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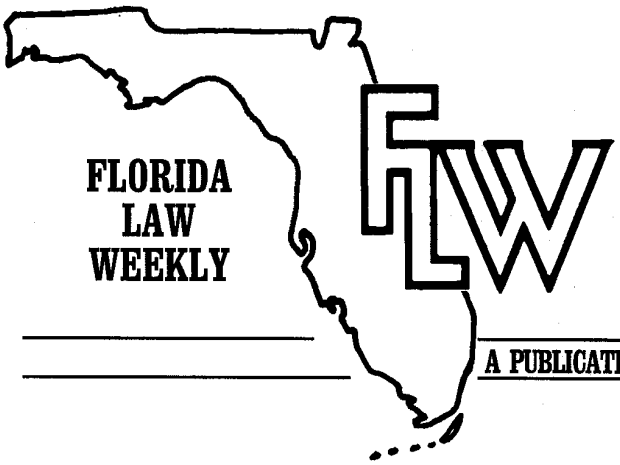

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 967-1045

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.

- **MORTGAGES—FORECLOSURE—SALE—DEFICIENCY JUDGMENT. The court calculated the fair market value of the property at issue, after considering testimony regarding the condition of the home, the unique nature of the community and the impact the community's membership rules have on the values of properties located within the community, and the fact that the home was encumbered by various liens. The court found that it was appropriate to add to its calculations the amount of liens which were paid by the plaintiff and which were not part of the original foreclosure judgment.** *BOYAR REALTY, LLC v. FLORIDA REAL ESTATE INVESTMENT AND LAND DEVELOPMENT GROUP, INC. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed January 6, 2021. Full Text at Circuit Courts-Original Section, page 1024a.*
- **TORTS—MEDICAL MALPRACTICE—PRESUIT REQUIREMENTS. The court denied a defendant-clinic's motion to dismiss claims related to the medical negligence of the clinic's plastic surgery team and to strike plaintiff's related expert witness, on the ground that the plaintiff failed to include the plastic surgery team in the plaintiff's presuit disclosures. Although the plaintiff's pre-suit filings gave notice and provided corroborating expert affidavits only with respect to treatment provided by the clinic's orthopedic team, nothing prohibited the plaintiff from discovering and alleging other acts of professional negligence committed by the clinic resulting in the same injury identified in the pre-suit filings.** *GIRGIS v. MAYO CLINIC JACKSONVILLE. Circuit Court, Fourth Judicial Circuit in and for Duval County. Filed December 15, 2020. Full Text at Circuit Courts-Original Section, page 1021a.*

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Bold denotes decision by circuit court in its appellate capacity.

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Physicians Group, L.L.C. (Greene) v. Century-National Insurance Company. County Court, Twelfth Judicial Circuit, Sarasota County, Case No. 2018 SC 004549 NC. County Court Order at 28 Fla. L. Weekly Supp. 157a (June 30, 2020). Affirmed **12CIR 986a**

Publix Supermarkets, Inc. v. Miami-Dade County. Circuit Court, Eleventh Judicial Circuit (Appellate), Miami-Dade County, Case No. 2017-82-AP-01. Circuit Court Opinion at 28 Fla. L. Weekly Supp. 449a (October 30, 2020). Petition for Second-Tier Certiorari Denied at 46 Fla. L. Weekly D479a

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Hardship license—Denial—Hearing officer did not depart from essential requirements of law in denying hardship license to licensee whose license was revoked as habitual traffic offender where licensee continued to drive despite revocation

JASMINE STRONG, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2020 AP 22. December 29, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANGELA C. DEMPSEY, J.) **THIS CAUSE** came before the Court upon the Petition for Writ of Certiorari filed on September 25, 2020. The Court having considered the Petition, Respondent's Response thereto, and examined the record before this Court, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief as follows.

1. Petitioner argues that it is a hardship for her not to have a driver's license, and that she was not aware of the revocation until her accident in November 2018. On August 14, 2018, Petitioner's driving privilege was revoked for five years pursuant to Sections 322.264(1)(d), and 322.27(5)(a), Florida Statutes as a habitual traffic offender. The Respondent provided Petitioner notice of the revocation on July 25, 2018. Petitioner applied for a hardship license and a hearing was held on August 27, 2020. The hearing officer denied early reinstatement by written order on August 27, 2020.

2. In the lower tribunal, the purpose of the hardship hearing is to investigate and determine a person's "qualification, fitness and need to drive." Section 322.271(1)(b), Florida Statutes. If eligible, the hearing officer may reinstate the driving privilege on a restricted basis solely for business or employment purposes. In a first-tier certiorari proceeding concerning an administrative action, the court is required to determine three things: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed; and (3) 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] (citing *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). When exercising certiorari review, the court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. *See DHSMV v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

3. There was competent substantial evidence to support the hearing officer's determination. Section 322.201, Florida Statutes, provides that the driving record of an individual is self-authenticating evidence to establish the Petitioner's three prior driving while license suspended convictions. *See also Littman v. State, Dept. of Hwy. Safety and Motor Vehicles,* 869 So.2d 771 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D851b]. The entries on Petitioner's driver record, which was admitted into evidence at the hearing below, constitute competent substantial evidence that she was convicted three times for driving while license suspended. See *Vandetti v. Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 399a (Fla. 2nd Cir. Ct. 2017). Section 322.27(5)(a), Florida Statutes, mandates a minimum five year revocation of a person's driver's license who is designated as a habitual traffic offender.

4. Petitioner had the burden to show the revocation causes a serious hardship and precludes the person from carrying out his or her normal business occupation, trade or employment and that the use of the person's license in the normal course for his or her business is necessary to the proper support of the person or his or her family. Section 322.271(2), Florida Statutes. Despite Petitioner's demonstration of need, the hearing officer properly denied Petitioner's request for early reinstatement because demonstration of need is not the only question to be addressed at the hardship hearing held pursuant to Section 322.271(2), Florida Statutes. In *Bosecker v. Department of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 404a (Fla. 6th Jud. Ct. 2016), the Court addressed a similar argument to the one made by Petitioner in this case. In *Bosecker,* the Petitioner requested early reinstatement of her driving privilege due to hardship. After conducting a hearing, the hearing officer denied her request. The Petitioner had approximately 17 driving violations, two of which she obtained after her license had been suspended for 30 days for accumulating 12 points on her license in 12 months. The Court noted that the hearing officer cited Section 322.263, Florida Statutes, which states, in part, the legislative intent of Chapter 322, Florida Statutes is to:

> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the law for the state and the orders of the state courts and administrative agencies

In *Bosecker,* the Court ruled that there was competent, substantial evidence to support the hearing officer's decision to deny Petitioner's request for early reinstatement.

5. Even if Petitioner was eligible for a hardship license, statutory eligibility does not mandate issuance of the license. Separate and apart from a person's eligibility for a hardship license is the question of whether a person can be trusted to lawfully operate a motor vehicle. In *Ware v. Department of Highway Safety and Motor Vehicles,* 11 Fla. L. Weekly Supp. 791a (Fla. 12th Jud. Ct. 2004), the court held that notwithstanding petitioner's entitlement to relief based upon his statutory eligibility for hardship license, "the hearing officer relied on his discretion to deny relief based on his belief that Petitioner could not be trusted to operate a motor vehicle based on his driving history." In that case, the number of convictions for various traffic infractions was considered ample evidence providing support for the hearing officer's "inherent discretionary authority" under Section 322.271, Florida Statutes, to deny the application for hardship license.

6. The Court on first tier certiorari review is not tasked with reweighing the evidence to determine whether it would have made the same decision. *Dept. of Hwy. Safety and Motor Vehicles v. Stenmark,* 941 So. 2d 1247 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. Instead, this Court must determine whether the hearing officer had competent substantial evidence to utilize her inherent authority in finding that the Petitioner could not be trusted to obey stricture of a hardship license as defined in Section 322.271(1)(c), Florida Statutes. Considering the Petitioner's continued driving in November 2018, despite her habitual traffic offender revocation, the hearing officer did not depart from the essential requirements of law in denying Petitioner a hardship license.

