lawsuit filings against the Defendant carrier during the months of June, July, and August of 2020. Specifically, the law firm immediately complied with the work-at-home mandate, which involved unexpected mechanical and technical maneuvering of equipment, internet, and other methods to maintain the security and privacy of the information of their clients. Thus, a system that was running well for years . . . went awry.

Defense counsel filed a Request for Judicial Notice providing Department of Financial Services Service of Process Reports showing the number of lawsuits filed historically since January of 2020 and the increase that occurred during the months of June, July, and August of 2020. Prior to the hearing, the parties stipulated to the Request for Judicial Notice, this was confirmed by Plaintiff's counsel at hearing, and the Judge took judicial notice of the data contained within the reports. The data confirmed that there was a substantial increase in the number of lawsuits filed against the Defendant during the work-at-home mandate.

Defense counsel argued at hearing that, prior to this 3-prong convergence of unforeseen events, the law firm had a history of timely answers and no defaults. And now, after taking measures to address the problems, the law firm's non-attorney staff is able to timely distribute the lawsuits to defense counsel, who are continuing to

answer timely and defaults are no longer being issued. Based on the evidence presented in the affidavit of the law firm's liaison and the data judicially noticed, this Court finds that defense counsel has established excusable neglect for not timely responding to Plaintiff's Complaint.

B. Due Diligence

Plaintiff argued that the delay in distribution of the lawsuit to defense counsel, once received by the liaison at the law firm, should be evaluated with a due diligence standard, and not excusable neglect. Case law from the Second District Court of Appeal confirms that the due diligence standard is applied to how quickly defense counsel acted once it "learned" of the default. See *Coquina Beach Club Condominium Ass'n v. Wagner,* 813 So. 2d 1061 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D873a]; *Lindell Motors, Inc. v. Morgan,* 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D667a]; *Goodwin v. Goodwin,* 559 So. 2d 109 (Fla. 2d DCA 1990); *Marshall Davis, Inc. v. Incapco, Inc.,* 558 So. 2d 206 (Fla. 2d DCA 1990); *Ponderosa, Inc. v. Stephens,* 539 So. 2d 1162 (Fla. 2d DCA 1989). In these cases, one day, three days, six days, seven days, and 15 days were acceptable time frames for the attorney to file its Motion to Vacate Default, *after learning of the default,* and did establish due diligence in seeking to set aside the default.

In the present case, defense counsel filed its Motion to Vacate Default only five days after "learning" of the default. This time frame was established by evidence presented in the affidavit of the law firm's non-attorney liaison. This immediate action by defense counsel follows the rulings of the Second District Court of Appeal, and for this reason, defense counsel has established it acted with due diligence when moving to set aside the default.

C. Meritorious Defense

In the present case, defense counsel filed an Answer to Plaintiff's Complaint and cited affirmative defenses. Thus, the Court finds that defense counsel has established a meritorious defense to the Plaintiff's lawsuit and the case has merits upon which to proceed.

* * *

In conclusion, this Court finds that Defendant has established all three requirements necessary to vacate a Default. Defendant presented an affidavit of the person with the most knowledge of the delay in distribution of the lawsuit to defense counsel once received from the Defendant insurer, and presented specific reasons for the delay including a breakdown in the mechanical and operational systems due to the convergence of three unforeseen events: the COVID-19 pandemic, the work-at-home mandate by the Governor of Florida, and the sudden and unexpected number of lawsuits filed against the Defendant. For the reasons stated above, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant's Amended Motion to Vacate Default is GRANTED. The Answer and Affirmative Defenses shall be as filed.

* * *

Insurance—Personal injury protection—Default—Vacation—Excusable neglect—Counsel for insurer established excusable neglect for failure to timely respond to complaint based on breakdown in usual system for distributing lawsuits to counsel due to pandemic, compliance with work-at-home mandate issued by governor, and unexpected increase in lawsuits against insurer—Where insurer's counsel filed motion to vacate default within 2 days of learning of default and has filed answer establishing meritorious defenses, motion to vacate default is granted

PRIMACARE EMC, a/a/o Sylvia Dumouchel, Plaintiff, v. GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-039107, Division K. November 19, 2020. Jessica G. Costello, Judge. Counsel: Matthew D. Brumley, FL Legal Group, Tampa, for Plaintiff. Catherine V. Arpen and Kimberly A. Sandefer, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO VACATE DEFAULT

THIS MATTER came before the Court on November 10, 2020, on Defendant's Amended Motion to Vacate Default, and this Honorable Court having heard argument of counsel, and reviewed the applicable case law and being otherwise duly advised in the premises, the Court hereby makes the following findings:

FACTS

1. Plaintiff filed a PIP suit, as assignee of Sylvia Dumouchel, against Defendant on July 1, 2020. The Complaint was served on the Defendant via service of process to the Department of Financial Services on July 9, 2020.

2. Defendant forwarded the service to its defense counsel's law firm on July 13, 2020, via a non-attorney staff member that serves as a liaison between the Defendant and the law firm.

3. Defendant's Answer was due July 30, 2020.

4. Having not received an Answer, Plaintiff filed a Motion for Clerk's Default on August 4, 2020, and Default was entered on August 6, 2020.

5. On August 24, 2020, defense counsel received the Complaint and Summons from the non-attorney staff member.

6. On August 26, 2020, defense counsel filed its Notice of Appearance and Motion to Vacate Default.

7. On August 27, 2020, defense counsel filed its Answer citing meritorious defenses.

8. On September 4, 2020, defense counsel filed its Amended Motion to Vacate Default, along with a Request for Judicial Notice, with exhibits from the Florida Department of Financial Services website, Jimmy Patronis Florida's Chief Financial Officer Service of Process Reports for the months of January 2020 through August 2020.

9. On September 22, 2020, defense counsel filed its Notice of Filing Affidavit of Leah Watson in Support of the Motion to Vacate Default.

10. Defense counsel reached out to Plaintiff's counsel requesting the default be set aside, but Plaintiff did not agree.

11. The subject hearing was then scheduled for November 10, 2020.

12. Defense counsel filed its hearing notebook with supporting case law on November 3, 2020, and Plaintiff filed its supporting case law on November 9, 2020.

CONCLUSION OF LAW

Defaults are not generally favored by the law; courts are reasonably liberal in granting a motion to vacate; and case law supports proceeding on the merits. *Lloyd's Underwriter's at London v. Ruby, Inc.,* 801 So.2d 138 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2765a]. *Coggin v. Barfield,* 8 So. 2d 9 (Fla. 1942); *McAlice v. Kirsch,* 368 So. 2d 401 (Fla. 3d DCA 1979); *Allstate Ins. Co. v. Ladner,* 740 So. 2d 42 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D840d]. *Torrey v. Leesburg Reg'l Med. Ctr.,* 769 So. 2d 1040 (Fla. 2000) [25 Fla. L. Weekly S911a]. To prevail on a motion to vacate default, a defendant must establish three requirements: 1) that the failure to act in the cause is excusable neglect; 2) that it has a meritorious defense to the action; and 3) that it has acted with due diligence in moving to set aside the default in a reasonable time. See *Lehner v. Durso,* 816 So.2d 1171 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1106a].

A. Excusable Neglect

"Courts are inclined to find excusable neglect 'when the error occurs due to a breakdown in the mechanical or operational practices of the attorney's office equipment or staff'." *Madill v. Rivercrest Cmty. Ass'n,* 273 So.3d 1157, 1160 (Fla. 2d DCA 2019) [44 Fla. L.

Weekly D1461a]; *Hovercraft of S. Fla., LLC v. Reynolds,* 211 So.3d 1073, 1077 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D367a]; *citing Boudot v. Boudot,* 925 So.2d 409, 416 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D942a]. "Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, or system gone awry[,] or any other of the foibles to which human nature is heir.' " *Elliott v. Aurora Loan,* 31 So.3d 304, 307 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D785a]; *quoting Somero v. Hendry Gen. Hosp.,* 467 So.2d 1103, 1106 (Fla. 4th DCA 1985).

Here, defense counsel filed an affidavit of a non-attorney member of their law firm who serves as a liaison between the Defendant insurance carrier and the law firm. This liaison is responsible for logging the lawsuits, identifying important dates, reviewing the claim file for payments, verifying the lawsuit is open, requesting both indemnity and medical payments PIP log, and requesting any missing documents. In addition to these responsibilities, there are other various responsibilities that are time-consuming and very important to ensuring the security and confidentiality of the information and systems are maintained.

The liaison's affidavit stated she received the lawsuit from the Defendant on July 13, 2020 but did not distribute the lawsuit to the defense counsel until August 24, 2020. The affidavit stated the reason for the delay in distributing the lawsuit to defense counsel was due to a convergence of three unforeseen activities: (1) the COVID-19 pandemic, (2) Governor Ron Desantes' declaration of a state of emergency urging people to work remotely, and (3) an unexpected increase in lawsuit filings against the Defendant carrier during the months of June, July, and August of 2020. Specifically, the law firm immediately complied with the work-at-home mandate, which involved unexpected mechanical and technical maneuvering of equipment, internet, and other methods to maintain the security and privacy of the information of their clients. Thus, a system that was running well for years . . . went awry.

Defense counsel filed a Request for Judicial Notice providing Department of Financial Services Service of Process Reports showing the number of lawsuits filed historically since January of 2020 and the increase that occurred during the months of June, July, and August of 2020. Prior to the hearing, the parties stipulated to the Request for Judicial Notice, this was confirmed by Plaintiff's counsel at hearing, and the Judge took judicial notice of the data contained within the reports. The data confirmed that there was a substantial increase in the number of lawsuits filed against the Defendant during the work-at-home mandate.

Defense counsel argued at hearing that, prior to this 3-prong convergence of unforeseen events, the law firm had a history of timely answers and no defaults. And now, after taking measures to address the problems, the law firm's non-attorney staff is able to timely distribute the lawsuits to defense counsel, who are continuing to answer timely and defaults are no longer being issued. Based on the evidence presented in the affidavit of the law firm's liaison and the data judicially noticed, this Court finds that defense counsel has established excusable neglect for not timely responding to Plaintiff's Complaint.

B. Due Diligence

Plaintiff argued that the delay in distribution of the lawsuit to defense counsel, once received by the liaison at the law firm, should be evaluated with a due diligence standard, and not excusable neglect. Case law from the Second District Court of Appeal confirms that the due diligence standard is applied to how quickly defense counsel acted once it "learned" of the default. See *Coquina Beach Club Condominium Ass'n v. Wagner,* 813 So. 2d 1061 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D873a]; *Lindell Motors, Inc. v. Morgan,* 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D667a]; *Goodwin v. Goodwin,* 559 So. 2d 109 (Fla. 2d DCA 1990); *Marshall Davis, Inc. v. Incapco, Inc.,* 558 So. 2d 206 (Fla. 2d DCA 1990); *Ponderosa, Inc. v. Stephens,* 539 So. 2d 1162 (Fla. 2d DCA 1989). In these cases, one day, three days, six days, seven days, and 15 days were acceptable time frames for the attorney to file its Motion to Vacate Default, *after learning of the default,* and did establish due diligence in seeking to set aside the default.

In the present case, defense counsel filed is original Motion to Vacate Default only two days after "learning" of the default. This time frame was established by evidence presented in the affidavit of the law firm's non-attorney liaison. This immediate action by defense counsel follows the rulings of the Second District Court of Appeal, and for this reason, defense counsel has established it acted with due diligence when moving to set aside the default.

C. Meritorious Defense

In the present case, defense counsel filed an Answer to Plaintiff's Complaint and cited affirmative defenses. Thus, the Court finds that defense counsel has established a meritorious defense to the Plaintiff's lawsuit and the case has merits upon which to proceed.

* * *

In conclusion, this Court finds that Defendant has established all three requirements necessary to vacate a Default. Defendant presented an affidavit of the person with the most knowledge of the delay in distribution of the lawsuit to defense counsel once received from the Defendant insurer, and presented specific reasons for the delay including a breakdown in the mechanical and operational systems due to the convergence of three unforeseen events: the COVID-19 pandemic, the work-at-home mandate by the Governor of Florida, and the sudden and unexpected number of lawsuits filed against the Defendant. For the reasons stated above, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant's Amended Motion to Vacate Default is GRANTED. The Answer and Affirmative Defenses shall be as filed.

* * *

Insurance—Homeowners—Standing—Assignment—Validity—Where policy requires mortgagee's prior written consent to transfer compensation for services to any person or entity that makes repairs to insured property, assignment that does not include or contemplate consent of mortgagee is invalid partial assignment—No merit to argument that insurer does not have standing to challenge validity of assignment to which it is not party where plaintiff, as assignee standing in shoes of assignor, is subject to all equities and defenses that insurer could assert against insured, such as need to obtain consent of mortgagee prior to assigning benefits—Motion to dismiss granted

EXPERT INSPECTIONS, LLC; Lourdes Perez, Plaintiff, v. HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-023663, Division S. September 18, 2020. Lisa Allen, Judge. Counsel: Joel Phillip Magdovitz, Magdovitz & Associates P.A., Tampa; and Juan J. Perez and Roberto Jose Gonzalez, Peregonza the Attorneys, PLLC, Doral, for Plaintiff. Michael Jay Nixon, Heritage Property & Casualty Insurance, Sunrise, for Defendant.

Order Granting Defendant's Motion to Dismiss

This matter came before the Court at hearing on August 27, 2020 on Defendant's Motion to Dismiss Plaintiff's Complaint and Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint. Upon review of the pleadings, arguments of counsel and being otherwise fully advised in the premises, the Court finds that Defendant's Motion to Dismiss Plaintiff's Complaint should be granted.

Plaintiff, Expert Inspections, LLC d/b/a iTest & MoldExpert.com ("Expert Inspections"), as assignee of Lourdes Perez ("Perez" or "Insured") (together referred to as "Plaintiff"), brings a one-count complaint (Count 1—Breach of Contract) against Defendant, Heritage Property & Casualty Insurance Company ("Defendant" or

"Heritage"). Defendant argues that Plaintiff's Complaint should be dismissed based on the following legal argument: the Assignment of Insurance Benefits attached as an exhibit to the complaint is an invalid, partial assignment because the mortgagee did not consent in writing to the assignment of benefits as required in the Policy, and therefore, Expert Inspections lacks standing to sue on the Insured's behalf for a breach of the Policy. In support of Defendant's argument, Defendant cites the Fourth District Court of Appeal's holding in *Restoration 1 of Port St. Lucie v. Ark Royal Insurance Co.,* 255 So.3d 344 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2056a]. In *Restoration 1,* Restoration 1 sued Ark Royal Insurance Company for breach of contract and sought a declaratory judgment determining that the post-loss assignment condition requiring consent of all insureds and mortgagees violated Florida law. *Restoration 1,* 255 So.3d 344-45. The trial court dismissed the complaint and Restoration 1 appealed arguing that Ark Royal's anti-assignment provision was illegal. Ultimately, the Forth DCA disagreed and affirmed the trial court's dismissal.

Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint argues that in Florida post-loss insurance claims are freely assignable without the consent of the insurer. Plaintiff cites the Fifth District Court of Appeal in *Security First Ins. v. Fla. Office of Ins. Reg.,* 232 So.3d 1157 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D2543a]. In *Security First,* Security First Insurance Company appealed the order entered by the Office of Insurance Regulation ("OIR") which disapproved Security First's request to amend its policy language to condition post-loss assignment of benefits on the consent of all insureds, all additional insureds, and all mortgagees named in the policy. *See Security First,* 232 So.3d at 1157.

OIR found that the proposed policy endorsement violated the intent and meaning of Sections 627.411(a), (b), and (e), and that it contained "language restricting the assignment of post-loss claim benefits under the policy which is contrary to Florida law." *Id.* at 1158. Security First sought administrative review of OIR's decision arguing that the case law upon which OIR relied prohibits provisions which require the insurer's consent for a post-loss assignment, not other parties such as an additional insured or mortgagee named in the policy. The Fifth DCA ultimately affirmed the order. *Id* at 1160-61.

I. Motion to Dismiss Standard

"A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Roberts v. Children's Med. Servs.,* 751 So.2d 672, 673 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D169c]. When a court determines the sufficiency of a complaint to state a cause of action, it applies the so-called "four corners rule" in the analysis. *Swope Rodante, P.A. v. Harmon,* 85 So.3d 508, 509 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D725c] (quoting *Al-Hakim v. Holder,* 787 So.2d 939, 941 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1380d]). Under this rule, the court's review is limited to an examination solely of the complaint and its attachments and "[w]hether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief against the defendant." *Pizzi v. Central Bank and Trust Co.,* 250 So.2d 895, 896 (Fla. 1971),*see also McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A.,* [*v. Weiss*], 704 So.2d 214, 215 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D250f].

Although the "four-corners rule" limits a court's review in determining the complaint's sufficiency, it does not limit it only to the body of the written complaint. Fla. R. Civ. Rule 1.130(b), provides that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes." *See Ginsberg v. Lennar Fla. Holdings, Inc.,* 645 So.2d 490, 494 (Fla. 3d DCA 1994). Also, exhibits attached to a complaint control over the allegations of the complaint when the two contradict each other. *See Santiago v. Mauna Loa Investments, LLC,* 189 So.3d 752 (Fla. 2016) [41 Fla. L. Weekly S91a]. "However, the alleged contradiction must be apparent from the face of the complaint and the exhibits." *Paladin Properties v. Family Investment Enterp.,* 952 So.2d 560, 564 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D432a]. Moreover, for exhibits to serve as a basis for dismissing a complaint for failure to state a cause of action, the exhibits must actually negate the cause of action—not simply raise possible defenses to it." *Id.*

In addition, where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss. *See Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So.3d 1246, 1249 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a] (rejecting argument that the trial court erred by considering the contents of a settlement agreement that was attached to a motion to dismiss: "[I]n this case, the complaint refers to the settlement agreement, and in fact, Veal's standing to bring suit is premised on the terms of that agreement. Accordingly, since the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature of the claim being alleged.").

II. Applicable Legal Authority

Case law in the Second District Court of Appeal is clear that an insured can assign benefits under the policy of insurance without the insurer's consent. *See Start to Finish Restoration, LLC v. Homeowners Choice Property,* 192 So.3d 1275 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1385a];*see also Bioscience West, Inc. v. Gulfstream Property & Casualty Ins., Co.,* 185 So.3d 638 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D349a]. There is no Second District Court of Appeal opinion, however, as to whether an insured may assign post-lost benefits under the policy of insurance without the consent of other interested parties such as additional insureds or mortgagees (as opposed to the insurer). On this question, there is a split between the Fourth District Court of Appeal in*Restoration* 1 and the Fifth District Court of Appeal in *Security First.* Accordingly, neither case is binding on this court until the Second District Court of Appeal dictates otherwise.

III. Background

The Complaint in the instant case alleges in pertinent part: the Insured purchased a homeowner's insurance policy from Heritage for property located at 4526 West Clifton Street, Tampa, Florida 33614, for the purposes of protecting it from loss; said insurance policy is identified by a policy number HPH120580, issued by Heritage to the Insured ("Policy"); on or about March 2, 2019, Insured retained Expert Inspections to inspect the property and conduct mold-related services; in exchange for these mold-related services, Insured agreed to sign an assignment of insurance benefits to Expect Inspections (the "Assignment"); Expert Inspections provided mold-related services to Insured; Expert Inspections submitted its final invoice for services rendered to Heritage and demanded payment of the same; Heritage refused to pay the invoice; Heritage's refusal to pay the invoice billed by Expert Inspections to the Insured for the mold-related services constitutes a breach of contract; Expert Inspections has been damaged as a result of the breach by Heritage in the form of the outstanding balance of insurance proceeds which have not been paid; and all conditions precedent to filing this lawsuit have been fully satisfied, or have otherwise been waived. Plaintiff attached a copy of the Assignment and one service invoice to the Complaint as exhibits. The Policy is incorporated by reference in the Complaint.

IV. Policy Language at Issue

The Policy provides, in pertinent part:

8. Suit Against Us

No action can be brought against us; unless:

a. There has been full compliance with all of the terms of this policy; and

b. The action is started within 5 years after the date of loss. [*Policy,* Page 21 of 33]

* * *

12. Mortgage Clause

The word "mortgagee" includes trustee and lienholder.[1]

If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. . .If we pay the mortgagee for any loss and deny payment to you:

a. We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. At our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim. [*Policy,* Page 22 of 33]

* * *

19. Assignment of Claim Benefits

a. Any person or entity that effectuates repairs to property insured under this policy is not entitled to perform those repairs or receive compensation for services using an assignment of benefits or any instrument that transfers any post loss rights under the insurance contract without the prior written consent of all "insureds", all additional insureds and all mortgagee(s) named in the policy. [*Policy,* Page 23 of 33]

V. Assignment of Insurance Benefits Document

The Assignment dated March 2, 2019 is allegedly signed only by the Insured, Lourdes Perez, and Expert Inspections' Inspector, Enrique Villamar. There are no other signatures on the Assignment. [Complaint, Plaintiff's Composite Exhibit A, *Assignment*.] The Assignment states in pertinent part:

4. **Direction to Pay.** Client hereby demands and authorizes any applicable insurance carrier(s) to pay ME [Expert Inspections] solely and directly for the services provided, without the need to include Client or any co-insured as a payee.

5. **Assignment of insurance Claim Benefits.** Client hereby assigns to ME any and all insurance rights, benefits and proceeds which pertain to services rendered in relation to the above loss, under any applicable policy of insurance. *The client will NOT be liable for any fees for the services rendered if the claim is denied, only insurance carrier. This assignment of rights, benefits and proceeds is limited to the amount of ME's invoice for services rendered* in relation to the above claim and the right and ability to collect same directly from my insurer, including the right to file suit and to seek attorney's fees and court costs. Toward that end, Client waves any homestead exemption, which might be applicable to such insurance funds. Any and all other insurance rights, benefits, and proceeds shall continue to belong to the Client. Only in the event customer decides not to open an insurance claim, will the customer be responsible for the fees related to the services rendered.

* * *

7. **Limited Power of Attorney.** Client hereby appoints ME as Client's attorney in fact to endorse and deposit any payments made by any source for services rendered by ME which may include Client's name as a co-payee.

[Complaint, Composite Exhibit A, *Assignment,* Paragraphs 4, 5 and 7].

VI. Opinion

A. Enforceability of Contractual Assignment of Claim Benefits Provision

Notably, the Assignment of Claim Benefits provision language contained in Paragraph 19(a) of the Policy does not restrict the Insured's unilateral post-loss assignment of a benefit derived from the Policy. Rather, the provision proactively notifies "any person or entity that effectuates repairs to property insured under this policy" that they are "not entitled to perform those repairs or receive compensation for services using an assignment of benefits or any instrument that transfers any post loss rights under the insurance contract without the prior written consent of all the insureds, all additional insureds and all mortgagee(s) named in the policy." [Underlining added]. *Policy,* Page 23 of 33. Shellpoint Mortgage Servicing ISAOA/ATIMA ("Shellpoint") is named as a mortgagee in the Policy, however, Plaintiff has not alleged that Shellpoint consented to the Assignment of Insurance Benefits at issue, nor is Shellpoint mentioned in the Assignment.

"All contractual rights are assignable unless the contract prohibits the assignment, the contract involves obligations of a personal nature, or public policy dictates against the assignment." *Kohl v. Blue Cross & Blue Shield of Fla., Inc.,* 988 So.2d 654, 658 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1779a]. Section 627.422 of the *Florida Statutes,* provides that, "A policy may be assignable, or not assignable, as provided by its terms." *Fla. Stat.* § 627.422. Thus, a provision in an insurance contract prohibiting assignment of the policy is enforceable under the plain language of Section 627.422. The purpose of an anti-assignment provision is to protect an insurer against "unbargained-for risk." *Lexington Ins. Co. v. Simkins Indus., Inc.,* 704 So.2d 1384, 1386 (Fla. 1998) [23 Fla. L. Weekly S41a]. Nevertheless, a post-loss assignment of a benefit under a policy, such as the right to seek payment under a policy for mitigation services rendered, will not constitute an assignment of the policy to a third-party assignee. *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.,* 185 So.3d 638, 641 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D349a] ("An assignment before a loss involves a transfer of a contractual relationship, whereas an assignment after a loss is the transfer of a right to money claim."). Upon this premise, Florida courts have allowed insureds to assign insurance proceeds to a third party after a loss, even without the consent of the insurer. This exception to the general rule is based on the theory that the insured's post-loss assignment of his right to insurance proceeds will not affect the insurer's liability for payment, because the insurer's duty under the policy is already established. *See Highlands Ins. Co. v. Kravecas,* 719 So. 2d 320, 321-22 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1869a]. In other words, the insurer's risk should not expand by substituting the identity of the party to whom payment is to be made under the policy.

The Policy provision at issue does not require the insurer's [Heritage's] consent; rather, the provision provides notice to the parties in contractual privity as well as any other prospective person or entity that effectuates repairs to property insured under the Policy that they are not entitled to perform those repairs or receive compensation for services using an assignment of benefits or any instrument that transfers any post-loss rights under the insurance contract without the prior written consent of all the insureds, all additional insureds and all mortgagee(s) named in the Policy. In this case, the Assignment seeks to transfer post-loss rights under the insurance contract without the mortgagee's consent.

Pursuant to the Policy "any loss payable under Coverage A or B will be paid to the mortgagee and you [insured]." Accordingly, the mortgagee's consent to the assignment is directly related to Heritage's duty to pay a claim under the Policy. The Assignment between Expert Inspections and Perez does not contemplate written consent by the mortgagee nor co-payment to the mortgagee.

Instead, the Assignment states, "Client hereby demands and authorizes any applicable insurance carrier(s) to pay ME [Expert Inspections] solely and directly for the services provided, without the need to include Client or any co-insured as a payee." [Complaint, Composite Exhibit "A", *Assignment,* Paragraph 4]. This payee directive alone attempts to

rewrite the material terms and conditions of the Policy. The insured has assigned its right to payment under the Policy directly to Expert Inspections without the consent of Shellpoint; however, if Heritage followed such a directive to pay all proceeds to Expert Inspections alone, then Heritage would be in breach of the Mortgage Clause contained in the Policy which requires any loss payable under Coverage A and B to be paid to the mortgagee [Shellpoint] and insured. Thus, without Shellpoint's written consent, Heritage's risk under the Policy immediately expands upon execution of the Assignment.[2] Furthermore, Perez agreed that no action could be brought against Heritage unless "there has been full compliance with all of the terms of this policy." *Policy,* Page 21 of 33, Paragraph 8.

Heritage and Perez freely contracted for the terms and conditions contained within the Policy. In Florida, parties may negotiate to contractually waive certain constitutional or legal rights. Therefore, within reason, parties are free to contract even though either side may get what turns out to be a "bad bargain." *Quinerly v. Dundee Corp.,* 31 So.2d 533, 534 (1947) ("[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute [the Court's] judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain.").[3] "We have long held that under contract law principles, contract language that is unambiguous on its face must be given its plain meaning." *Green v. Life & Health of America,* 704 So.2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a]; *Carefree Villages, Inc. v. Keating Properties, Inc.,* 489 So.2d 99 (Fla. 2d DCA 1986).

Upon a review of the Assignment of Claims Benefits provision contained in Paragraph 19 of the Policy at issue, this Court finds that such language is clear, unambiguous and provides a simple notice of a condition precedent to all parties in contractual privity as well as any person or entity that effectuates repairs to property insured under this Policy that such repair service providers will not be compensated for services without the prior written consent of all insureds, all additional insureds and all mortgagees named in the Policy. Notably, the provision does not require Heritage's written consent to assign the after loss claim, thus such notice provision does not violate Florida law.

Furthermore, the condition precedent of obtaining the written consent of the mortgagee prior to assigning after loss benefits to a service provider is consistent with other provisions contained within the Policy (e.g. insured's duties after loss, insurer's subrogation rights under the mortgagee clause, inspections and surveys and notice conditions).

B. Standing to Challenge Contracts Between Insured and Expert Inspections

At hearing Plaintiff argued that Heritage does not have standing to challenge the validity of the Assignment because Heritage is not a party to the Assignment and therefore does not have contractual privity. Plaintiff brings this lawsuit as an assignee of Perez, the Insured under the Policy.

Heritage is in privity with the Insured by virtue of the Policy and is enforcing the provisions of its own Policy (i.e. any person or entity that effectuates repairs to property insured under this policy is not entitled to perform those repairs or receive compensation for services using an assignment of benefits or any instrument that transfers any post lost rights under the insurance contract without the prior consent of the mortgagee named in the policy). Plaintiff failed to fulfill this condition in the Policy when it attempted to assign its rights to receive compensation to Expert Inspections without the prior written consent of Shellpoint.

"The law is well established that an unqualified assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned. The assignee steps into the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made." *FL-7, Inc. v. SWF Premium Real Estate, LLC,* 259 So.3d 285, 287 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2557d], quoting *State v. Family Bank of Hallandale* 667 So.2d 257, 259 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1992a]. Accordingly, Expert Inspections is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made, such as obtaining mortgagee's consent prior to assigning compensation benefits. Thus, Plaintiff is estopped from making this circular argument, because the Policy came first.

VII. Conclusion

For the reasons stated above and based strictly on a review within the four corners of the complaint, attached exhibits and the incorporated Policy, the Court finds that: (1) the Policy requires the mortgagee's prior written consent to transfer compensation for services to any person or entity that effectuates repairs to property insured under the Policy; (2) the Assignment does not include or contemplate consent by the mortgagee; and (3) therefore, the Assignment is an invalid, partial assignment. Thus, Expert Inspections lacks standing to bring this action on behalf of Perez.

Accordingly, it is ORDERED AND ADJUDGED as follows:

1) Defendant's Motion to Dismiss Plaintiff's Complaint is GRANTED.

2) Plaintiff's Complaint is DISMISSED without prejudice with leave to amend within 20 days of the entry of this Order.

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[1]Under "Policy Interest" section Shellpoint Mortgage Servicing ISAOA/ATIMA is listed as a mortgagee. [*Policy,* Declarations, Page 3 of 3.]

[2]Simultaneously, Shellpoint's rights as an interested party under the Policy as well as its rights as a secured creditor under the mortgage on the improved real property are potentially being circumvented by the Assignment.

[3]*See also Lee R. Russ, Couch on Insurance 3d,* § *17:2* (1997) ("[i]t is axiomatic that parties are free to create the insurance contract they deem appropriate to their needs, provided its form and content do not conflict with any provision of law or public policy; and such is the case even though the resulting contract is improvident as to the insured. Assuming compliance with a standard form and the absence of conflict with statute, the parties to a contract of insurance are free to incorporate such provisions and conditions as they desire.")

* * *

Insurance—Coverage—Declaratory action—Motion to dismiss is denied

ORLANDO THERAPY CENTER, INC., (a/a/o Nancy Torres), Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 20-CC-029312. December 9, 2020. Joelle Ann Ober, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before the court on October 21, 2020 on Defendant's Motion to Dismiss. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Plaintiff filed this Declaratory action seeking a declaration of coverage based upon Defendant's denial of coverage and that Defendant was already in breach of contract at the time of the denial.

2. Defendant's Motion to Dismiss alleges that the proper cause of action for Plaintiff is a breach of contract action and that Plaintiff's Complaint is not plead with the required specificity.

3. Based upon the four corners of the complaint, Defendant's Motion to Dismiss is **HEREBY DENIED**.

4. Defendant shall file its answer within twenty (20) days.

* * *

Insurance—Automobile—Windshield replacement—Notice of claim—Where plaintiff presented evidence that it faxed two claims for windshield replacement to insurer at correct number for faxing claims and received confirmation that transmission was successful, and insurer denied that it received claims but did not present any evidence contesting validity of fax confirmation or correctness of fax number used, plaintiff established that insurer received claims and breached policies by failing to pay claims

PATRIOT AUTO GLASS, a.a.o. R. Hodzia, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-021218, Division M. Consolidated. PATRIOT AUTO GLASS, a.a.o. N. Fambro, Plaintiff, v. GEICO

GENERAL INSURANCE COMPANY, Defendant. Case No. 18-CC-021306, Division M. December 16, 2020. Miriam Valkenburg, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa; Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. Megan Tobin, Chad Howard, and Lucas R. Smith-Martin, Law Office of David S. Dougherty, Tampa, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court on October 19, 2020 for a nonjury trial utilizing "Zoom" video conferencing. After observing and assessing the demeanor and credibility of the witnesses, weighing the evidence presented, considering the arguments of counsel and applicable legal authority, and being otherwise advised in the premises, the Court makes the following findings of fact and conclusions of law:

1. The non-jury trial of these two cases results from this Court's January 4, 2020 order consolidating these cases for purposes of trial. Each case involves the same Plaintiff, Patriot Auto Glass (hereinafter "Patriot"), as the assignee of two different insureds (R. Hodzia and N. Fambro) for two different insurance claims made during 2018. Each insured customer is covered by a policy of insurance with the same Defendant, GEICO General Insurance Company (hereinafter "GEICO"). Patriot replaced the damaged windshield on each of the two vehicles insured by GEICO.

2. Pursuant to an assignment of benefits from each of the insured customers, Patriot billed $1,497.76 for R. Hodzia's windshield replacement job, and $951.23 for N. Fambro's windshield replacement job. Patriot contends it properly faxed the invoice, work order, and customer form/assignment of benefits (hereinafter the "claim documents") for each claim to the fax number designated by GEICO, and received a fax confirmation receipt verifying that the claim documents were successfully transmitted to that fax number on March 16, 2018. It is undisputed that GEICO did not tender payment on either of the two claims. Patriot filed the subject lawsuits on April 19, 2018 alleging GEICO breached its contractual obligations under the insurance policies by failing to pay the claims.

3. GEICO contends that it never received Patriot's claim documents and payment requests for these two claims and, therefore, was not under an obligation to make payment and did not breach its contractual obligations.

4. In a breach of contract case, the burden rest on the plaintiff to prove all the elements of its claim. A breach of contract claim includes three elements, (1) a valid contract, (2) a material breach, and (3) damages. All elements of a cause of action must exist and be complete before an action may properly be commenced. *See Ferguson Enters., Inc. v. Astro Air Conditioning and Hearing, Inc.*, 137 So.3d 613, 615 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D936a] (citing *Havens v. Coast Florida, P.A.*, 117 So.3d 1179, 1181 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1273b]).

5. Prior to trial, the parties agreed there was a valid contract providing coverage for each of the losses. Additionally, GEICO does not dispute that the amount of Patriot's damages, in the event of a finding of breach of contract, are $1,497.76 for R. Hodzia's windshield replacement job, and $951.23 for N. Fambro's windshield replacement job. *See* Notice of Filing Joint Stipulation (Sept. 18, 2020). The question of whether Patriot's charges exceeded GEICO's "prevailing competitive price" limitation of liability provision does not apply in this case. *See, e.g., Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Jud. Cir. Ct. App. Div. March 27, 2018).

6. The sole issue to be decided in these cases is whether or not GEICO materially breached the Policies. Patriot must offer substantial, competent evidence to establish its prima facie case that GEICO's legal obligation for payment under the subject policies was triggered prior to the filing of these lawsuits and, as such, GEICO breached its duty by not making payment. The disputed factual issue at the crux of both of these lawsuits is whether GEICO received Patriot's claim documents for the subject insureds.

7. At trial, Patriot presented the testimony of Cindy Krapfel (Patriot's owner) and Angela O'Berry (the person responsible for faxing Patriot's claim documents to GEICO), and moved seven exhibits into evidence. Ms. O'Berry testified that she faxed the invoices at issue to GEICO on March 16, 2018. She further explained that the invoices were among five batches of claims documents that were faxed to GEICO on March 16, 2018. The evidence showed that GEICO paid four (4) of the five (5) batches. The unpaid fifth batch contained the invoices at issue in these two cases.

8. The evidence also included the facsimile transmittal sheet and fax confirmation from March 16 2018. The transmittal sheet reflects the inclusion of the invoices for these two cases, the fax number for GEICO (855-801-3742), and the total number of pages (44). The fax confirmation sheet shows successful transmission of forty-four (44) pages to GEICO at 855-801- 3742.[1]

9. GEICO presented the testimony of Suzanna Eberling (GEICO's corporate representative). Ms. Eberling testified, that GEICO did not receive the invoices until after the lawsuits were filed.

10. Although GEICO contends that it did not receive the claim documents before this lawsuit was filed, GEICO did not present any evidence contesting the validity of the Plaintiff's fax confirmation sheet or indicate that the fax number was not correct.[2] The evidence reflects that the claims documents faxed to GEICO are received by central services and placed into claims files; however, there was also an acknowledgment that documents had been inadvertently misfiled or lost in other cases. GEICO did not present any evidence to specifically counter the evidence of a successful fax transmission. There was no evidence of who was responsible for receiving or processing the claim documents faxed to GEICO's designated fax number on the relevant date or any log of fax transmissions received by GEICO that day. Patriot's witnesses and exhibits credibly and clearly established that the claim documents were successfully faxed to GEICO's designated fax number on March 16, 2018.

11. Based on the greater weight of the evidence, including the credibility and demeanor of the witnesses, this Court finds that GEICO received the claim documents for these two claims, triggering their obligation under the policies, and for whatever reason, failed to issue payment to Patriot.

12. Accordingly, this Court finds that Patriot met its burden of proof and established that GEICO breached its contractual obligations under the insurance policies by failing to pay these two claims. Based on stipulation, Patriot incurred damages of $1,497.76 for the R. Hodzia case and $951.23 for the N. Fambro case.

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

A. Final judgment is hereby entered in favor of the Plaintiff, Patriot Auto Glass., and against the Defendant, GEICO General Insurance Company, as follows:

1. In Case No. 18-CC-021218, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $1,497.76, plus pre-judgment interest since April 16, 2018 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

2. In Case No. 18-CC-021306, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $951.23, plus pre-judgment interest since April 16, 2018 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

B. The Court reserves jurisdiction to determine entitlement to and amount of any claims for attorneys' fees and costs in each of these matters.

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[1]This Court finds the evidence of the submission of documents by fax, including the fax confirmation, in this matter to be similar in nature to evidence of mailing by a business and also finds the routine procedure of Plaintiff in submitting claims documents to Defendant via fax, using the fax number designated by Defendant, and receiving confirmation of successful transmission is strong evidence the claims documents were sent and received. *Compare e.g. PNC Bank National Association v. Roberts*, 246 So. 3d 482, 485 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D944e]; *Progressive Express Insurance Co. v. Camillo*, 80 So. 3d 394, 402 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D344a] (indicating "[p]roof of mailing of a document to the correct address creates a presumption that the item mailed was, in fact, received"); *Allstate Insurance Co. v. Eckert*, 472 So. 2d 807, 809 (Fla. 4th DCA 1985) (stating "[t]he rule is that when something is mailed by a business, it is presumed that the ordinary course of business was followed in mailing it and that the mail was received by the addressee") *with e.g. Stevens Shipping and Terminal Company v. Japan Rainbow, II MV*, 334 F. 3d 439, 443-444 (5th Cir. 2003) (agreeing with the district court's finding "that the fax confirmation sheet created a rebuttable presumption" that the notice was delivered and received given that "[n]either party dispute[d] that facsimiles are a reliable and customary method of communicating in the shipping business"); *Gold Coast Eagle Distributing, Inc. v. Unemployment Appeals Commission*, 861 So. 2d 480, 481 (Fla. 1 DCA 2003) [28 Fla. L. Weekly D2709a] (citing *Langworthy v. Unemployment Appeals Commission and Communication Installation & Cisco*, 858 So. 2d 1187 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2579b]) (finding "a fax confirmation is sufficient to create a question of fact as to whether a faxed notice of appeal was timely filed" and "[u]pon a party's submission of such evidence, the burden shifts to the appeals office to demonstrate that the appeal was not timely filed"); *Espanioly v. Florida Unemployment Appeals Commission*, 768 So. 2d 1230 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2377a] (finding a fax confirmation sufficient evidence to establish a timely appeal to the Commission).

[2]In fact, a May 15, 2017 letter from GEICO to glass shops specifies the fax number used by Plaintiff as the fax number to be used to submit invoices.

* * *

Attorney's fees—Insurance—Personal injury protection—Action for unpaid postage—Where PIP policy does not make any reference to payment of postage; medical provider does not have private cause of action for postage; and insurer timely paid PIP benefits, statutory interest, and penalty in compliance with section 627.736(10); no action should have been filed for unpaid postage—Since no judgment can be entered for provider, it is not entitled to award of attorney's fees under section 627.428

CENTER FOR BONE AND JOINT SURGERY OF THE PALM BEACHES, P.A., a/a/o Santa Gomez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court,15th Judicial Circuit in and for Palm Beach County. Case No. 502018SC020367XXXXMB (RE), Civil Division. October 1, 2020. Sarah L. Shullman, Judge. Counsel: Tara Kopp, West Palm Beach, for Plaintiff. Ashley L. Cole, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY DISPOSITION/JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on September 16, 2020, for hearing on Defendant's Motion for Final Summary Disposition/Judgment and Plaintiff's Motion for Final Summary Judgment, based on the pleadings, motions, and record evidence, and having considered the arguments of Counsel, this Court hereby grants Defendant's Motion for Final Summary Disposition/Judgment, enters Final Judgment for Defendant, and makes the following findings of fact and conclusions of law:

1. The following facts are undisputed:

a. Plaintiff Center for Bone and Joint Surgery of the Palm Beaches, P.A. ("Plaintiff") submitted a claim for personal injury protection ("PIP") benefits to Progressive ("Defendant") for dates of service December 23, 2016 through July 7, 2017.

b. Defendant received a Pre-suit Demand Letter from Plaintiff for dates of service December 23, 2016 through July 7, 2017. Within thirty (30) days of receipt of the Plaintiff's pre-suit demand letter, Defendant responded to and issued payment for benefits, penalty, partial postage and applicable interest.

c. Plaintiff filed a lawsuit on October 5, 2018 for unpaid postage in the amount of $5.66, representing the cost for mailing its pre-suit demand letter, and for any unpaid benefits. During the course of the lawsuit, Defendant issued payment for the remaining postage, and demonstrated that benefits had been exhausted pre-suit.

d. The parties' insurance policy contract makes no reference to payment of postage.

e. Defendant does not owe Plaintiff any amounts for unpaid medical benefits, penalty or interest.

2. Defendant filed an affidavit of its Claims Adjuster in support of its Motion for Summary Judgment. Plaintiff did not file any evidence in opposition to Defendant's motion or in support of Plaintiff's motion, but attached copies of its Assignment of Benefits from the insured, its pre-suit demand letter, and a copy of Defendant's check for postage. As Defendant noted at the hearing, these documents are not evidence, but Defendant's post-suit payment of postage was not in dispute.