7. Even if Petitioner was not aware of her 5 year revocation until November 22, 2018, as stated in the Petition, that is not dispositive. Section 322.251(1), Florida Statutes permits notice to be given by mail at the last known address furnished to the department. Petitioner's driving record indicates that such notice was given, and Petitioner does not challenge this.

8. The court finds that the administrative findings and judgment are

supported by competent substantial evidence. Additionally, this Court finds that the Hearing Officer accorded Petitioner procedural due process and observed the essential requirements of the law in upholding the revocation of the driving privilege. For the reasons discussed above, Petitioner has not carried her burden for a writ of certiorari to issue. It is therefore

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Hearing officer's finding that law enforcement had probable cause to believe that licensee was in actual physical control of vehicle was supported by competent substantial evidence where deputy lawfully stopped licensee after observing him speeding and driving over median into oncoming traffic, and fellow deputy who arrived on scene after licensee had been removed from vehicle and effected arrest reasonably inferred that detained licensee was driver of vehicle—No merit to argument that there was no probable cause to arrest licensee based solely on odor of alcohol where law enforcement observed several other indicia of impairment—Finding that licensee refused to submit to breath test was supported by competent substantial evidence where, although licensee initially agreed to perform test, he failed to provide breath sample when prompted to do so—Hearing officer did not err in holding that issue of permanent disqualification of licensee's commercial driver's license was outside her limited scope of review—Petition for writ of certiorari is denied

RICHARD CHARLES DUNLAP, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Clay County. Case No. 2020-AP-01. November 20, 2020. Counsel: Janet E. Johnson, Jacksonville, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

Opinion

(COX, J.) This cause came before this Court upon the Petition for Writ of Certiorari timely filed by the Petitioner on October 7, 2020. Petitioner seeks review of the Findings of Fact, Conclusions of Law and the Decision entered by the Respondent, Florida Department of Highway Safety and Motor Vehicles (Department), on September 18, 2020, which sustained the administrative suspension of Petitioner's driving privilege and the disqualification of Petitioner's Commercial Driver License (CDL) for refusing to submit to a breath test. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c) and sections 322.2615(13), 322.64(13), and 322.31, Florida Statutes.

Factual Background and Procedural History:

On August 16, 2020, multiple members of the Clay County Sheriff's Office were dispatched to the area of Peppers Restaurant on Business Center Drive in reference to a report of a drunk driver. An anonymous tipster observed a white male stumble into a large gray pickup truck before backing into a tree and leaving the area. Deputy Futch, while en route to the location, observed a truck matching the description traveling at 112 miles per hour (mph) in a 55-mph zone. The vehicle ran over the median into oncoming traffic, causing other vehicles to maneuver around it. The vehicle ultimately stopped in the driveway of a residence.

Deputy Riley arrived at the residence, later determined to be the Petitioner's home address, and made contact with the Petitioner, who had been detained and was seated on the ground near his vehicle. As a result of the detention, Deputy Riley detected the odor of an alcoholic beverage emanating from the Petitioner, observed the Petitioner's speech was extremely slurred and his eyes were extremely watery and bloodshot. The Petitioner refused to participate in field sobriety exercises and was informed that the failure to perform such exercises would mean that Deputy Riley's decision to arrest would be based upon his observations. The Petitioner maintained his refusal. When assisted to his feet, the Petitioner could not maintain his balance. When asked about recent alcohol consumption and whether he had come from Peppers Restaurant, the Petitioner admitted that he had come from the restaurant and had "too much" to drink. Deputy Riley also observed fresh scuffmarks and tree bark on the rear of the Petitioner's vehicle.

The Petitioner was placed under arrest for driving under the influence in violation of section 316.193, Florida Statutes. He was then transported to the Clay County Jail, where Deputy Holbert conducted a 20-minute observation of the Petitioner. The Petitioner was read the implied consent warning and initially agreed to provide a breath sample, but he later refused after he was escorted to the Intoxilyzer 8000 room. The Petitioner's driving privilege was suspended and his CDL was disqualified based upon this refusal. The Petitioner obtained a formal review hearing before the Department pursuant to sections 322.2615 and 322.64. The Department hearing officer sustained the suspension of Petitioner's driver license and disqualification of the Petitioner's CDL.

In this Court, the Petitioner raises several issues. First, he argues that the hearing officer's finding that law enforcement had probable cause that the Petitioner was in actual physical control of a motor vehicle is not supported by competent substantial evidence. Second, he argues that the hearing officer's finding that law enforcement had probable cause that the Petitioner was impaired by alcohol is not supported by competent substantial evidence. Third, he argues that the hearing officer's finding that the Petitioner refused to submit to a breath test is not supported by competent substantial evidence. Finally, the Petitioner argues that the hearing officer departed from the essential requirements of the law and violated the Petitioner's procedural due process rights by holding that the duration of the Petitioner's CDL disqualification was outside the scope of review.

Standard of Review:

The scope of the circuit court's review of a hearing officer's suspension order is limited. In reviewing an administrative order by certiorari, the circuit court must determine (1) whether procedural due process is accorded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. The Court is not permitted to re-weigh the evidence or to substitute its judgment for the findings of the Department's hearing officer. *See Education Dev. Ctr., Inc. v. West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a].

Analysis:

Petitioner's first argument that there was no competent substantial evidence of actual physical control relies upon the arrest report, which establishes that Deputy Futch observed a vehicle (belonging to the Petitioner) speeding and driving erratically, but Deputy Riley (the arresting officer) never observed the Petitioner in actual physical control. Instead, when Deputy Riley arrived on scene, the arrest report states that the Petitioner had been detained and was seated on the ground near his vehicle.

This Court finds that the arrest report, which is self-authenticating, constituted competent substantial evidence that the Clay County Sheriff's Office had probable cause to believe the Petitioner was in actual physical control of a motor vehicle. The hearing officer found that Deputy Futch was the stopping officer who observed the Peti-

tioner's driving and traffic infractions, and he had probable cause to stop the Petitioner's vehicle. Given that Deputy Riley arrived on scene after the Petitioner had been detained, the hearing officer made the reasonable inference that Deputy Futch detained the Petitioner because he was the driver of the vehicle. Pursuant to the hearing officer's limited scope of review in sections 322.2615(7) and 322.64(7), the hearing officer only needs to determine whether Deputy Futch had probable cause that the Petitioner was in actual physical control. *May v. Dep't of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 141a (Fla. 4th Cir. Ct. Jan. 9, 2003). On certiorari review, this Court's limited scope of review does not allow the Court to reweigh the evidence. The hearing officer's finding of fact on this issue is supported by competent substantial evidence.

Petitioner's second argument that law enforcement lacked probable cause to arrest the Petitioner is predicated on case law stating that the mere odor of an alcoholic beverage only indicates consumption of alcohol, but not impairment. See *State v. Kliphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. However, the hearing officer found that in addition to the odor of an alcoholic beverage emanating from the Petitioner, law enforcement also observed the Petitioner's excessive speed, erratic driving pattern, his extremely slurred speech, his extremely watery and bloodshot eyes, his lack of balance, his admission of having "too much" to drink, and his refusal to perform field sobriety exercises. This Court has reviewed the record and finds that these findings of fact are supported by competent substantial evidence in the record. This evidence, viewed collectively, established probable cause of the Petitioner's impairment by alcohol. See *State v. Liles*, 191 So. 3d 484, nt. 4 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D892a]; *Dep't of Highway Safety and Motor Vehicles v. Possati*, 866 So. 2d 737, 740 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a].

Petitioner's third argument that there was no competent substantial evidence that he refused to submit to a breath test is based upon the assertion that the record evidence does not establish that the Petitioner expressed a refusal to submit to a breath test. On this issue, the hearing officer first found that a twenty (20) minute observation period was conducted on the Petitioner and the Intoxilyzer was made ready for the Petitioner to submit to a breath test after he initially agreed to submit to such test. However, when prompted to provide a breath sample, the Petitioner failed to do so. The Petitioner was then informed multiple times of the consequences of his failure to submit to a breath test.