3. Plaintiff argues that section 627.736(10)(c) of the Florida Motor Vehicle No-Fault Law requires postage to be paid, when requested, for any pre-suit demand letter sent by a claimant:

> Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. *Such postal costs shall be reimbursed by the insurer if requested by the claimant in the notice,* when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. . .

§ 627.736(10)(c), Fla. Stat. (emphasis added).

4. Plaintiff further argues that "any dispute" arising under the Florida Motor Vehicle No-Fault Law, including a dispute regarding the above provision, triggers the application of attorney's fees under section 627.428(1):

> (8) APPLICABILITY OF PROVISION REGULATING ATTORNEY FEES.—With respect to *any dispute* under the provisions of ss. 627.730-627.7405 between the insured and the insurer, or between an assignee of an insured's rights and the insurer, the *provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10)* and (15) . . .

§ 627.736(8), Fla. Stat. (emphasis added).

5. In turn, section 627.428(1) provides:

> *Upon the rendition of a judgment* or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary *under a policy or contract executed by the insurer,* the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (emphasis added).

6. However, subsection (10), referenced above as an exception to applying section 627.428, provides:

> If, within 30 days after receipt of notice by the insurer, the *overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty* of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, *no action may be brought against the insurer* . . . The insurer is *not obligated to pay any attorney fees if the insurer pays the claim* or mails its agreement to pay for future treatment *within the time prescribed* by this subsection.

§ 627.736(10)(d), Fla. Stat. (emphasis added).

7. The question here is not whether "any dispute" arose under

section 627.736, as clearly one did. Rather, the first question is whether Defendant's payment of postage constituted a confession of judgment, so as to be deemed a "judgment . . . under a policy or contract executed by the insurer" under section 627.428(1), Florida Statutes. The second, perhaps more dispositive question, is whether an action for postage was properly brought.

8. As to the first issue, Plaintiff argues that, pursuant to *Johnson v. Omega Insurance Co*., 200 So. 3d 1207 (Fla. 2016) [41 Fla. L. Weekly S415a] and *Ivey v. Allstate Ins. Co*., 774 So. 2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a], Defendant's post-suit payment of the postage constitutes a confession of judgment, thereby entitling Plaintiff to an award of attorney fees and costs. However, both of these cases address payments of "benefits" and/or "policy proceeds" under the respective insurance policies, and not payments of postage.

9. Defendant argues that postage is not a "benefit" covered by the parties' PIP insurance policy, and is purely a creature of statute established pursuant to section 627.736(10)(c), Florida Statutes. Section 627.736(1) provides the list of "Required personal injury protection benefits" and postage is not included.

10. The Court agrees. Postage is not included in the parties' insurance policy or in the list of benefits required by statute. As referenced above, section 627.736(10)(d) provides that "no action may be brought against the insurer" if it pays the overdue claim, plus interest and 10% penalty, within 30 days after receipt of notice. Noticeably absent from the foregoing is a requirement for postage. The Florida Motor Vehicle No-Fault Law does not provide a time period in which postage must be paid. Postage is treated differently than benefits, interest or penalty.

11. Along that same line, and in answer to the second question, section 627.736(10)(d) makes clear that "no action may be brought" when the insurer pays the overdue claim, penalty and interest within 30 days. Because it is undisputed that Defendant timely made these required payments in this case, as a matter of law, no cause of action "may [have been] brought." Plaintiff did not have a standalone cause of action for unpaid postage when Defendant complied with the statute.

12. Stated differently, section 627.736(8) triggers attorney's fees "except as provided in subsections (10) and (15)." That exception has been met. Thus, as a matter of law, Plaintiff is not entitled to attorney's fees.

13. As additional grounds for this Court's ruling, Florida law holds that section 627.428 only applies when coverage is disputed or the insurer incorrectly denies benefits.

14. *Petty v. Fla. Ins. Guar. Ass'n, Inc*., 80 So. 3d 313 (Fla. 2012) [37 Fla. L. Weekly S34a], is instructive. In *Petty*, the issue was whether the insured's attorney fee award pursuant to section 627.428(1), Florida Statutes, was a "covered claim" under section 631.54(3), Florida Statutes, which the Florida Insurance Guaranty Association (FIGA) must then pay. Although not directly on point, *Petty* discussed section 627.428 at length, noting that: "This statute provides that an insured will be entitled to an attorney's fee award when *coverage is disputed* and the insured prevails." *Petty*, 80 So. 3d at 316 (emphasis added) (citing *Pepper's Steel & Alloys, Inc. v. U.S*., 850 So. 2d 462, 465 (Fla. 2003) [28 Fla. L. Weekly S455a]). "And, as we have previously stated, the purpose of this statute is to discourage insurance companies from contesting valid claims, and to reimburse insureds for their attorney's fees incurred when they must enforce in court their contract with the insurance company." *Id*. (internal quotation omitted).

15. Plaintiff argues that the No-Fault Law, including the statutory postage provision, is incorporated into every insurance policy. However, the Supreme Court of Florida in *Petty* noted in a different context that, "the fact that section 627.428, Florida Statutes, is an implicit part of an insurance claim did not mean that the insured's claim for fees and costs is part of the policy's coverage." *Id*. at 316 (internal quotation omitted).

16. As the Seventeenth Judicial Circuit ruled in its appellate capacity in *United Auto Ins. Co. v. ISO Diagnostic Testing, Inc*., 23 Fla. L. Weekly Supp. 1000c (Fla. 17th Cir. App. 2016), a plaintiff is not entitled to attorney's fees and costs for post-suit payment of a penalty. "Under *Petty*, this obligation to pay the statutory penalty and postage has been imposed by operation of law and does not alter the coverage provisions of the insurance contract itself." *Id*. (citing *Petty*, 80 So. 3d at 317). "Thus, this Court finds that the statutory penalty and postage do not constitute benefits under the PIP policy . . . for the purpose of entitlement to an award of attorney's fees, a prevailing insured is one who obtains a judgment on a claim for PIP benefits in his favor." *Id*. (emphasis added).

17. Although this Court finds that a dispute over a statutory penalty could, in some circumstances, give rise to fees, this case did not involve statutory penalty or interest but only postage. In this case, the Plaintiff has not recovered any PIP benefits, and is therefore not a prevailing insured.

18. Even in the cases relied on by Plaintiff, the Supreme Court of Florida has held that, "In sum, the law is clear. Section 627.428 provides that an *incorrect denial of benefits,* followed by a judgment or its equivalent of payment in favor of the insured, is sufficient for an insured to recover attorney's fees. Extensive case law further provides that an insurer's concession that the insured was *entitled to benefits* after a legal action has been initiated is the functional equivalent of a confession of judgment." *Johnson*, 200 So. 3d at 1219 (emphasis added). *See also Ivey*, 774 So. 2d at 684 ("It is the *incorrect denial of benefits,* not the presence of some sinister concept of 'wrongfulness,' that generates the basic entitlement to the fees if such denial is incorrect.") (emphasis added).

19. Although those cases focused on whether bad faith is required to establish entitlement to fees, the underlying disputes involved denials of benefits. Neither case discussed postage. The Court finds that the other cases cited by Plaintiff are either distinguishable or not binding or persuasive.

20. The Court finds section 627.48(1) and the confession-of-judgment doctrine inapplicable in the instant case, as post-suit payment of benefits is simply not at issue here. *See Bryant v. GeoVera Specialty Ins. Co*., 271 So. 3d 1013 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1232a] ("The confession-of-judgment doctrine is limited to situations where the filing of the lawsuit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract.") (internal quotation omitted).

21. Finally, in addition to the limitation on actions imposed by section 627.736(10), the Court finds that the Plaintiff cannot maintain a private cause of action for unpaid postage.

22. "Absent such expression of intent, a private right of action is not implied." *Villazon v. Prudential Health Care Plan, Inc*., 843 So. 2d 842, 852 (Fla. 2003) [28 Fla. L. Weekly S267a]. "'[A] court may imply a private cause of action only where the statutory scheme and statute itself indicate a legislative purpose to do so.' " *Universal Prop. & Cas. Ins. Co. v. Loftus*, 276 So. 3d 849, 851 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2025a] (quoting *Merkle v. Health Options, Inc*., 940 So. 2d 1190, 1197 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2579a].

23. It is not appropriate for this Court to attempt to divine the intent of the Florida legislature in enacting the Florida Motor Vehicle No-Fault Law, nor is it necessary. Both the text and binding Supreme Court case law are clear. The express, written purpose enacted by the Legislature, "is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle

insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience." § 627.731, Fla. Stat.

24. As stated in *Basik Exports & Imports, Inc. v. Preferred Nat. Ins. Co*., 911 So. 2d 291 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2359a], the "purpose behind section 627.428, Florida Statutes, 'is to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies.' " (emphasis removed) (quoting *Danis Indus. Corp. v. Ground Improvement Techniques*, 645 So. 2d 420, 421 (Fla. 1994). *See also Johnson*, 200 So. 3d at 1209 ("We have consistently explained that the purpose of this statute is to provide an adequate means to afford a level process and make an already financially burdened insured whole again, and to also discourage insurance companies from withholding benefits on valid claims") (citing *Ivey*, 774 So. 2d at 683-84; *Bell v. U.S.B. Acquisition Co., Inc*., 734 So.2d 403, 410-11 n. 10 (Fla. 1999) [24 Fla. L. Weekly S220a]).

25. *United Auto. Ins. Co. v. A 1st Choice Healthcare Systems Inc*., 21 So. 3d 124, 129 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D2268a], is persuasive, in which the Third District Court of Appeal declined to imply a private cause of action for an insurer's failure to provide an Explanation of Benefits, holding that, "the statute [627.736] only authorizes one cause of action: a cause of action for personal injury protection benefits."

26. There is nothing in section 627.736 to suggest a private cause of action was intended by the Legislature, or expressly provided in the statute, for failure to pay correct postage. To the contrary, the express text of section 627.736(10)(d) makes clear that an action may *not* be brought when the insurer timely complies with a pre-suit demand for benefits, statutory penalty and interest.

27. In sum, although it is undisputed that Defendant did not pay the correct postage pre-suit, section 627.428 applies only when judgment is rendered in favor of Plaintiff. As Plaintiff does not have a private cause of action for postage, and because Defendant complied with section 627.736(10) by timely paying benefits, statutory interest and penalty, no action should have been filed and no judgment may be entered for Plaintiff. Thus, section 627.428 does not apply and Plaintiff is not entitled to attorney's fees.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Disposition/Judgment against the Plaintiff is hereby GRANTED. Plaintiff's Motion for Final Summary Judgment against the Defendant is hereby DENIED. Plaintiff shall take nothing by this action. FINAL JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE DEFENDANT AND IT SHALL GO HENCE FORTH WITHOUT DAY. The Court reserves jurisdiction to enter any other and further orders consistent with this Order.

* * *

Criminal law—Driving under influence—Evidence—Breath test—No merit to arguments seeking to suppress breath test results as illegally obtained confession or warrantless search—Defendant has failed to provide admissible evidence regarding Intoxilyzer that would render breath test results inadmissible—Officer's failure to read complete implied consent warning to defendant does not warrant suppression of test results—There was no need to read warning to defendant who agreed to test immediately upon request—There is no evidence to support claim that defendant's consent was not voluntary

STATE OF FLORIDA, Plaintiff, v. ROBERT EWING REYNOLDS, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Criminal Division E. Case No. 2019CT008451AXXXSB. August 14, 2020. Robert Panse, Judge.

ORDER STRIKING/DENYING DEFENDANT'S MOTION TO SUPPRESS

The above styled action came before the Court upon a hearing on August 10, 2020 on the State of Florida's (State's) Motion to Strike the Defendant's Motion to Suppress. The Court having heard argument of counsel and otherwise being fully advised of the premises therein, finds:

The Defendant seeks to "suppress any and all analyses and test results of the Intoxilyzer 8000 breathalyzer test submitted to the Defendant on May 8, 2019" alleging violation of his constitutional rights and an alleged violation of section 316.1932(1)(a) 1.a, Fla. Stat. The Defendant filed his motion pursuant to "Rule 3.190(h), Fla. R. Crim. P." which is entitled "Motion to Suppress a Confession or Admission Illegally Obtained" and as such is inapplicable to the suppression of the Intoxilyzer 8000 breath test results.

The State correctly contends that breath tests are valid searches incident to arrest and do not require a warrant. Thus, Fla. R. Crim. P. 3.190(g) which the Defendant may have intended to reference (as it concerns a "Motion to Suppress Evidence in Unlawful Search") has no applicability as a warrant is not required to perform a blood alcohol breath test. Furthermore, as a warrant is not required to conduct a breath test, the state has no burden of going forward to demonstrate the lawfulness of the breath test results.

Alternatively, should the Court treat the Defendant's motion to suppress as a motion in limine, the Court finds that the Defendant has failed to provide the Court with any admissible evidence and testimony concerning the Intoxilyzer 8000 that would cause the analyses and test results to be inadmissible into evidence.

Furthermore, even if arguendo, the Court were to find that the State has not substantially complied with Chapter 11 D-8, Florida Administrative Code, the breath alcohol test results would still be admissible if the State is able to prove that the results of such breath test are reliable under traditional scientific predicate. See *State v. Robertson,* 604 So.2d 783, 790-91 (Fla. 1992).

With respect to the Defendant seeking to suppress "all confessions, statements and answers to questions or admissions by the Defendant while in custody," the Defendant fails to allege any proper specific legal bases for the suppression of those questions, answers, and information.

The Defendant also seeks to exclude all analyses and test results of the Intoxilyzer 8000 breathalyzer test submitted to Mr. Reynolds on May 8, 2019 alleging that the arresting officer failed to read to the Defendant the complete implied consent warning referenced in section 316.1932(1)(a)1 a, Fla. Stat. The Court finds that the intent of that statutory section is to advise the Defendant of the consequences (suspension durations of driver's license) if the Defendant refuses to submit to the breath test. In this case, the Defendant agreed immediately upon request to submit to the breathalyzer test and there was no need to read the implied consent warning/consequences. Even if arguendo, the statute requires the complete reading of the implied consent warning even where the Defendant has already agreed to submit to the breathalyzer test, the sole remedy expressed by the Legislature would be for the Defendant's license not to be suspended due to an officer's failure to read the implied consent warnings. See *State v. Iaco,* 906 So.2d 1151 at 1153 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1556a] where the Appellate Court noted, "the administrative and criminal consequences apply only if the Defendant refuses the breathalyzer test. When the Defendant consents to the test, those consequences do not apply. Thus, failing to be advised of them does not warrant suppression of the test results."