After reviewing the record, these findings of fact are supported by the Arrest Report, the Affidavit of Refusal, the Breath Alcohol Test Affidavit, the Intoxilyzer 20 Minute Observation Form, and the Implied Consent for DUI in a Motor Vehicle form. The final order held that pursuant to Fla. Admin. Code R. 11D-8.002(12), a "refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test." The hearing officer had competent substantial evidence supporting her factual findings and complied with the essential requirements of law in reaching this legal conclusion. See *Dep't of Highway Safety & Motor Vehicles v. Perry*, 751 So. 2d 1277 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a]; *Dep't of Highway Safety & Motor Vehicles v. Cherry*, 91 So. 3d 849 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a].

Petitioner's final argument relates to the permanent disqualification of the Petitioner's CDL, which authorized him to operate commercial motor vehicles as the holder of a Class A driver license. Specifically, the Petitioner argues that a CDL can only be permanently disqualified if the licensee has been convicted of DUI, and the criminal proceeding arising out of Petitioner's DUI arrest in this matter has not yet resulted in conviction. The Petitioner additionally argues that Section 322.61, Florida Statutes, requires that the two incidents leading to a permanent disqualification cannot be more than three years apart, and in this case Petitioner's prior refusal to submit to a breath test occurred more than three years prior to the refusal at issue in this case.

When these issues were raised in the administrative hearing, the hearing officer reserved ruling, but ultimately determined in her final order that the arguments raised were outside the scope of review pursuant to Section 322.64, Florida Statutes. Specifically, Petitioner's counsel argued that her client had received an Order of Disqualification dated September 2, 2020 stating that the Petitioner's CDL privileges had been permanently revoked. However, this document was not placed in evidence. The hearing officer's order notes that no evidence was offered in support of the motion, only counsel's argument. The Petitioner argues that the hearing officer violated the Petitioner's procedural due process rights by failing to rule on the merits of these arguments.

On this issue, this Court finds that the hearing officer complied with the essential requirements of the law in holding that the arguments raised were outside the limited scope of review. Therefore, the hearing officer's refusal to address the merits of these arguments does not constitute a harmful due process error warranting remand for further proceedings. With regards to the Petitioner's CDL privileges, the hearing officer's scope of review is limited by statute. See § 322.64(7)(b), Fla. Stat. Under this statute, the hearing officer is only tasked with determining whether there was probable cause of DUI, whether the petitioner refused to submit to a lawful request for a breath, urine, or blood test, and whether the petitioner was read the implied consent warning. *Id*. The administrative process at issue was held pursuant to sections 322.2615 and 322.64, Florida Statutes. The arguments raised were outside the limited scope of review. *Calderon v. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 1001a (Fla. 13th Cir. Ct. Dec. 31, 2019) (holding that the duration of a driver license suspension is not within the hearing officer's scope of review in a hearing held pursuant to section 322.2615). Therefore, this Court will not address the merits of these two arguments. The Department's Response stipulates that if the Petitioner seeks an administrative ruling on the merits of these arguments, an administrative hearing is available pursuant to Fla. Admin. Code R. 15A-1.0195. A final order issued by the Department following such a hearing is subject to judicial review pursuant to Section 322.31, Florida Statutes. Therefore, this Court finds that the Petitioner has not yet exhausted an available administrative remedy.

Based on the above, it is **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby **DENIED**.

* * *

Licensing—Driver's license—Commercial driver's license—Reinstatement—Even if hearing officer erred by failing to specifically address licensee's request for reinstatement of permanently suspended CDL, error was harmless where licensee sought remedy allowed by Code of Federal Regulations but not provided for by Florida statutes or rules—Petition for writ of certiorari is denied

GRADY F. DORTCH, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2019-AP-98, Division AP-A. September 24, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Thomas F. Rosenblum, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari relief and asserts the Hearing Officer erred because she did not address the legal issue brought by Petitioner; Petitioner's request for reinstatement of his commercial driver's license (CDL) pursuant to Title 49, Part 383, subpart D, § 383.51(a)(6) of the Code of Federal Regulations.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether proce-

dural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Bailey,* 870 So. 2d 47, 49 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2384a].

Petitioner's commercial driver's license was permanently suspended in 2007. In 2019, he petitioned for reinstatement pursuant to Title 49, Part 383, subpart D, § 383.51(a)(6) of the Code of Federal Regulations, which provides:

> Reinstatement after lifetime disqualification. A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) must not be reinstated.

This section gives a state discretion whether to reinstate a driver disqualified for life. It does not mandate that a state must provide such a remedy. The Florida legislature has not adopted any law permitting or requiring such reinstatement. Similarly, the Department has not promulgated an administrative code rule authorizing reinstatement of a permanently disqualified commercial driver's license.

The Court recognizes the Department's order does not specifically mention reinstatement pursuant to section 383.51(a)(6) of the Code of Federal Regulations. This does not, however, implicate due process nor require reversal because Petitioner sought a remedy not provided for by Florida law. As such, even if the Hearing Officer erred by failing to specifically address Petitioner's request for reinstatement of his CDL, the error was harmless. *See Dep't of Highway Safety and Motor Vehicles v. Chamizo,* 753 So. 2d 749, 752 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D711e] (recognizing "[w]here the hearing officer makes an error but the error is harmless, the circuit court should affirm." (citations omitted)).

Based on the foregoing, the Petition for Writ of Certiorari is **DENIED**. (SALVADOR and CHARBULA JJ., concur; ROBERSON, J., concurs with opinion.)

(ROBERSON, J., concurring.) Because the remedy sought by Petitioner is legally unavailable, I concur in the denial of the Petition. I write separately, however, to address the troubling nature of the Department's order. Petitioner raised a single claim for relief. Yet the order under review fails to even address that argument.

The Department's woefully inadequate order undermines the integrity of the process and the appearance of a fair and impartial hearing. The clearly erroneous order is only salvaged by after-the-fact arguments and the very high burden for obtaining certiorari relief.

Denying the Petition is the right result but it raises significant concerns, nonetheless.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Investigatory stop—Brief detention of licensee, who was observed driving recklessly and had indicia of impairment, handcuffed in back of patrol vehicle while stopping officer verified his license did not transform investigatory stop into de facto arrest—Officer had reasonable suspicion to detain licensee for DUI investigation and to arrest him for DUI based on reckless driving and indicia of impairment—Record refutes claim that licensee was denied due process when hearing officer found that length of suspension should be 18 months—Hearing officer was not required to make findings regarding prior refusal or length of suspension and did not do so—Petition for writ of certiorari is denied

JERAD BRITT LIPFORD, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2019-AP-13, Division AP-A. December 11, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari review of the Department's ruling and raises five arguments for review: (1) The initial investigatory stop was transformed into an illegal *de facto* arrest; (2) Police lacked reasonable suspicion to detain him for a DUI investigation; (3) Police lacked probable cause to arrest him for DUI; (4) The hearing officer erred by issuing an eighteen-month suspension; and (5) Petitioner was not afforded a fair and impartial hearing.

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

The hearing officer summarized her findings of facts as follows:

> Trooper G.B. Healy, Florida Highway Patrol, was on the lookout for a reckless driver reported by the Nassau County Sheriff's Office. Trooper Healy observed a vehicle heading towards him at a high rate of speed. Trooper Healy verified the vehicle's speed as 85-mph in a posted 45-mph zone with his radar. As the vehicle passed Trooper Healy, the trooper conducted a traffic stop on the vehicle. The driver was asked to exit his vehicle. Trooper Healy requested the driver's driver license, and he responded that he did not have one. Trooper Healy observed that the driver had an odor of alcohol emitting from his breath; he was unsteady on his feet; his eyes were bloodshot and watery; his face was flushed; and, there was a strong odor of burnt marijuana emitting from the driver. The driver was detained while Trooper Healy determined if his license was valid.
>
> Trooper Healy asked the Petitioner whether he had consumed any alcohol, and he confirmed that he had. Backup deputies arrived on scene, and Trooper Healy requested the Petitioner submit to field sobriety exercises. The Petitioner agreed, but became argumentative during the walk and turn exercise. The Petitioner was placed under arrest for driving under the influence (DUI). The Petitioner became increasingly argumentative and threatening once inside the patrol vehicle. Trooper Healy transported the Petitioner to the Nassau County Jail. Once at the facility, Trooper Healy requested a breath test and read the Implied Consent Warning to the driver. The Petitioner refused. Based on the foregoing, I find that the Petitioner was lawfully arrested for DUI.