The Defense also argues that because the Defendant was not read the complete implied consent warnings concerning the consequences of failure to provide a breath sample, that the verbal consent provided

by Mr. Reynolds to submit to the test was "involuntary and invalid". The Defendant offers no evidence or testimony that the officer made misrepresentations, used coercion, or otherwise intimidated or forced the Defendant to provide his consent. The question of whether consent is voluntary "is a question of fact to be determined from the totality of all the circumstances". *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Under ordinary circumstances, the voluntariness of the consent to search must be established by a preponderance of the evidence. See *Elsledger v. State,* 503 So.2d 1367 (Fla. 4th DCA 1987). As there is no evidence of police misconduct, prolonged detention, coercion, or any other actions that would lead the Court to conclude that Defendant's consent to the breath test was not voluntary, there is no basis for the Court at this time to find that the Defendant's consent was not freely given. See also *Wyche v. State,* 987 So.2d 23 (Fla. 2008) [33 Fla. L. Weekly S509a].

Alternatively, the above analysis is not necessary in this particular case as the Defendant has provided implied consent by virtue of section 316.1932, Fla. Stat. which states, "any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test. . ."

It is hereby, ORDERED AND ADJUDGED that the State's Motion to Strike the Defendants' Motion to Suppress is GRANTED and in the alternative, the Defendants Motion to Suppress is DENIED.

* * *

Consumer law—Debt collection—Credit card—Account stated—Florida law controls statement of claim based upon theory of account stated where plaintiff has failed to plead or prove application of law of any foreign forum to action

CREDIT CORP. SOLUTIONS INC., Plaintiff, v. KAREN JONES, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20016952, Division 47. November 30, 2020. Pole, Judge. Counsel: Shera Anderson and Ofer Shmucher, Miami, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

THIS CAUSE came before the Court on November 20, 2020 at approximately 2:00pm, or as soon thereafter as the case could be heard, at which counsel for each party was present, and the Court having heard argument from each counsel, having reviewed the file and being otherwise fully advised in the premises, the Court finds as follows:

Findings of Fact

1. The Plaintiff initiated the above captioned cause of action by filing a one-count statement of claim based upon the theory of account stated.

2. The Plaintiff alleges in its statement of claim that the account stated is based upon a defaulted credit card account.

3. The body of the Plaintiff's statement of claim failed to allege that any law other than the law of Florida applied to the above captioned cause of action.

4. The Plaintiff attached to its complaint a single statement in support of its claim for account stated; the statement itself did not reflect that any law other than the law of the State of Florida applied to the above captioned cause of action.

5. The Defendant issued Requests for Production of Documents to the Plaintiff; the Plaintiff failed to produce a copy of any terms or conditions associated with the account and during the above-described hearing indicated that the Plaintiff was not in fact in possession of any terms or conditions associated with the account at issue.

6. The Defendant issued Requests for Admissions to the Plaintiff; the Plaintiff, in response thereto, asserted an improper objection and otherwise avoided responding to the request seeking an admission as to whether Florida law applied to the above captioned cause of action.

7. The Defendant filed a Motion for Partial Summary Disposition solely on the issue of whether Florida law applies to the above captioned cause of action.

Summary Judgment Standard

8. Summary disposition is appropriate "if there is no triable issue, the court shall summarily enter an appropriate order or judgment." *Fla. Sm. Cl. R.* 7.135.

9. Partial summary disposition is appropriate where no triable issue exists as to a specific issue, and allows a trial court to narrow the issues prior to trial. *See A-1 Mobile MRI v. United Auto. Ins. Co.,* 12 Fla. L. Weekly Supp. 171a (Fla. 17th Cir. Ct. 2004).

Applicable Legal Authority

10. "In order for a party to seek reliance on the law of a foreign forum, such must be plead. [Where a Plaintiff has] failed to plead or prove any applicable foreign law, it is presumed that such law is the same as Florida law." *Capital One v. Aguilera,* 16 Fla. L. Weekly Supp. 192a (Fla. 15th Cir. Ct. 2008) (citing *Owens-Corning Fiberglas v. Engler,* 704 So.2d 594 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2297a] ("Where the law of a foreign forum is claimed to be dispositional, yet no foreign law is plead to the trial court, the matter is to be determined by the law of this forum."); *Watson v. First Nat'l Bank of Chicago,* 367 So. 2d 732, 733 (Fla. 4th DCA 1979); see also *Kingston v. Quimby,* 80 So. 2d 455 (Fla. 1955)).

11. Where a Plaintiff fails to plead and prove the application of foreign law, Florida law controls. *Portfolio Recovery Assoc. LLC v. Restrepo,* 20 Fla. L. Weekly Supp. 681a (Fla. 18th Cir. Ct. 2018) ("The complaint did not plead the choice of law and there were not any exhibits attached to the complaint . . . [therefore] Florida law will control.").

12. The issue of whether or not a foreign law applies to a particular case is an issue of fact and, where a party fails allege in its pleading the application of a law other than the State of Florida's, there are no issues of material fact as to whether the law of the State of Florida applies. *See Hieber v. Hieber,* 151 So.2d 646, 650 (Fla. 3d DCA 1963) ("If the law of a foreign state is to be relied upon as governing a given transaction it must be pleaded and proved as any other issue of fact.").

CONCLUSIONS OF LAW

13. The Plaintiff did not allege or otherwise raise in its pleadings the application of a foreign law to the present matter.

14. The Plaintiff has failed to produce any terms or conditions or other contract in which the parties agreed to the application of a law other than the State of Florida's.

15. Insofar as the Plaintiff failed to plead or otherwise bring into issue the application of a foreign law to the present matter, no genuine issue of material fact or triable issue exists and Florida law applies to all aspects of the above captioned cause of action as a matter of law.

IT IS THEREFORE ORDERED AND ADJUDGED

16. For the above reasons, the Defendant's Motion for Partial Summary Disposition is hereby GRANTED and Florida law applies to the statement of claim, counterclaims, and all other aspects of the above captioned cause of action.

* * *

Consumer law—Debt collection—Account stated—Summary disposition—Defendant is entitled to summary disposition as to standing and failure to state cause of action where plaintiff failed to respond to discovery, file affidavit in opposition to motion for summary disposition, or otherwise produce evidence that it is real party in interest; and plaintiff failed to allege business transaction between parties

PORTFOLIO RECOVERY ASSOCIATES LLC, Plaintiff, v. MACKENSIE MANE, Defendant. County Court , 17th Judicial Circuit in and for Broward County. Case No. COCE20011817, Division 51. November 13, 2020. Kathleen Mccarthy, Judge. Counsel: Shera Anderson and Ofer Shmucher, Miami, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE came before the Court at a hearing on the Defendant's Motion for Summary Disposition on November 12, 2020 at approximately 4:00pm, or as soon thereafter as the case could be heard, at which counsel for each party was present, and the Court having heard argument from each counsel, having reviewed the file and being otherwise fully advised in the premises, the Court finds as follows:

Findings of Fact

1. The Plaintiff initiated the above captioned cause of action by filing a one-count statement of claim based upon the theory of account stated. The Court notes this case was initially filed in South Regional Courthouse under case number: COSO2000649

2. The body of the Plaintiff's statement of claim failed to allege ultimate facts regarding the existence of business transactions between the parties.

3. The Plaintiff attached to its complaint a single statement in support of its claim for account stated; the statement itself did not reflect any transactions or payments initiated by the Defendant.

4. In response to the statement of claim, the Defendant filed an Answer and Affirmative Defenses which raised several defenses including: failure to state a cause of action for account stated and lack of standing.

5. The Defendant issued discovery to the Plaintiff in the form of Interrogatories, Requests for Admissions, and Requests for Production of Documents; the Plaintiff completely failed to respond.

6. In accordance with this Court's Scheduling Order dated September 29, 2020, the Defendant timely filed his Motion for Summary Disposition and set same for hearing before this Court. **The Defendant did not file any pleading nor affidavit in opposition to the Motion for Summary Disposition.**

Summary Judgment Standard

7. Summary disposition is appropriate "if there is no triable issue, the court shall summarily enter an appropriate order or judgment." *Fla. Sm. Cl. R.* 7.135.

Applicable Legal Authority

I. **Failure to Prove Standing**

8. "A creditor seeking to recover on an obligation has the burden of proof to show that it has the right to seek collection on the debt because it owns the consumer's obligation or State law gives it the right to sue on behalf of the owner." *Palisades Collection LLC v. Thomas,* 16 Fla. L. Weekly Supp. 783b (Fla. 17th Cir. Ct. 2009).

9. Where a plaintiff has failed to respond to discovery, failed to file an affidavit in opposition to a pending motion for summary disposition, and otherwise failed to produce evidence that it is the real-party-in-interest, the defendant is entitled to a judgment as a matter of law. *Thomas, supra*; *see also Midland Funding LLC v. Cembrook,* 29 Fla. L. Weekly Supp. 74a (Fla. 18th Cir. Ct. 2012); *Portfolio Recovery Assoc. LLC v. Veverka,* 18 Fla. L. Weekly Supp. 299b (Fla. 9th Cir. Ct. 2010).

II. **Failure to State a Claim for Account Stated**

10. "To prove a claim for account stated, a plaintiff must show: (1) the parties had business transactions between them; (2) the plaintiff rendered a statement to the defendant, who failed to object within a reasonable time; (3) the defendant promised to pay the amount set forth in the statement; and (4) the defendant has not paid the amount owed under the statement." *Portfolio Recovery Assoc. LLC v. Blanchard,* 26 Fla. L. Weekly Supp. 555a (Fla. 13th Cir. Ct. 2018) (appellate capacity) (citing *In Re: Standard Jury Instructions—Contract and Business Cases,* "416.39 Account Stated," 116 So. 3d 284, 331 (Fla. 2013) [38 Fla. L. Weekly S384a]); *see also Fla. Sm. Cl. R.* Form 7.337.

11. Thus, a Plaintiff asserting a claim under a theory of account stated must allege ultimate facts regarding the existence of business transactions between the parties; whether the pleading party has asserted sufficient ultimate facts to state a cause of action is an issue of law. *Samuels v. King Motor Co. of Fort Lauderdale,* 782 So. 2d 489, 495 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D849a].

12. Where a pleading party fails to plead ultimate facts supporting each element of a claim for account stated, the opposing party is entitled to a judgment as a matter of law. *See Portfolio Recovery Assoc. LLC v. Jenna Cole,* 24 Fla. L. Weekly Supp. 355a (Fla. 13th Cir. Ct. 2014).

CONCLUSIONS OF LAW

13. The Plaintiff failed to respond to the Defendant's discovery requests, ***failed to file any affidavit in opposition to the motion for summary disposition,*** and otherwise failed to produce any evidence that it is the real-party-in-interest to bring the present action.

14. Additionally, the Plaintiff failed to sufficiently allege ultimate facts and plead the requisite elements to support a claim for account stated and thus the Plaintiff's statement of claim fails to state a claim upon which relief may be granted.

15. Therefore, there are no genuine issues of material fact and the Defendant, Mackensie Mane, is entitled to Summary Disposition in his favor against Plaintiff, Portfolio Recovery Associates LLC.

16. The Defendant is the prevailing party and the Court reserves jurisdiction as to entitlement to and amount of attorney's fees and costs for which the Defendant may seek.

IT IS THEREFORE ORDERED AND ADJUDGED

Defendant's Motion for Summary Disposition is hereby GRANTED.

* * *

Insurance—Personal injury protection—Coverage—Denial of coverage and rescission of policy based upon insured's alleged failure to disclose household residents—Insurer was in breach of contract, and its rescission of PIP policy was improper, where insurer violated PIP statute by failing to pay or deny claim within 30 days and did not invoke the additional time limitation under section 627.736(4)(i)

SOUTH BROWARD HOSPITAL DISTRICT, a/a/o Leathea Nottage, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19017695, Division 56. December 14, 2020. Betsy Benson, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Rashad Haqq el-Amin, for Defendant.

CORRECTED ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on November 20, 2020 upon the Defendant's Motion for Final Summary Judgment Re: No Coverage due to Material Misrepresentation and Plaintiff's Cross-Motion for Final Summary Judgment, and the Court having reviewed

the motions, having reviewed the summary judgment evidence, having heard argument of counsel and being otherwise fully advised, it is

ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment is DENIED and Plaintiff's Cross-Motion for Final Summary Judgment is GRANTED, for the reasons set forth below.

The summary judgment evidence reflects that United Automobile Insurance Company ("United Auto") issued an automobile insurance policy to Leathea Nottage, who submitted a claim for Personal Injury Protection benefits as a result of a motor vehicle accident for which Memorial Regional Hospital provided treatment on May 29, 2015. On June 22, 2015, United Auto received Memorial Regional Hospital's bill. On July 17, 2015, United Auto conducted the Examination Under Oath ("EUO") of Leathea Nottage. During the course of that EUO, United Auto discovered that Leathea Nottage had failed to disclose household residents in her application for automobile insurance. On September 14, 2015, United Auto denied Plaintiff's claim for reimbursement. On September 16, 2015, United Auto rescinded the policy, based upon the material misrepresentation that United Auto had discovered at the July 17, 2015 EUO.

Pursuant to Sec. 627.736(4)(b), Fla. Stat., personal injury protection insurance benefits are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and the amount of same.[1] In this case, United Auto was furnished written notice of the fact of a covered loss and the amount of same on June 22, 2015. Accordingly, United Auto had 30 days from June 22, 2015 to pay or deny the claim.

Having failed to deny the claim until September 14, 2015—84 days from the date on which United Auto received Memorial Regional Hospital's bill, United Auto violated the PIP statute and as such, was in breach of contract and waived the ability to investigate or deny the claim for material misrepresentation. Its rescission of the policy was therefore improper. *Direct General Ins. Co. v. Mungin*, 28 Fla. L. Weekly Supp. 403b (Hillsborough County, Judge Martha J. Cook, August 2, 2020); *Beaufils v. Allstate Property and Cas. Ins. Co*., 28 Fla. L. Weekly Supp. 421a (Hillsborough County, Judge Frances M. Perrone, July 28, 2020); *Direct General Ins. Co. v. Harris*, 28 Fla. L. Weekly Supp. 403a (Hillsborough County, Judge Ralph C. Stoddard, July 14, 2020); *Regions All Care Health Center, Inc. (a/a/o Remy Jean) v. Century-National Ins. Co*., 28 Fla. L. Weekly Supp. 161a (Hillsborough County, Judge Michael C. Bagge-Hernandez, April 14, 2020); *Physicians Group, LLC (a/a/o James Greene, Sr. v. Century-National Ins. Co*., 28 Fla. L. Weekly Supp. 157a (Sarasota County, Judge Maryann Boehm, March 25, 2020); *Orlando Medical and Wellness (a/a/o Moises Montoya) v. Century-National Ins. Co*., 27 Fla. L. Weekly Supp. 979a (Hillsborough County, Judge Daryl M. Manning, January 9, 2020); *Halifax Chiropractic and Injury Clinic (a/a/o Rantanen Bloodworth) v. Century-National Ins. Co*., 27 Fla. L. Weekly Supp. 392a (Orange County, Judge David P. Johnson, January 16, 2018)

[1]Where an insurer notifies the claimant, in writing, within 30 days after submission of the claim that the claim is being investigated for suspected fraud, the insurer has an additional 60 days to conduct its fraud investigation. Sec. 627.736(4)(i), Fla. Stat. United Auto did not notify the claimant, within 30 days after submission of the claim, that the claim was being investigated for suspected fraud.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Impartial appraiser—Motion to strike appraiser appointed by insurer is granted where appraiser previously threatened plaintiff glass repair shop with litigation and holds itself out as extension of insurance carriers' claims service

AUTO GLASS AMERICA LLC, a/a/o Tiara McFadden, Plaintiff, v. ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19024303, Division 51. December 2, 2020. Kathleen Mccarthy, Judge. Counsel: Emilio R. Stillo and Andrew B. Davis-Henrichs, Emilio Stillo, P.A.; and Mac S. Phillips, Phillips Tadros, P.A., for Plaintiff. Geneva R. Fountain and Kansas R. Gooden, Boyd & Jenerette, P.A.; and Lawrence J. Signori, Law Offices of Robert J. Smith, for Defendant.

ORDER GRANTING MOTION TO STRIKE

THIS CAUSE having come before the Court for consideration on November 12, 2020, on Plaintiff's Amended Motion to Strike the Defendant's Chosen Appraiser Auto Glass Inspection Services and for Attorneys' Fees and Costs, the Court having reviewed the filings, received argument of counsel and having otherwise been duly advised in the Premises, finds as follows:

The Defendant ("Esurance") demanded appraisal pursuant to the terms and conditions of the applicable Policy, and selected Auto Glass Inspection Services ("AGIS") as its designated appraiser in this claim. In pertinent part, the applicable insurance policy states:

APPRAISAL

1. If **"we"** and **"you"** do not agree on the amount **"loss"**, either party may request:

A. An appraisal of the **"loss"**; or

B. Mediation in accord with the Mediation provision set forth in Part VI; General Provisions Applicable to All Coverage.

If a request is made for Appraisal, each party will select a competent and ***impartial*** appraiser. The two appraisers will select an impartial and qualified umpire. Each appraiser will state separately the actual cash value and the amount of loss. In the event of a disagreement, they will submit their differences to the umpire. A decision agreed to by any two will be binding on each party. Each Party will:

A. Pay its own chosen appraiser; and

B. Bear the expenses of the appraisal and umpire equally.

2. Neither party waives any rights under this policy by agreeing to an appraisal.

(emphasis added).

Plaintiff, Auto Glass America, LLC ("AGA"), contends that AGIS is not impartial as required by the policy and, therefore, moved to strike AGIS. In other words, AGA ultimately consented to participate in the appraisal process, but does not agree to Esurance's selection of AGIS. In support of its motion, AGA filed the affidavit of Charles Isaly, owner and records custodian of AGA. Mr. Isaly attests AGIS previously engaged counsel who sent a letter to AGA that threatened legal action, ironically, because AGIS did not think that an umpire appointed by AGA's appraiser to resolve an appraisal dispute with AGIS was impartial or disinterested. Specifically, the correspondence states the Alvarez & Gilbert, PLLC law firm represented AGIS in its capacity as appraiser for Esurance's various entities. Further, the letter (a copy of which was attached to Mr. Isaly's affidavit) warned AGA (and the other shops listed) to "govern [themselves] accordingly." AGA contends that an adverse appraiser who previously threatened AGA with litigation cannot be impartial as required by the policy.

AGA also presented the Court with a print-out of the AGIS website on which AGIS states its mission is "*to verify glass damage for the insurance industry*." The website also represents that "*AGIS sole purpose is to report back to the insurance industry what type of damage exists or lack thereof.*" It further indicates that "*AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies*."

AGA additionally presented the Court with a print-out of the AGIS presentation slides at the 2018 Florida Chamber of Commerce Insurance Summit in which AGIS effectively held itself out to the public as an adjuster of its insurer clients. Specifically, the slide states on page two that, "*AGIS works as an extension of the carriers claims*

service to document glass damage."

AGA further presented correspondence, dated October 10, 2018, wherein AGA, through counsel, objected to Esurance's use of AGIS as its appointed appraiser for *all* claims. AGA argues that despite making a good faith effort to request that Esurance remove AGIS and to obtain another appraiser (i.e., one that is impartial), Esurance's position remains steadfast that it does not have to do so. Although Esurance suggested that AGA should send separate letters for each claim, AGA argued that to do so would be futile. *See Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2007) [28 Fla. L. Weekly D2229d]. Esurance maintained at the hearing that AGIS was "impartial".

In *Fla. Ins. Guaranty Ass'n v. Branco* 148 So. 3d 488 (5th DCA 2014) [39 Fla. L. Weekly D2020a], the Fifth District Court of Appeal held that "disinterested" is defined as:

> [F]ree from bias, prejudice, or partiality; not having a pecuniary interest; a disinterested witness," *Black's Law Dictionary* 536 (9th ed.2009), and 'not having the mind or feelings engaged: not interested . . . free from selfish motive or interest: unbiased,' *Merriam-Webster's Collegiate Dictionary* 333 (10th ed.2000). The latter also defines 'disinterestedness' as 'the quality of being objective or impartial.' (defining "disinterested" as 'lacking or revealing lack of interest,' 'not influenced by regard to personal advantage,' 'free from selfish motive,' or 'not biased or prejudiced').

As in *Branco,* the policy provision here expresses the parties' very clear intention to restrict appraisers to those who are actually impartial or disinterested in the outcome of the appraisal. Interest, whether pecuniary or otherwise, of a selected appraiser pertains to partiality of the appraiser for or against specific parties to a dispute. *Id.* Additionally, since simply appointing a different appraiser does not appear to be too daunting, Esurance's refusal to do so suggests there is an underlying reason.

It is undisputed that the policy-based appraisal provision requires ***both*** parties to select an impartial appraiser. Based on the record evidence, AGA has made a sufficient showing that AGIS is not impartial, and Esurance failed to present anything to suggest otherwise. This Court therefore finds AGIS does not appear to be free from bias, prejudice, or partiality. *See, Travelers of Fla. v. Stormont*, 43 So. 3d 941 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a].[1] It is therefore

ORDERED AND ADJUDGED that said Motion be, and the same are hereby GRANTED. Defendant shall designate a competent and impartial appraiser within 20 days of the date of this Order. The appraisal shall be completed within 60 days. The Court defers as to whether AGA is entitled to attorney's fees and costs at this time.

[1]Esurance contends that the Stormont case stands for the proposition that failure to sufficiently raise an objection to an appraiser pre-suit results in a waiver of objection to the appraiser. However, the main question presented there concerned entitlement to attorney's fees for legal services in conjunction with an appraisal. The Court is making no ruling as to entitlement to attorney's fees and costs at this time. Additionally, the Court finds that AGA sufficiently objected to Esurance's use of AGIS by the letter dated October 10, 2018 referenced above.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency—Demand letter that included itemized statement in form of original HICF substantially complied with section 627.736(10)—Letter is not deficient for demanding amount that was inconsistent with jurisdictional amount set forth in statement of claim

ALLIANCE SPINE & JOINT II INC., Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20008549, Division 62. December 3, 2020. Terri-Ann Miller, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. David Cruz, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED, as follows:

Plaintiff's Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense is hereby Granted. The Court finds that Plaintiff's Demand Letter complies with Florida Statute 627.736 and qualifies as a valid Demand Letter. Notwithstanding the foregoing the Court finds that the Defendant sustained no prejudice related to the deficiencies they claim existed with the Demand Letter and therefore the Plaintiff should not be prevented from pursuing this action even had their Demand Letter not substantially complied with Florida Statute 627.736.

The Court finds that Florida law only requires a Plaintiff's demand letter to substantially comply with the requirements of Florida Statute 627.736. See *Citigroup Mortg. Loan Tr. Inc. v. Scialabba,* 238 So. 3d 317, 319-20 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a] and *United Auto. Ins. Co. v. Prof'l Med. Grp., Inc.,* 26 So. 3d 21, 24 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a]. In addition, a breach of a condition precedent does not preclude enforcement of an otherwise valid contract, absent some prejudice. *See Citigroup Mortg. Loan Tr. Inc. v. Scialabba,* 238 So. 3d 317, 319-20 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a].

The Court further finds that the Demand Letter included a copy of the original HICF that was submitted to the insurance carrier and that this satisfies the Plaintiff's obligation to include an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court adopts the reasoning set forth by Judge Guzman in *Saavedra v. State Farm,* 26 Fla. L. Weekly Supp. 663a (Dade Cty. Ct. 2018) where he held:

> this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount owed. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible.1 [Editors note: Footnote is not included.] The Court is not free to edit statutes of add requirements that the legislature did not include. *Meyer v Caruso*, 731 So.2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c].
>
> Moreover, this Court is also aware of its constitutional duty to allow litigants access to the courts. When examining conditions precedent, they must be construed narrowly in order to allow Florida citizens access to courts. *Pierrot v. Osceola Mental Health*, 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a]. "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System*, 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. For this Court to hold a potential litigant to the high standard suggested by the Defen-

dant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostilico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostilico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to *deny access to courts on the basis of technicalities*") (emphasis added), citing, *Archer v. Maddux*, 645 So.2d 544 (Fla. 1st DCA 1994).

As to Defendant's contention that the Demand Letter asked for an amount that was inconsistent with the jurisdictional amount set forth in the Statement of Claim this Court finds that Florida Statute 627.736 does not set forth that a Demand Letter is invalid if a later filed suit contains a jurisdictional amount that differs from the amount requested in the Demand Letter. See *Nunez v. Geico Gen. Ins. Co.,* 117 So. 3d 388, 398 (Fla. 2013) [38 Fla. L. Weekly S440a] (holding that conditions or denials of payment that are contrary to the terms of section 627.736 are invalid.).

* * *

Insurance—Personal injury protection—Coverage—Interest on unbundled charges—Medical provider's motion for summary judgment as to interest for late payment of medical bill is denied where it is undisputed that interest claimed is for bill that was improperly unbundled, and therefore, is not a covered loss—Provider's untimely summary judgment evidence and its unsworn and conclusory opposing affidavit do not support summary judgment in its favor or preclude final summary judgment in favor of insurer

INJURYONE, INC., a/a/o Avenie Tirogene, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20009738, Division 48. October 29, 2020. Jennifer Hilal, Judge. Counsel: John C. Daly, Daly & Barber, P.A., Plantation, for Plaintiff. Erika Reagan, McFarlane Law, Coral Springs, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO INTEREST AND GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on October 7, 2020, for hearing on Plaintiff's Motion for Summary Judgment as to Interest as well as Defendant's Motion for Final Summary Judgment and Memorandum of Law in Support Thereof, and the Court having reviewed the Motions, the entire court file, and the relevant legal authorities; having heard argument of counsel, having made a thorough review of the matters filed of record; and being otherwise fully advised in the premises, the Court finds as follows:

BACKGROUND

1. In 2016, InjuryOne, Inc. a/a/o Avenie Tirogene ("Plaintiff"), filed the instant breach of contract lawsuit for Personal Injury Protection ("PIP") benefits pursuant to a policy of insurance issued by the Defendant, Century-National Insurance Company ("Defendant").The Complaint alleges that Plaintiff rendered reasonable, related and medically necessary treatment to the Claimant on date of service, August 31, 2016.

2. Defendant's Amended Answer denies that Plaintiff's treatment was reasonable, related and medically necessary and affirmatively asserts, in part, that Plaintiff's billing for two injection procedures in conjunction with an "EZ Trigger Kit" was improperly billed and unbundled contrary to the PIP Statute and therefore, should any liability be imposed, Defendant is entitled to a set off for the overpayment made on the improperly unbundled bill. Plaintiff did not file a timely reply to Defendant's Amended Affirmative Defenses.

3. On October 29, 2019, Defendant filed its Motion for Final Summary Judgment with the supporting affidavit of Coding Expert, Denisha Torres Lich, MS, RHIA, LHRM, who concluded that Plaintiff improperly billed and unbundled its services/supplies rendered on August 31, 2016, contrary to Fla. Stat. § 627.736(5)(b)1 and (5)(d). Specifically, Plaintiff improperly billed for two injection procedures under CPT Code 20553 and CPT Code 20610 and then separately billed for an "EZ Trigger Kit" in the amount of $425.39, which is considered improper unbundling under Fla. Stat. § 627.736(5)(b)(1)(e) and results in duplicative reimbursement.

4. On September 1, 2020, Plaintiff filed its Motion for Summary Judgment as to Interest, seeking $.49 cents in interest for its August 31, 2016 date of service bill.

5. The summary judgment motions were noticed for October 7, 2020 at 11 a.m. On October 7, 2020 at 9:24 a.m., less than two hours before the hearing, Plaintiff filed a "Notice of Partial Withdrawal," after four years of litigation over PIP benefits, stating that Plaintiff is no longer seeking PIP benefits, but rather is maintaining the instant lawsuit for $.49 in interest allegedly owed for date of service August 31, 2016 pursuant to Fla. Stat. § 627.736(4)(b).