I

In his first ground for relief, Petitioner argues that the initial investigatory stop was transformed into an illegal *de facto* arrest when he was handcuffed and locked in the back of Trooper Healy's patrol car. However, "[t]he use of handcuffs does not automatically turn an investigatory stop into a de facto arrest." *Studemire v. State,* 95 So. 2d 1256, 1257 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1352c] (citing *Reynolds v. State,* 592 So. 2d 1082, 1084 (Fla. 1992)). Here, the officer briefly detained Petitioner to verify his license *after* observing reckless driving and signs of inebriation. This did not transform the investigatory stop into a *de facto* arrest. *See State v. Leach,* 170 So. 3d 56, 62 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1087a] (use of handcuffs to briefly detain suspect until eyewitness arrived was

reasonable and did not result in custodial arrest).

II

In his second ground for relief, Petitioner argues that the hearing officer erred by finding that there was a reasonable suspicion to detain him for a DUI investigation. This Court finds that the initial stop was justified by Petitioner's high rate of speed and that the officer's observations established a reasonable suspicion that Petitioner was operating a vehicle under the influence.

III

In his third ground for relief, Petitioner argues that the hearing officer erred by finding that Petitioner was lawfully arrested for driving under the influence. Based upon the hearing officer's factual findings, there is competent substantial evidence to find that Petitioner was lawfully arrested.

IV

In his fourth ground for relief, Petitioner argues that he was denied procedural due process when the hearing officer found that the length of the suspension should be eighteen months. However, the hearing officer made no such finding:

> After consideration of the foregoing, I conclude as a matter of law, that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if he refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

These are the only findings required by section 322.2615, Florida Statutes, (2013). Nowhere in the statute is the hearing officer required to make a finding as to a prior refusal. Instead, it is the Department's role to determine the length of the suspension based upon the hearing officer's findings. *Id.* Here, the hearing officer made the appropriate findings after a noticed hearing. Accordingly, Petitioner was afforded procedural due process and is not entitled to relief.

V

In his fifth ground for relief, Petitioner argues he was not afforded an impartial hearing. As Petitioner concedes, other panels from this Circuit have already rejected this argument. While not binding, this Court finds the reasoning of those opinions to be persuasive. *See e.g., Meadows v. Dep't of Highway Safety& Motor Vehicles,* 2017-AP-000116 (Fla. 4th Cir. Ct., Sept 26, 2018) [26 Fla. L. Weekly D699a].

Based on the foregoing, the Petition for Writ of Certiorari is **DENIED**. Additionally, the Motion for Oral Argument and Motion for Attorney's Fees are **DENIED**. (ROBERSON, SALVADOR, and CHARBULA, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Record refutes claim that licensee was denied due process when hearing officer found that length of suspension should be 18 months—Hearing officer was not required to make findings regarding prior refusal or length of suspension and did not do so—Lawfulness of stop—Transporting lawfully stopped licensee who exhibited several indicia of impairment to nearby parking lot for performance of field sobriety exercises did not transform stop into de facto arrest—Petition for writ of certiorari is denied

LARRY J. FAIRMAN, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2019-AP-52, Division AP-A. December 9, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM) Petitioner seeks certiorari review of the Department's ruling and raises three arguments for review: (1) The hearing officer erred by upholding an eighteen month suspension; (2) The initial stop became an illegal *de facto* arrest; and (3) He was not afforded a fair, impartial hearing.

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

I

In his first ground for relief, Petitioner argues that he was denied procedural due process when the hearing officer found that the length of the suspension should be eighteen months. However, the hearing officer made no such finding:

> After consideration of the foregoing, I conclude as a matter of law, that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if he refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

These are the only findings required by section 322.2615, Florida Statutes, (2013). Nowhere in the statute is the hearing officer required to make a finding as to a prior refusal. Instead, it is the Department's role to determine the length of the suspension based upon the hearing officers findings. *Id.* Here, the hearing officer made the appropriate findings after a noticed hearing.

II

In his second ground for relief, Petitioner argues that the initial investigatory stopped was transformed into an illegal *de facto* arrest when officers transported him to a parking lot for field sobriety exercises.

There is no bright line rule for determining when an investigatory stop becomes an arrest. *Saturnino-Boudet v. State,* 682 So. 2d 188, 192-93 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2173j]. Instead, the focus should be on whether or not officers diligently pursue a means of investigation. *Id.* Here, the hearing officer summarized the relevant facts as follows:

> Corporal Lavender of the Jacksonville Beach Police Department was dispatched to the scene in reference to the driver of a black Mercedes who was driving recklessly. [A witness] advised dispatch that Petitioner was slumped over the wheel of his vehicle and having a hard time maintaining a single lane of travel. . . . Petitioner appeared to be falling asleep at ever red light and repeatedly weaved and swerved. Corporal Lavender also observed Petitioner nearly strike a vehicle stopped for the traffic signal. A traffic stop was conducted. Additionally, Officer Turpin of the Jacksonville Beach Police Department responded to the scene to assist.
>
> Upon contact with Petitioner, Officer Turpin detected an odor of alcoholic beverage emitting from his breath, watery eyes and unsteadiness on his feet.

Based upon these facts, reasonable suspicion existed to detain Petitioner for a DUI investigation. Transporting Petitioner to a nearby parking lot so he could perform field sobriety exercises did not transform the stop into an arrest. *See Weeks v. Dep't of Highway Safety and Motor Vehicles,* 22 Fla. L. Weekly Supp. 171a (Fla. 4th Cir. Ct. Aug. 29, 2014).

III

Petitioner's argument that he was not afforded an impartial hearing has been repeatedly denied in this circuit and will, again, be denied.

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Failure of subpoenaed witnesses to appear—Hearing officer did not depart from essential requirements of law in refusing to invalidate suspension based on failure of two subpoenaed officers to appear at hearing where officers were not arresting officer or breath technician, and licensee refused offered opportunity to enforce subpoenas—Petition for writ of certiorari is denied

ARTHUR DAVID PRESTON, IV, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2019-AP-41, Division AP-A. November 25, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Mitchell A. Stone, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari review of the Department's ruling and raises one argument for review: Whether or not the Department departed from the essential requirements of the law when the hearing officer refused to invalidate the suspension based on witnesses' failure to appear.

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

Petitioner's only ground for relief involves the failure of two officers to appear at the hearing. However, the only necessary witnesses are the arresting officer and—if there was a breathalyzer test—the breath technician. See *Objio v. State, Dep't. of Highway Safety and Motor Vehicles,* 179 So. 3d 494, 497 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2608a]. In the instant case, the arresting officer appeared, and there was no "breath technician" because Petitioner refused to take a breath test. The hearing officer afforded Petitioner the opportunity to seek enforcement of the subpoena, but Petitioner refused. Thus, the hearing officer did not depart from the essential requirements of the law by refusing to invalidate the suspension.

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Failure of subpoenaed witnesses to appear— Hearing officer did not depart from essential requirements of law in refusing to invalidate suspension based on failure of subpoenaed breath technician to appear at hearing in case in which licensee refused to take breath test—Petition for writ of certiorari is denied

SHAUN LYNDON WRIGHT, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2019-AP-01, Division AP-A. November 24, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Ronald L. Roberts, Jr., for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM) Petitioner seeks certiorari review of the Department's ruling and raises one argument for review: Whether or not the Department departed from the essential requirements of the law when the hearing officer refused to invalidate the suspension based on the breath technician's failure to appear pursuant to a lawful subpoena.

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

Petitioner argues that a hearing officer must invalidate a license suspension when the arresting officer or breath technician fails to appear at a hearing after being duly subpoenaed. *Objio v. State, Dep't. of Highway Safety and Motor Vehicles*, 179 So. 3d 494, 497 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2608a]. In the instant case, the arresting officers appeared, and there was no "breath technician" because Petitioner refused to take a breath test. Thus, the hearing officer did not depart from the essential requirements of the law by refusing to invalidate the suspension.

Based on the foregoing, the "Petition for Writ of Certiorari" is **DENIED**. (SALEM, CHARBULA, and ROBERSON, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention—Officer who stopped licensee for speeding and observed that she had odor of alcohol and watery bloodshot eyes had reasonable suspicion to detain licensee for DUI investigation—Lawfulness of arrest—Officer had probable cause for DUI arrest based on odor of alcohol, watery bloodshot eyes, licensee's demeanor during detention, and licensee's performance on field sobriety exercises—No error in denying motion to strike statement made by licensee admitting to drinking alcohol, made after her request to speak to her attorney was denied, because licensee was not in custody for *Miranda* purposes at time of statement, and therefore, was not entitled to speak to attorney—Even if hearing officer erred in denying motion to strike, error was harmless where there was competent substantial evidence to support lawfulness of arrest without consideration of statement—Petition for writ of certiorari is denied

ALEXANDRA ANN MILLER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2019-AP-86, Division AP-A. October 9, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins and Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner challenges the Department's ruling following an administrative hearing and argues that the hearing officer erred in (1) finding that Petitioner was lawfully arrested, and (2) denying Petitioner's motion to strike any statements she made after she was denied the right to counsel.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements

of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a].

(1)

Petitioner contends the Department's order failed to comply with the essential requirements of the law when the Hearing Officer determined Officer Rodriguez legally detained Petitioner for a DUI investigation. Specifically, Petitioner argues Officer Rodriguez did not have reasonable suspicion to believe that Petitioner was driving while under the influence of an alcoholic beverage to the extent her normal faculties were impaired. Petitioner further argues her arrest was not supported by probable cause.

Law enforcement may temporarily detain a driver for a DUI investigation based on reasonable suspicion. *State v. Taylor*, 648 So. 2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b]. A reasonable suspicion "is one which 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. Davis*, 849 So. 2d 398, 400 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1477a]. Florida courts have held a combination of speeding, the smell of alcohol, and bloodshot or watery eyes to comprise sufficient facts to form a reasonable suspicion. *State v. Castaneda*, 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]; *see also Origi v. State*, 912 So. 2d 69, 71, 72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (finding the police officer had sufficient reasonable suspicion to detain the driver for a DUI investigation where the latter drove at a high rate of speed, smelled of alcohol, and had bloodshot eyes); *Mendez v. State*, 678 So. 2d 388, 390 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1592a] (finding that the officer was justified in conducting a DUI investigation where the driver's face was flushed, she had bloodshot eyes, and her vehicle was illegally parked). With respect to probable cause for an arrest, "probable 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 reasonably 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. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a] (citations omitted). "Probable cause is often a conclusion drawn from reasonable inferences." *Id.* (citing *State v. Cote*, 547 So.2d 993, 995 (Fla. 4th DCA 1989)).

In this case, competent, substantial evidence supported the Hearing Officer's findings that Officer Rodriguez legally detained Petitioner for a DUI investigation, including field sobriety exercises, and lawfully arrested Petitioner. Officer Rodriguez stopped Petitioner for driving 87 mph in a 45 mph zone. When Officer Rodriguez approached the vehicle, he detected a strong odor of alcohol coming from the vehicle, and once Petitioner exited the vehicle, Officer Rodriguez smelled a moderate to strong odor of alcohol coming from Petitioner's breath. As observed on the DVD of the stop, during the DUI investigation, Officer Rodriguez stated that he observed Petitioner had bloodshot and watery eyes prior to asking her to exit the vehicle. Prior to exiting the vehicle, Petitioner admitted to drinking a glass of wine earlier in the evening. The totality of the evidence before the hearing officer constitutes competent, substantial evidence to support finding law enforcement had reasonable suspicion to detain Petitioner for a DUI investigation.

Further, the DVD, Arrest and Booking Report, and Field Sobriety Report, provide competent substantial evidence to support the Hearing Officer's finding that Officer Rodriguez had probable cause to arrest Petitioner for DUI. These include the observations discussed above, Petitioner's demeanor and actions during the stop and detainment, and Petitioner's performance on field sobriety exercises. Based on the foregoing, Petitioner's claims are denied.

(2)

Petitioner contends the Hearing Officer erred when she denied Petitioner's Motion to strike any statements Petitioner made after she was denied the right to counsel. In this case, there came a point that Officer Rodriguez told Petitioner he was going to read her *Miranda*[1] rights before continuing the DUI investigation. Petitioner requested to call her attorney, and that request was denied. Officer Rodriguez proceeded to read Petitioner her *Miranda* rights, and after reading her rights, Petitioner answered Officer Rodriguez's questions and performed field sobriety exercises. The only post-*Miranda* statement mentioned in the Hearing Officer's Findings of Fact, and thus the only statement at issue, was that Petitioner had a margarita during dinner and a glass of wine at the movies after dinner. Petitioner acknowledges any physical observations, including the manner in which Petitioner completed field sobriety exercises, were admissible.

The Court finds the Hearing Officer did not err in denying Petitioner's Motion to Strike because Petitioner was not in custody when the statement at issue was made, and therefore, *Miranda* warnings were not required and Petitioner was not entitled to speak to her attorney. *See State v. Whelan*, 728 So. 2d 807, 809 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] ("recognizing so long as the motorist is not 'in custody' for *Miranda* purposes, no *Miranda* warnings need be given prior to the administration of roadside sobriety tests"); *see also State v. Burns*, 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a]; *State v. Alvarez*, 776 So. 2d 1060 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D386c].

Even if the Hearing Officer erred in denying Petitioner's Motion to Strike, the error was harmless. The Court finds *Dep't of Highway Safety and Motor Vehicles v. Silva*, 806 So. 2d 551 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a], instructive. In *Silva*, the Hearing Officer relied on a privileged statement in reviewing the license suspension despite previously ruling she would not consider statements the petitioner made during the crash investigation. *Id.* at 553. The circuit court granted the petitioner a writ of certiorari finding: "[t]here was no competent, substantial evidence to support the Hearing Officer's finding that Mr. Silva was driving or in actual physical control of a motor vehicle in violation of 316.193, Fla. Stat.," "[s]tatements made by Mr. Silva should not have been admitted without evidence of Miranda warnings," and "[a]lthough there was clearly suspicion that Mr. Silva was the driver, the circumstances did not rise to the level of probable cause." *Id.* On second-tier review, the Second District Court of Appeal found "the circuit court exceeded its scope of review by making an independent probable cause determination," and observed that "the circumstances surrounding the accident, together with the arresting officer's observations, provided ample probable cause for Silva's DUI arrest." *Id.* at 554.

As in *Silva*, the Court finds Officer Rodriguez's observations detailed in the Hearing Officer's Findings of Fact, excluding Petitioner's statement that she consumed wine and a margarita, constituted competent, substantial evidence to support the Hearing Officer's finding Petitioner was lawfully arrested for DUI.

Based on the foregoing, Petitioner's claim is denied.

(3)

On November 20, 2019, Petitioner filed a "Motion for Oral Argument," requesting oral argument on the instant Petition. Since this Court finds Petitioner is not entitled to certiorari relief, Petitioner's request for oral argument is moot.

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

concur.)

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

* * *

MERRY WICHMAN, Appellant, v. MARION COUNTY, a political subdivision of the State of Florida, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Marion County. Case No. 2010-AP-39. L.T. Case No. 2010-CC-1342. December 8, 2020. Appeal from the County Court for Marion County. Honorable James McCune, Judge. Counsel: Merry Wichman, Pro Se, Appellant. Dana E. Olesky, Ocala, for Appellee.