6. However, Plaintiff's withdrawal of PIP benefits should have no effect on the remaining issues to be resolved by this Court as raised in the pleadings, the parties Joint Pre-Trial Stipulation and Defendant's Motion for Final Summary Judgment. The plain language of Fla. Stat. § 627.736(4)(b) requires the Court to first determine whether the underlying bill, for which the Plaintiff is seeking interest on, is "covered by the policy issued." After the bills are deemed "covered," the statute then requires proof that the insurer was provided with "written notice of the fact of a covered loss." If there is no written notice of a covered loss, then the bill for which the Plaintiff seeks interest on is not "overdue," and no interest is due or payable.

7. The Florida Supreme Court in *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 88 (Fla. 2001) [26 Fla. L. Weekly S747a] stated:

> the purpose of the no-fault scheme does not logically extend to require an insurer to automatically pay for bills for which the insurer is not responsible. . .**the penalty for 'overdue' payments**. . .**applies only if the insurer is ultimately found liable for the claim**. The insurer does not forfeit its ability to contest payment by its failure to obtain reasonable proof in the thirty-day period. [emphasis added].

8. The Fourth DCA in *AIU Ins. Co. v. Daidone*, 760 So. 2d 1110 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1625a] stated:

> We conclude that the thirty-day period in section 627.736(4) applies only to benefits which are reasonable and necessary as a result of the accident. . .**[i]f an insured submits a bill for medical treatment which is not related to the accident, there are no 'benefits due.' If benefits are not due, they cannot be 'overdue.'** As we observed in a PIP case involving a different issue: 'an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary.' *Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. [emphasis added].

9. The Fourth DCA in *Northwoods Sports Med. & Physical Rehab., Inc.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] provides:

> [I]n order to activate the right to claim PIP payments under the assignment, the provider's bills must be compensable under the statute in that they have been determined to be reasonable and necessary. . . [e]ven after a claim is denied or reduced, an insurance company may still defend a suit by the provider claiming additional amounts on the grounds that the service was not medically necessary or that the amount was not reasonable. . .**[u]ntil the necessity of the services and reasonableness of the charges is settled, their compensability under PIP is not established**, and assignment of PIP benefits has not matured. [emphasis added].

10. It is Defendant's position that 1.) Plaintiff's bill is not a "covered" loss because it is not reasonable, related or medically necessary and the bill was improperly unbundled contrary to Fla. Stat. §§ 627.736(5)(b)(1)(e) and (5)(d); 2) Defendant was not furnished with written notice of a covered loss because Fla. Stat. § 627.736(5)(d) provides: "[f]or purposes of paragraph (4)(b), an insurer is not considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph;" and 3) because Plaintiff's bill is not covered and because the Defendant was not provided written notice of a covered loss, the bill is not overdue under Fla. Stat. § 627.736(4)(b) and Plaintiff cannot seek interest on a bill that is not reasonable, related, or medically necessary and does not comply with the requirements of Fla. Stat. § 627.736(5)(b)(1)(e) or 627.736(5)(d). *See United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a]; *Daidone,* 760 So. 2d 1110; *Northwoods*, 137 So. 3d 1049; *Derius*, 723 So. 2d 271.

11. It is the Plaintiff's contention that the Defendant received the bill in dispute on October 20, 2016, causing payment to become due on or before November 19, 2016. The Defendant subsequently issued payment on November 22, 2016 and as such the payment made was three days late, causing $.49 of interest to become due.

12. At the hearing, Plaintiff argued that reasonableness, relatedness, and medical necessity is not at issue due to technical admissions. Defendant argued, pursuant to Rule 1.370(b)[1], that the Court should not find technical admissions as the Plaintiff was on clear notice of the intent to dispute reasonableness, relatedness, and medical necessity and suffers no prejudice, especially since Plaintiff bears the burden to prove same in every PIP case. *See Derius,* 723 So. 2d 271. Defendant never stipulated to reasonableness, relatedness, or medical necessity and still contests same pursuant to its absolute right under Fla. Stat. § 627.736(4)(b)(6). Furthermore, the admissions were served *before* the deposition of Defendant's Adjuster, *before* Defendant's Amended Answer asserting the unbundling defense and denying reasonableness, relatedness, and medical necessity, *before* the filing of Defendant's Motion for Final Summary Judgment, *before* the filing of the affidavits of Defendant's Adjuster and Coding Expert, and *before* the parties Joint Pre-Trial Stipulation was filed, all of which clearly indicate Defendant's intent to dispute reasonableness, relatedness, and medical necessity.

13. Even if this Court were to find that reasonableness, relatedness, and medical necessity is not at issue due to the technical admissions, whether Plaintiff's bill is compensable or improperly unbundled contrary to Florida Law and whether the Plaintiff was overpaid, are still issues raised in the pleadings and the Joint Pre-Trial Stipulation that the Court must address in order to determine whether interest is owed.

14. Defendant further submits that Final Summary Judgment must be granted in Defendant's favor because Plaintiff failed to submit any admissible evidence creating a genuine issue of material fact[2]. Defendant's Coding Expert concludes that Plaintiff's billing is improper and unbundled, as supported by her coding expertise, and the guidelines promogulated by the American Medical Association ("AMA"), Centers for Medicare/Medicaid Services ("CMS"), Physicians' Current Procedural Terminology ("CPT") and the HCPCS in effect for the year in which services are rendered, as incorporated by reference in Fla. Stat. § 627.736(5)(d), *Florida Statutes*.

15. Moreover, Plaintiff presented no law or authority pursuant to the AMA, CMS, CPT, or HCPCS guidelines which supports the manner in which Plaintiff billed for its treatment. Accordingly, Plaintiff's Motion for Final Summary Judgment as to Interest Owed must be denied since the amount of interest claimed is based upon a bill that was improperly unbundled contrary to Florida Law and Plaintiff cannot obtain a judgment for interest based on a bill that is not compensable, not reasonable, not related and not medically necessary. *See United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a]; *Daidone,* 760 So. 2d 1110; *Northwoods*, 137 So. 3d 1049; *Derius*, 723 So. 2d 271.

16. In the instant case, the unbundling defense pertains to Plaintiff's billing of an "EZ Trigger Kit" in conjunction with CPT 20610 and CPT 20553. The undisputed contents of the "EZ Trigger Kit" are: Kenalog (1ml), Lidocaine (2ml), Ammonia inhalent, povidone iodine prep pad (betadine), 1 pair of latex gloves, and Sterile CSR Wrap. Defendant's Coding Expert, Denisha Torres Lich, MS, RHIA, LHRM, concludes that the payment Plaintiff received for CPT 20610[3] and CPT 20553[4] included reimbursement for more Lidocaine than what Plaintiff actually utilized for the patient, betadine solution, 2 pairs of latex gloves and other supplies incident to the injection procedures, making the separate billing of the $425.39 "EZ Trigger Kit" improperly unbundled and resulting in duplicative charges to the patient and insurer contrary to Fla. Stat. § 627.736(5)(b)1 and (5)(d).

17. The Defendant's Coding Expert also found that the Plaintiff's bill did not include the correct procedure code pursuant to Fla. Stat. § 627.736(5)(d) for the reimbursement of Kenalog[5]. According to the Defendant's Coding Expert, had the Plaintiff properly billed for Kenalog, the fee schedules would have only allowed reimbursement in the amount of $14.248, instead, Plaintiff improperly billed the "EZ Trigger Kit" in the amount of $425.39 for the reimbursement of Kenalog.

18. Based upon the Coding Expert's knowledge and expertise relating to the CPT coding manuals, CPT guidelines, and other authorities referenced in Fla. Stat. § 627.736(5)(d), and based upon the medical records which detail the supplies utilized by the Plaintiff in rendering the two injections, the Plaintiff was properly reimbursed for the rendering of the two injections, including the use of any and all supplies incident to the injection procedures within the fee schedule reimbursement for CPT 20553 and CPT 20610. The separate charge in the amount of $425.39 for the "EZ Trigger Kit" was improperly unbundled and resulted in duplicative payment for supplies that were not provided to the Patient and not detailed in Plaintiff's medical records and that are not reasonable, related, and/or medically necessary.

19. The above findings by the Defendant's Coding Expert remain unrefuted as the Plaintiff failed to produce admissible evidence in opposition to Defendant's Motion for Final Summary Judgment. Plaintiff relied upon untimely submitted evidence that was not authenticated and an affidavit that was not notarized.

20. Pursuant to Rule 1.510(c) and (e)[6], Defendant moved to strike Plaintiff's untimely summary judgment evidence, unsworn affidavit, and unauthenticated records. *State Farm Mutual Automobile Ins. Co. v. Figler Family Chiro., P.A., a/a/o Linda Manners*, 41 Fla. L. Weekly D805b (4th DCA March 30, 2016) (finding rule 1.510(c) requires that the evidence in support of and in opposition to the motion be specifically identified, prior to the hearing. Thus, if the movant or opposing party, at the hearing on the motion, tries to rely on record evidence in the court file that is not identified in advance of the hearing as being in support of, or in opposition to, the motion, the motion or defense to the motion should properly be denied. *See also Adams v. Bell Partners, Inc.*, 138 So.3d 1054 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D836a]. *See also State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis a/a/o Gilberto Souza*, 27 Fla. L. Weekly Supp. 125a (11th Cir. App. April 9, 2019) (finding the trial court erred in granting summary judgment supported by affidavits there were not properly notarized and which affiant did not swear to contents of affidavits).

21. At the hearing, Plaintiff argued that it did not have to notarize

or authenticate the affidavit due to COVID-19, however no supporting order was provided and there was no explanation as to why the supporting documentation was untimely served at 5:07 p.m. Notably, the Supreme Court's Administrative Order No. AOSC20-16 only suspended the *in-person* requirement for notaries but does not allow a party to submit affidavits without *any* notary seal or authentication[7]. Therefore, Plaintiff's affidavit that was not signed under oath with a notary via audio-video communication is improper and inadmissible evidence that must be stricken from the record.

22. In accordance with the Fourth DCA in *Figler* and *Adams* and the 11th Judicial Appellate Court in *Gilberto Souza,* the Court cannot consider the untimely and unsworn evidence. Plaintiff had ample notice to timely file and authenticate its evidence and especially where Plaintiff had four years to file evidence as to the reasonableness, relatedness, and medical necessity of its treatment. Without any admissible evidence contrary to Defendant's Motion for Final Summary Judgment as to Plaintiff's improperly unbundled and non-compensable bill, final summary judgment must be found in Defendant's favor.

23. However, even if the Court were to admit Plaintiff's evidence as timely and proper, the unsworn Affidavit of Eduardo Rivero first states the charges were reasonable and customary but fails to provide any factual or legal evidence to support this conclusory statement. The unsworn Affidavit also states the EZ injection kit included supplies and medication "above and beyond" the supplies and medications included with the two injections but fails to detail which supplies were "above and beyond," or how the supplies were "above and beyond." As stated by the Defendant's Coding Expert, Plaintiff did not use any additional supplies that were not already included in the reimbursement for the two injection procedures. The unsworn Affidavit also states that "superior quality" sterile gloves and gauze were utilized but does not detail how or why the gloves or gauze were "superior" in quality. Moreover, the medical records themselves do not reflect that the gloves or gauze were of superior quality, therefore the insurer cannot possibly be put on notice of same.

24. Similarly in *Path Medical, LLC aao Deborah Clark v. Allstate Indemnity Co. Ins.*, 26 Fla. L. Weekly Supp. 1001a (Fla. 17th Cir. February 4, 2019) the court found Plaintiff's affidavit conclusory, self-serving, and failed to set forth the facts upon with the provider's opinions were based. The court concluded that Plaintiff's bills were improperly unbundled and despite the Plaintiff's affidavit claiming that the supply was medically necessary, the "[c]ourt disagrees that an insurer can be judicially forced to reimburse for a service or supply, regardless of an expert testimony that said service or supply is compensable, if such service or supply is not reimbursable under Florida Law."

25. Relying on *Deborah Clark*, the court in *Pines Injury Center, Inc. aao Edlyne Thelusma v. Allstate Property & Casualty Ins. Co.*, 27 Fla. L. Weekly Supp. 562b (Fla. 17th Cir. August 16, 2019) also found the affidavit of a chiropractor merely contained conclusory statements regarding why the electrodes were not "incident to" the electrical stimulation. Moreover, the court ruled that Plaintiff's billing was improperly unbundled where nothing in the medical records submitted to the insurer provided notice that the supplies were not "incident to" or "above and beyond" the service the provider was already reimbursed for. *See also Florida Injury Deltona, Inc. aao Jose Alanis-Esparza v. Allstate Ins. Co.*, 26 Fla. L. Weekly Supp. 903a (Fla. 17th Cir. January 3, 2019) (finding that PIP insurer is not required to pay separate additional charge for electrodes used in conjunction with electrical muscle stimulation treatment and finding there is no merit to arguments that electrodes are compensable merely because the electrodes were "superior" or medically necessary.).

LEGAL CONCLUSIONS

26. In the instant lawsuit, Plaintiff is claiming $.49 in interest for one bill. Defendant argues that interest is not owed and provides reasonable proof it is not responsible for same with evidence that the bill is not compensable and thus not overdue in accordance with Fla. Stat. § 627.736(4)(b). Moreover, even if the Court found interest is owed, Defendant asserts that Plaintiff has been overpaid $340.31, and therefore suffers no damages.

27. In determining interest, the PIP statute provides that benefits must be overdue and the bills can only be overdue if the insurer is provided with written notice of a **covered** loss. *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a]; *AIU Ins. Co. v. Daidone*, 760 So. 2d 1110 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1625a]; *Northwoods Sports Med. & Physical Rehab., Inc.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys.*, 21 So. 3d 124 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2268a].

28. The plain language of Fla. Stat. § 627.736(4)(b), which Plaintiff relies on to support its contention that interest is owed, very clearly requires the Plaintiff to prove that the underlying bills are "covered by the policy issued." After the bills are deemed payable and covered, the Plaintiff must prove that the insurer was provided with written notice of a covered loss. Plaintiff's evidence only shows when the bill was received and when the bill was paid yet provides no evidence to satisfy its burden of proof that the bill was compensable, reasonable, related, and medically necessary.

29. The Court cannot solely look at section (4)(b) in a vacuum as Plaintiff argues, rather it must look at the policy and the entire PIP statute as a whole, and failure to do so would reach a result that would impermissibly require an insurer to pay interest on a bill that is not compensable, is improperly unbundled under Florida Law, and is not reasonable, related, or medically necessary.