(PER CURIAM.) AFFIRMED. Due to the lack of transcripts filed in the record on appeal, there is no ability to review any portion of the proceeding on appeal and no meaningful appellate review can occur in the case. *S.R.J. v. State,* 997 So. 2d 498, 499 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2875b]. The written Orders on appeal in this matter were pertinent to determine whether the findings of facts supported the trial court's decision. Here, we find the trial court's detailed and thorough Orders clearly set forth the specific findings of facts that supported the trial court's ultimate ruling.[1] (FALVEY, C., DAVIS, H., and ROGERS, S., JJ., concur.)

[1]This case was discovered as outstanding upon the Court's review of files to transfer to the Fifth District Court of Appeals. No record activity has occurred since February 18, 2011.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing officer's finding that requested breath test was incident to lawful arrest was supported by competent substantial evidence—Documents before hearing officer were not in hopeless conflict and consistently reported timeline of stop, arrest, reading of implied consent warning, and test refusal—Arresting officer's report that she asked licensee to submit to breath test "upon arriving on scene" does not contradict other documents stating that breath test was requested at police station after arrest where, read in context, "upon arriving on scene" refers to officer arriving at police station, not scene of traffic stop—Petition for writ of certiorari is denied

ANTHONY RICKY O'NEAL, JR., 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 30544 CICI, Division 32. September 14, 2020. Counsel: Flem Whited, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ORFINGER, J.) THIS CAUSE came before the Court on Petitioner, ANTHONY RICKY O'NEAL, JR.'s, Petition for Writ of Certiorari [Doc. 2]. The Court, having reviewed the Petition and Exhibits attached thereto, the Response [Doc. 6], and being fully advised in the premises, finds as follows:

Statement of the Facts

On February 1, 2020, Petitioner ANTHONY RICKY O'NEAL, JR. was arrested for a violation of Fla. Stat. § 316.193(1), driving under the influence (DUI), following a traffic stop. He ultimately refused to submit to a breath alcohol test in violation of Fla. Stat. § 316.1939(1). As a result, his driver's license was administratively suspended for one year by Respondent STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department"). Thereafter, Petitioner requested a formal review hearing of his license suspension pursuant to Fla. Stat. § 322.2615. The hearing was held on March 24, 2020, before Department Field Hearing Officer Morcos Ikladious.

The following documents were presented and reviewed at the hearing: (1) DDL-1: a composite exhibit consisting of (a) DUI Uniform Traffic Citation A2FZWGP; (b) Florida Uniform Traffic Citation AC3L27E; (c) Charging Affidavit, Volusia County; (d) Florida Uniform Traffic Citation Transmittal Form; (e) Implied Consent Warning; (f) Incident Report; (g) Narrative Supplement 707B; and (h) Affidavit of Refusal to Submit to Breath and/or Urine Test. *See* Transcript, 4:20-5:5 [Doc. 4].

The only issues to be determined at Petitioner's hearing, as in all administrative hearings reviewing license suspensions occasioned by a refusal to submit to a blood, urine, or breath test for alcohol or controlled substances, were (1) whether law enforcement officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs, (2) whether the Petitioner refused to submit to submit to one of the foregoing tests after being requested to do so by a law enforcement officer, and (3) whether Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. Fla. Stat. § 322.2615(7)(b).

On March 24, 2020, the Hearing Officer entered a written order upholding the suspension of Petitioner's driver's license. The Hearing Officer found that the following facts had been established by a preponderance of the evidence.

> On February 1, 2020, Officer Torres of Daytona Beach Police Department, responded for a DUI investigation. Originally, Officer McDowell observed a vehicle across [sic] the double yellow line, driving on the wrong side of the road while passing multiple vehicles. Officer McDowell made a contact with the driver and noted a strong smell of an alcoholic beverage. Officer McDowell also noted that the Petitioner continued to look for his driver's license after giving it to Officer McDowell. Officer McDowell observed the Petitioner's reaching to [sic] a gun after being advised not to do so. Officer McDowell noted the petitioner was unable to stand up straight or to keep his balance.
>
> Officer Torres made a contact with the Petitioner and noted his eyes were glossy and red, and his speech was slurred. Officer Torres also noted a strong odor of alcoholic beverage coming from the Petitioner's breath.
>
> The Petitioner was offered [sic] to complete the field sobriety exercises and was subsequently arrested for DUI.
>
> The Petitioner was read the implied consent warning form and a breath test was requested. The Petitioner refused to submit to the breath test.
>
> Based on the foregoing, I find the Petitioner was placed under lawful arrest for DUI.

Petition, Ex. "A-5" at 2-3.

Based on the foregoing facts, the Hearing Officer concluded as a matter of law that the officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or chemical or controlled substances, that he refused to submit to the breath alcohol test after being requested to do so by a law enforcement officer subsequent to a lawful arrest, and that Petitioner was properly advised of the consequences of refusing to submit to the test. The suspension of Petitioner's driver's license was therefore affirmed. *Id.* at 4.

This Petition for Writ of Certiorari timely followed. Respondent filed a Response pursuant to this Court's Order to Show Cause [Doc. 5]. Petitioner asks this Court to grant his Petition and quash the Final Order of License Suspension entered by the Hearing Officer.

Standard of Review

The Court has jurisdiction to consider this Petition pursuant to Fla. Stat. § 322.31 and Fla. R. App. P. 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this

Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

The first factor, procedural due process, "requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (internal citations omitted). The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the lower tribunal applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

The third factor requires the Court to determine whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957) (defining "competent substantial evidence"). Of critical significance to this case, the Court in its review is not entitled to reweigh the evidence or substitute its judgment for the findings of the Department Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [Petitioner's] driver's license should have been suspended").

Petitioner in the instant case does not challenge whether he was afforded due process. Instead, he contends that the Hearing Officer misapplied the law in concluding that there was sufficient competent substantial evidence (CSE) to support the suspension. Those issues are discussed below.

Analysis

Petitioner attacked the Department's evidence at the hearing on multiple grounds, most of which he has not raised in this certiorari proceeding. Those issues not raised are therefore waived.[1] The sole issue Petitioner now raises is that the documentary evidence before the Hearing Officer is in irreconcilable conflict on the question of whether Petitioner was arrested *before* or *after* he was requested to submit to a breath test and refused to do so. As a legal matter, if the arrest preceded the request and refusal, Petitioner's license was properly suspended. However, if the request and refusal preceded the arrest, then the license suspension was inappropriate. This is so because Florida's "implied consent" statute, Fla. Stat. § 316.1932(1)(a)1 requires that the breath test be administered "incidental to a lawful arrest." The Fifth District Court of Appeal has held this language to mean that the arrest must precede the test, and that the results of pre-arrest breath alcohol tests are inadmissible. *See Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1167 (Fla. 5th DCA) [28 Fla. L. Weekly D1090a], *rev. denied* 858 So. 2d 333 (Fla. 2003); *State v. Barrett,* 508 So. 2d 361 (Fla. 5th DCA), *rev. denied* 511 So. 2d 299 (Fla. 1987).

Petitioner correctly states that the Hearing Officer decided this case on a paper record, without the benefit of any live testimony. While the Department is free to proceed in this fashion, doing so is not without risks:

> When the documents conflict on a material issue, however, the hearing officer cannot simply throw a dart to decide which one is correct. This does not necessarily mean that live testimony is always needed to resolve such conflicts. For example, had the record here contained the machine-generated printout of the results, the hearing officer might appropriately have chosen to prefer it over a report, because it is an inherently reliable expression of the result. We are aware that the Department is authorized to proceed without witnesses in a formal review. It also has the authority to compel the attendance of witnesses when it chooses. When it elects the former strategy, however, it does so at the risk that the documents might contain irreconcilable, material contradictions.

Dep't of Highway Safety & Motor Vehicles v. Colling, 178 So. 3d 2, 5 (Fla. 5th DCA) [39 Fla. L. Weekly D1195b], *rev. denied* 148 So. 3d 770 (Fla. 2014).

A prime example of documentary evidence being in irreconcilable conflict, and therefore not constituting CSE is found in *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. In *Trimble,* the evidence at formal hearing on the suspension of petitioner's driver's license consisted only of documents. The arresting officer's Affidavit of Refusal to Submit to Breath, Urine, or Blood Test stated that petitioner was arrested for DUI on September 27, 2000 at 11:40 p.m. That same document inconsistently stated, however, that petitioner was requested to submit to a breath test and advised of the consequences of the refusal on September 27, 2000 at 12:45 a.m., *i.e.* almost 23 hours *earlier.* The Breathalyzer printout showed that the refusal occurred on September 27 at 12:47 a.m., but the officer's Alcohol Influence Report stated that the consent warning was given on the 27th at 12:50 a.m., a few minutes *after* the refusal but a few minutes *earlier* than the arresting officer's Affidavit of Refusal said the consent warning was given. *Id.* at 1086. The hearing officer upheld the license suspension, but on certiorari review, the circuit court set the suspension order aside. The circuit court concluded that "the documentary evidence presented by the Department, which was the only evidence submitted to prove its case, was legally insufficient to constitute CSE on the warning issue, because the documents were hopelessly in conflict and the discrepancies on the critical facts went unexplained." *Id.* at 1086. The Department then sought second-tier certiorari in the First District Court of Appeal, arguing that the circuit court had improperly engaged in reweighing the evidence.

The *Trimble* court denied certiorari, holding that the circuit court did not reweigh the evidence in concluding that there was simply a lack of CSE to support the suspension. *Id.* at 1085. The court began its analysis with the definition of "competent substantial evidence" from the seminal case of *De Groot v. Sheffield,* 95 So.2d 912 (Fla. 1957):

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

Id. at 916. The *Trimble* court concluded that the circuit court did not misapply the law or reweigh the evidence in finding that the Department's documentary evidence was neither competent nor substantial. This was so because the "critical determination of when or whether

the motorist was given the consent warning required by law as a predicate for the conclusion that she refused to submit to the test, thereby leading to a suspension of the license, was supported only by ***evidence that gives equal support to inconsistent inferences,*** and as such can hardly be deemed so sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached." *Trimble,* 821 So. 2d at 1087 (emphasis added). Because the "hearing officer's finding that Trimble was given a consent warning before her refusal could have rested as much on the flip of a coin as on the documentary evidence submitted," the circuit court's invalidation of the suspension was upheld. *Id.*

Petitioner asserts that the instant case presents a situation like *Trimble* or *Colling,* where the Department's documentary evidence is in hopeless conflict on the issue of whether the request and refusal to submit to a breath test came before or after his arrest. The Florida DUI Uniform Traffic Citation reflects that it was issued on February 1, 2020 at 2:30 a.m. *See* Petition, Ex. A-1. The Charging Affidavit (Form 707) indicates the date and time of arrest as February 1, 2020 at 2:30 a.m. *Id.,* Ex. A-2. The Affidavit of Refusal to Submit to Breath and/or Urine Test signed by Officer Torres indicates that Petitioner was arrested on February 1 at 2:30 a.m. and that on February 1 at 2:50 a.m., Officer Torres requested Petitioner to submit to a breath test, warned him that his driver's license would be suspended if he refused, and that Petitioner nonetheless refused to submit to the test. *Id.,* Ex. A-4. Contrary to Petitioner's assertions, these documents are not inconsistent. Petitioner was arrested at 2:30 a.m. on February 1, 2020, and was requested to submit to a breath test and warned of the consequences some 20 minutes after the arrest, at 2:50 a.m., at which time he refused

In an attempt to find an "irreconcilable, material contradiction[ ]," *see Colling,* 178 So. 3d at 5, Petitioner points to Officer Torres' Charging Affidavit. He contends it states that Officer Torres (a) was contacted at 2:09 a.m. by Officer McDowell to respond to the scene of the traffic stop; (b) that upon her arrival on scene, she made contact with Petitioner, and (c) upon arriving on scene, she requested Petitioner to submit to a breath test, which he refused. *See* Petition, Ex. A-2. Petitioner argues that because Officer Torres could not arrest him until after she arrived on the scene, her statement that she asked him to submit to a breath test "upon arriving on scene" contradicts her Affidavit of Refusal which states she made that request at 2:50 a.m. It is unclear whether Petitioner even made this argument to the Hearing Officer. *See* Response at 5. Even if he did, however, the Hearing Officer quite correctly rejected it.

Petitioner's argument conflates Officer Torres' use of the word "scene" in her narrative. *See* Petition, Ex. A-2. This is readily apparent when the narrative is read in full:

> On 2/11/20 at 0209 hours, I was contacted by Officer Mcdowell to respond to his traffic stop at MLK and South St. Officer McDowell advised that he observed D-1 drive across the double yellow line and drive on the wrong side of the road passing multiple vehicles.
>
> Officer McDowell completed a traffic stop near the intersection of South St. and MLK Blvd. Officer McDowell advised upon making contact with D-1 who was in actual physical control of the vehicle he could smell a strong odor of alcohol.
>
> Officer McDowell asked D-1 for his driver's license, registration and proof of insurance. D-1 provided Officer McDowell with his DL while he continued to look for the rest of the documents. D-1 gave Officer McDowell all proper documents and continued to look for his driver's license which he had already given to Officer MacDowell [sic]. As D-1 searched through his vehicle Officer McDowell asked D-1 what he was looking for. D-1 advised that he was looking for his drivel's license, while looking for the drivers [sic] license D-1 opened up his center console. Officer McDowell saw D-1' s gun sitting in the center console. Officer McDowell asked D-1 to keep his hands away from the gun. D-1 reached for the gun a second time after being advised not to.
>
> D-1 was asked to step out of the vehicle for his safety. D-1 was unable to stand up straight on his own and keep his balance.
>
> ***Upon my arrival on scene,*** I made contact with D-1 (Anthony Oneal) [sic] who was leaning against his vehicle for support. I advised D-1 that I was here to conduct a DUI investigation to see if he was under the influence of alcoholic beverages or a chemical substance. D-1 had glossy red eyes and a strong odor of alcohol could be smelled on his breath. D-1 had slurred speech.
>
> D-1 refused to participate in all field sobriety exercises.
>
> At this time, I advised D-1 that he was being placed under arrest for DUI based on the totality of my investigation. D-1 proceeded to rolled up both sleeves and put his wrist [sic] together out in front of him. D-1 "stated man take me then." I determined that D-1's normal facilities [sic] were impaired for which he was placed under arrest.
>
> ***D-1 was transported from the scene to Daytona Beach Police Department*** (DBPD) located at 129 Valor Blvd.
>
> ***Upon arriving on scene*** I asked D-1 if he was willing to submit to a lawful test of his breathe [sic] for the purpose of determining its alcohol content in which [sic] he refused. I read D-1 implied consent. D-1 acknowledged that he understood the implied consent D-1 still refused.
>
> D-1 was issued Florida Uniform Traffic Citation #(AC3L27E) for refusal to submit to a breath test, #(AC3L24E) for passing in a no passing zone and a Florida DUI Citation #(A2FZW GP). (Emphasis added)

Officer Torres' narrative report sets forth the events prior to, during, and subsequent to Petitioner's arrest in chronological order. It is apparent that she is referring to two different "scenes" at which she arrived. The first is the scene of the traffic stop and arrest, while the second is the Daytona Beach Police Department at which she arrived after the arrest. This clear chronology of events constitutes CSE upon which the Hearing Officer properly relied. *See, e.g., Soles v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Cir. Ct. Sept. 22, 2008). *Accord Labuda v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 208a (Fla. 7th Cir. Ct. May 22, 2012). While it may be uncommon to refer to arriving at the police station as "arriving on scene," doing so does not create a conflict with anything else in the documentary evidence, much less an irreconcilable one. The propriety of Petitioner's driver's license suspension will not turn on the arresting officer's arguably poor choice of nouns.