30. The Policy, PIP Statute, and binding case law from the Florida Supreme Court, various District Court of Appeals, and other 17th Circuit County Court opinions support Defendant's contention that Plaintiff's bills for which it claims interest, must first be deemed a compensable covered loss. To find an insurer is required to pay interest on bills that are not compliant with Florida Law would thwart the Legislature's clear and plain language included in the PIP statute to prevent a provider from improperly billing a patient and insurer for services/supplies and would render Fla. Stat. § 627.732(15), Fla. Stat. § 627.736(5)(b)1, and Fla. Stat. § 627.736(5)(d) meaningless. *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a] (finding only "overdue" benefits require payment of interest. "the criteria governing payment of benefits and penalties are as follows: (1) an insured may seek the payment of benefits for a **covered loss** by submitting 'reasonable proof' of such loss to the insurer; (2) if the benefits are not paid within thirty days and the insurer does not have **reasonable proof that it is not responsible for the payment, the payment is 'overdue'**; (3) all **'overdue'** payments shall bear simple interest at a rate of ten percent per year." [emphasis added]).

31. The Plaintiff cannot avoid its statutory responsibility to properly bill a patient and insurer for its services/supplies and it cannot avoid its statutory responsibility to render and prove that its services/supplies were reasonable, related, and medically necessary. *See Derius v. Allstate Indemnity Co.*, 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] *(finding* an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary.)

32. Notably absent from the record is any evidence that Plaintiff's bill for which it claims interest on, was properly billed, compensable,

reasonable, related, and medically necessary. In fact, the only evidence that this Court can rely on is Defendant's timely evidence including the affidavit of the Adjuster and the affidavit of the Coding Expert, which conclude that Plaintiff's only bill at issue in this case was improperly unbundled and therefore not compensable pursuant to Florida Law, resulting in duplicative charges to the patient and the insurer and an overpayment to Plaintiff.

33. Accordingly, Plaintiff has not proven that it suffered any damages, nor did Plaintiff prove that Defendant breached its insurance policy. Defendant has provided reasonable proof that it is not responsible for Plaintiff's bill pursuant to Fla. Stat. § 627.736(4)(b) because Plaintiff's bill was improperly unbundled and not compliant with the policy, Fla. Stat. § 627.732(15), Fla. Stat. § 627.736(5)(b)1, and Fla. Stat. § 627.736(5)(d), and therefore Defendant is not considered to have been furnished with written notice of a covered loss, Plaintiff's bill is not overdue, and Defendant is entitled to Final Summary Judgment as a matter of law.

THEREFORE, it is **ORDERED** and **ADJUDGED:**

A. Plaintiff's Motion for Summary Judgment as to Interest is DENIED.

B. Defendant's Motion for Final Summary Judgment is GRANTED;

C. The Plaintiff shall take nothing by this action;

D. The Defendant is the prevailing party in this action; and

E. The Court reserves jurisdiction to determine entitlement and amount of attorneys' fees and costs owed to Defendant.

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[1]Rule 1.370(b): Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits.

[2]Plaintiff's only evidence is the statutory interest rates. An unsworn and untimely submitted affidavit without a notary seal and unauthenticated documents filed after 5 p.m. two days prior to the summary judgment hearing is not proper evidence for this Court to consider.

[3]Plaintiff's medical records for the billing of CPT 20610 indicate that Plaintiff used and supplied[3]: 1 pair of sterile gloves, an unspecified amount of povidone-betadine solution, and 3 mL of 1% Lidocaine. The Defendant's Coding Expert references a chart titled "The Centers for Medicare Services Physician Fee Schedule Federal Regulation Notice"[3] which reflects that Plaintiff was reimbursed for 1 pair of sterile gloves, 10mL of povidone- betadine solution, and 5mL of Lidocaine, amongst other supplies including needles, gauze, barriers, etc. As such, Plaintiff was already reimbursed for 2 extra mL of 1% Lidocaine, which was not supplied to the patient according to the medical records.

[4]Plaintiff's medical records for the billing of CPT 20553 indicate that Plaintiff used and supplied[4]: 1 pair of sterile gloves, an unspecified amount of povidone-betadine solution, and 2 mL of 1% Lidocaine. The CMS chart referenced by the Defendant's Coding Expert reflects that Plaintiff was reimbursed for 1 pair of sterile gloves, 10mL of povidone-betadine solution, and 2mL of 1% Lidocaine, amongst other supplies including needles, gauze, barriers, etc.

[5]See Page 8 of the Coding Expert's Affidavit, paragraph 17: "It should be noted that the more appropriate code to represented the Kenalog within the kit is HCSCPSA Level II code J3301. . .[t]he Provider failed to submit the appropriate HCPCS Level II code to represent this pharmaceutical (Kenalog) for 8/31/16 date of service. The ASP Drug Fee Schedule shows an allowed about for J3301 for 8/31/16 as $1.781. The provider documented within the procedure note the provision of 1ml of 40mg of Kenalog, therefore, 4 units of J3301 is $7.124 $1.781 x 4 units). 200% of Fee Schedule amount is $14.248 ($7.124 X 200%)."

[6]Fla. R. Civ. P. 1.510 (e): Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

[7]On March 18, 2020, the Florida Supreme Court issued an administrative *Order No. AOSC20-16, which specifically states: "it is the intent of this order to suspend any actual or implied requirement that notaries, and other persons qualified to administer an oath in the State of Florida, must be in the presence of witnesses for purposes of administering an oath for depositions and other testimony,* ***so long as the notary or other qualified person can both see and hear the witness via audio-video communications*** *equipment for purposes of readily identifying the witness." The Order further states: "[n]otaries and other persons qualified to administer an oath in the State of Florida* ***may swear a witness remotely*** *by audio-video communication technology from a location within the State of Florida,* ***provided they can positively identify the witness.***"

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle—Evidence—Statements of defendant—Motion to suppress statements of defendant made during pre-arrest detention and search is denied where defendant was not illegally seized or illegally searched—Where deputy responding to report of elderly man fumbling toward vehicle in parking lot and spilling liquid from cup encountered defendant slumped over ashtray in vehicle with spilled liquid inside and outside of vehicle and odor of alcohol, deputy had legitimate concern for health and safety of defendant and reasonable suspicion of DUI that provided lawful basis for ordering defendant out of vehicle, ordering him into rear seat of his own vehicle, and ordering him into back seat of patrol vehicle—Warrantless search of vehicle for key fob was legal where deputies had reasonable belief that relevant evidence to ascertain defendant's actual physical control of vehicle was present in vehicle—Pat down—Where defendant was owner and only occupant of vehicle and had indicated that key fob was in vehicle, deputy had probable cause to pat down defendant and search his pockets for missing fob

STATE OF FLORIDA, Plaintiff, v. JAMES WAYNE MYERS, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CT-1725. December 14, 2020. Frederic M. Schott, Judge.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO SUPPRESS EVIDENCE PURSUANT TO FLORIDA STATUTES SECTIONS 901.15 AND 901.151(6) / ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS

THIS CAUSE came on to be heard for Hearing before the undersigned County Court Judge on the 11th day of December, 2020, upon the Defendant's Amended Motion to Suppress Evidence pursuant to Florida Statutes Sections 901.15 and 901.151(6) and Motion to Suppress Confessions, Statements and Admissions. After carefully reviewing the Motions, after carefully reviewing and considering all of the evidence admitted at the Hearing, after carefully reviewing all of the applicable U.S. Constitutional Law, Florida Constitutional Law, Florida Statutes and 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 Evidence pursuant to Florida Statutes Sections 901.15 and 901.151(6) is hereby DENIED. This finding is based on the totality of the circumstances and, therefore, the unique facts of this case are paramount.

2. That on July 25, 2020, Deputy Riggio was informed by Seminole County Sheriff's Office Dispatch that an elderly man was walking toward a car in the parking lot in front of Sola Salons Studio. The information also included that the man was fumbling in his gait and, as he walked, he was spilling liquid from a cup with a white straw. The caller had been alarmed enough to contact authorities.

When Deputy Riggio arrived at the parking lot in front of Sola Salons Studio she observed the Defendant with his car windows down. The Defendant was asleep and slumped over his ashtray. There was liquid beside a white straw just outside of the Defendant's driver's side door which had an odor of alcohol. There was similar liquid inside the readily observable cup next to the Defendant's driver's seat area within the motor vehicle. Some of this liquid had spilled inside of the Defendant's car. There was an odor of alcohol emanating from the Defendant's vehicle and from his breath.

When Deputy Riggio attempted to wake the Defendant, he startled. The Defendant told Deputy Riggio there was no problem because he believed that he was in his own home. When asked if he had been drinking, the Defendant said that he had been but in his own home, where he still believed he was.

3. That the central issue to be determined by this Court is whether the element of actual physical control of a motor vehicle was proved with admissible evidence available at the time of Defendant's arrest. This issue includes a determination whether the Defendant was illegally seized, illegally detained, or illegally searched.

In addressing the seizure of the Defendant, this Court finds that Deputy Riggio did not illegally seize the Defendant either when ordering him from his own motor vehicle, ordering him into the back seat of his own motor vehicle, or ordering him into the back seat of Deputy Riggio's motor vehicle. Deputy Riggio had both a legitimate concern for the Defendant's health as well as the safety of both the Defendant and others as a reasonable basis for all of her actions in securing the Defendant during her DUI investigation. Furthermore, a law enforcement officer may institute an investigatory

detention if he or she has reasonable suspicion to believe, inter alia, that the individual being detained has committed a crime. *Majors v. State,* 70 So. 2d 655, 659 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a]; *Faunce v. State,* 884 So. 2d 504, 506 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2251b]. Here, there is an abundance of competent evidence that Deputy Riggio had a well-founded, articulable suspicion to believe that the Defendant had driven his motor vehicle while his normal faculties were impaired as a result of consuming alcoholic beverages. *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed. 607 (1975); *Ikner v. State,* 756 So. 2d 1116, 1118 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1133b].

I further find, based upon a totality of the circumstances, that the seizure of the Defendant was no longer than reasonable or than necessary to keep the Defendant at the scene for purposes of a DUI investigation. Indeed, the Defendant was not going anywhere anyway in the condition in which he presented.

Finally, the Court finds that there was no illegal search of the Defendant. Deputy Riggio had the Defendant in investigatory detention while she and Deputy Le Compte attempted to find the Defendant's key fob. It is abundantly clear that both Deputy Riggio and Deputy Le Compte had reasonable suspicion to believe that a crime, specifically DUI, had taken place based upon the totality of the circumstances on the afternoon of July 25, 2020, including the Defendant being slumped over his ashtray, liquid matching that inside Defendant's motor vehicle just outside of the driver's side door with an odor of alcohol, spilled liquid in the interior of Defendant's car consistent with the liquid with odor of alcohol, and the Defendant's extreme disorientation.

While a warrant is generally required under the Fourth Amendment for a legal search to be held, the United States Supreme Court carved out an "automobile exception" to this warrant requirement. *Carroll v. U.S.,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. Betz,* 815 So. 2d 627, 631 (Fla. 2002) [27 Fla. L. Weekly S285b]. Pursuant to this "automobile exception," law enforcement officers such as Deputy Riggio and Deputy Le Compte may lawfully conduct warrantless searches of motor vehicles if they reasonably believe the motor vehicle contains evidence of a crime. *Id*. In the instant case, there is an abundance of evidence that both Deputies reasonably believed that relevant evidence to ascertain actual physical control was present inside of the Defendant's motor vehicle. Consequently, the search of the motor vehicle did not violate any of the Defendant's constitutional rights.

However, the Court's inquiry does not end here. The Court is not willing to ascribe to the position taken by the State that even if no key or key fob had ever been found, there is no need for the State to have evidence of an ability of the Defendant, under the circumstances herein, to start his motor vehicle in order to support the element of actual physical control.

Notwithstanding this Court's unwillingness to accept the State's argument to find actual physical control without evidence of any car-starting device, a key fob was ultimately located in the instant case for the Defendant's motor vehicle after a legal pat-down of the Defendant by Deputy Riggio, thereby providing clear and convincing evidence of actual physical control.

This Court finds that there was an abundance of evidence to support probable cause for both a pat-down and a search of the Defendant's pockets. The Defendant's motor vehicle could not have magically appeared at the parking lot in front of Sola Salons Studio. The Defendant was the registered owner of the subject motor vehicle. The Defendant was the only person found in the subject motor vehicle. The Defendant had indicated, pursuant to non-custodial questioning, that the key fob was in his motor vehicle and, yet, it was not. These unique facts provided probable cause for Deputy Riggio to both perform a pat-down of the Defendant and to search his pocket for the missing key fob.

Indeed, even if Deputy Riggio had turned the Defendant's pants pocket inside out, any reasonable person facing the circumstances surrounding the failure to locate a key fob in the Defendant's motor vehicle, after being told by him that was its location, would have a reasonable belief that the key fob was in the Defendant's pocket. Every practical consideration of everyday life, under the unique circumstances of this case, provided probable cause for a search of not only the Defendant's motor vehicle but also the Defendant himself for the missing key fob. "Probable cause is a practical, common-sense question. It is the probability of criminal activity, and not a prima facie showing of such activity, which is the standard of probable cause. The determination of probable cause involves factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Polk v. Williams,* 565 So. 2d 1387, 1390 (Fla. 5th DCA 1990).

4. That the Defendant's Motion to Suppress Confessions, Statements and Admissions is hereby DENIED. It is my finding, based on the totality of the circumstances, that there was no requirement for Deputy Riggio to apprise the Defendant of *Miranda* rights until after Deputy Riggio effectuated the arrest. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court further finds that none of the statements or admissions obtained from the Defendant, as set forth in the evidence introduced at the subject Hearing, violated the Defendant's Fourth, Fifth, Sixth or Fourteenth Amendment rights under the United States Constitution. This ruling does not preclude the Defendant from raising the issues of admissibility of confessions, statements and admissions which were not introduced into evidence at the Hearing held on November 11, 2020.

5. That the Defendant has conceded that he was impaired on the afternoon of July 25, 2020. Consequently, any issues pertaining to the request for Field Sobriety Exercises, the performance of those Field Sobriety Exercises, and probable cause for the impairment aspect of the element of the pending charge are moot.

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