CONCLUSION

The instant case does not present a situation where conflicts in the documents equally support competing and inconsistent conclusions. The Hearing Officer did not misapply the law, and his findings were indeed supported by competent substantial evidence. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari shall be, and the same is hereby DENIED.

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[1] *See* Petition at 3, n.2.

* * *

Counties—Code enforcement—Hearing officer's decision is affirmed

NATURES TROPICAL NURSERY, LLC., Appellants, v. MIAMI-DADE COUNTY CODE ENFORCEMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-233 AP 01. December 31, 2020. An Appeal of an administrative decision rendered by the Miami-Dade County Office of Code Enforcement—Civil Violation Notice 2019-T081602. Counsel: Lance Joseph, Lance Joseph, P.A., for Appellant. Abigail Price-Williams, Miami-Dade County Attorney, and Ryan Carlin, Assistant County Attorney, Miami-Dade County Attorney's Office, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, 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 $835 fine and costs imposed were not excessive, and neither cruel nor unusual. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

* * *

Schools—Colleges and universities—Student discipline—Academic dishonesty—University violated due process by sanctioning student for academic dishonesty for using portions of her own prior work concerning same subject matter in current assignment where neither code of student conduct nor information on dishonesty provided in class syllabus put student on reasonable notice that it was unlawful to use her own prior work product—Further, academic dishonesty charge was not established by competent substantial evidence—Plagiarism—Conduct did not constitute plagiarism, which is defined by code as appropriation of another's work without attribution

SHENEE MURRAY, Petitioner, v. FLORIDA INTERNATIONAL UNIVERSITY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-000093-AP-01. December 21, 2020. On Petition for Writ of Certiorari from Final Disciplinary Action by Florida International University. Counsel: John Sutton, for Petitioner. Oscar E. Marrero and Lourdes E. Wydler, Marrero & Wydler, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(WALSH, J.) Shenee Murray is a graduate nursing student at Florida International University ("FIU"). She petitions this Court to issue a writ of certiorari quashing FIU's written reprimand on a finding of academic misconduct. For the following reasons, we grant the writ and order FIU to quash its decision and written reprimand of Ms. Murray.

We review orders of final disciplinary action by a Florida university by certiorari. *Decker v. Univ. of W. Fla.,* 85 So. 3d 571, 574 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D955a]. Accordingly, our standard of review is limited to whether the university provided due process of law, whether it observed the essential requirements of law and whether its findings are supported by competent, substantial evidence. *See Haines City Community Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Background

The FIU Student Honor Code prohibits the following:

1. **DEFINITIONS**

a. Academic Misconduct: Any act or omission by a Student, which violates the concept of academic integrity and undermines the academic mission of the University in violation of the Code.

* * *

6. **ACADEMIC MISCONDUCT VIOLATIONS**

a. **Academic Dishonesty**

1. In general, by any act or omission not specifically mentioned in the Code and which is outside the customary scope of preparing and completing academic assignments and/or contrary to the above stated policies concerning academic integrity.

* * *

g. **Plagiarism**

1. The deliberate use and appropriation of another's work without any indication of the source and the representation of such work as the Student's own.

Professor Sandra Lobar issued a syllabus to the students at the beginning of the class. In it, she defined misconduct as follows:

Misconduct includes:

Cheating: The unauthorized use of books, notes, aids, electronic sources; or assistance from another person with respect to examinations, course assignments, field service reports, class recitations; or the unauthorized possession of examination papers or course materials, whether originally authorized or not.

Plagiarism: The use and appropriation of another's work without any indication and the representation of such work as the student's own. Any student, who fails to give credit for ideas, expressions or materials taken from another source, including internet sources, is guilty of plagiarism.

As a student taking this class:

- I will not represent someone else's work as my own.
- I will not cheat, nor will I aid in another's cheating.
- I will be honest in my academic endeavors.

Professor Lobar's class also distributed an academic dishonesty video which instructed the students against cheating or plagiarizing other students' work.

The students in Professor Lobar's Translational Research class were required to use an application called "Turnitin" to submit their assignments. Turnitin analyzes their work to determine whether there is a quantifiable similarity between the students' work and any other work previously submitted to the University or accessible on the internet. In other words, Turnitin flags unoriginal work.

Professor Lobar's syllabus set the threshold for acceptable similarity to other sources through Turnitin at 25%. This percentage would account for an author's appropriate citation to or quoting other research authorities.

Ms. Murray submitted a research paper to Professor Lobar through Turnitin. Turnitin returned a "Similarity Index" of 80%. 79% of the similarity was attributed to a student paper "submitted to Florida International University." When Ms. Murray received this similarity report from Turnitin, she emailed her professor:

Hello Dr. Lobar,

I turned in my assignment #1 and saw the turn it in results originality report. Just FYI, last semester I did an annotated bibliography that asked a very similar question as your assignment #1, basically towards the DNP project. Therefore, I expanded on the research I did for the annotated bibliography and answered whatever was different in your question from last semester. The work is my original work, from my hard work researching material. Any information I got from the research papers I read and analyzed I cited in the body of my paper and in the reference. I worked very hard for in all my subjects and also this assignment #1.

Thank you

Shenee

Dr. Lobar later accepted an amended assignment from Ms. Murray

that fell within acceptable Turnitin similarity limits, for which Ms. Murray received a grade deduction for late-submitted work. Dr. Lobar referred Ms. Murray to the Office of Student Conduct and Conflict Resolution on charges of Academic Misconduct. The Office of Student Conduct and Conflict Resolution formally charged Ms. Murray with academic misconduct, specifically, plagiarism and academic dishonesty.

Ms. Murray requested a formal hearing, where she expected to cross-examine Dr. Lobar on the charges. However, Dr. Lobar did not attend the hearing. Ms. Murray was the only live witness who testified at the hearing.[1]

Ms. Murray testified that she obtained both her bachelor's and master's degrees in nursing from FIU and is now pursuing her doctorate degree in nursing. She is employed as a surgical ICU nurse at a major public hospital. She obtained straight A's in all her classes for her master's degree and completed her first year in the doctorate program, also with straight A's. Never in her academic career had Ms. Murray been accused of academic dishonesty.

During her first semester, Ms. Murray took Nursing Science and Theories of the APN where she was asked to write a paper about one of her clinical problems, the significance of the problem, and provide literature searches about the problem. Dr. Lobar's project asked many of the same questions as were asked in her first-semester class:

> Dr. Lobar's class asked the same thing, the clinical problem, the significance of the problem and literature searches. The difference is the first subject focused on the theories that guided the studies of the literature whereas Dr. Lobar's class focused on the solution. In her, which is what I did. (sic)

Ms. Murray testified that she completed her work as instructed in the syllabus:

> Yes, her syllabus, under the course objectives on the first page, number three it said, "students will be able to synthesize evidence-based literature to address a clinical problem and provide a rationale for the intervention." That is what I did in her paper. So, the papers were not the same. They were different. Where the focus was different, I addressed that. Just as she said here, that even though students may have similar papers in other classes about areas of interest, this assignment was created to help students refine the problem and the significance. I did exactly that.

Ms. Murray further explained that some of the questions from the first semester's paper were the same as the paper for Dr. Lobar's class, which explains much of the similarity:

> They both asked about the significance of the problem. And I was never told that I could not use a previous paper when the question is the same. I was never even told not to use a previous paper in total. By definition, I cannot be guilty of plagiarism because there's nobody else's work I used. And the fact that I reported the similarity score to her, I am the one who said it to her indicates that there's no dishonesty.

Further, Ms. Murray testified that she was the one who noted the 80% similarity and brought it to Dr. Lobar's attention. The fact that she alerted her professor evinced lack of dishonesty.

The Committee found Ms. Murray culpable for both plagiarism and academic dishonesty. The formal letter served as a written reprimand. The Committee also required that she complete a reflection paper and receive a grade sanction. Her reduced grade on the substituted paper was accepted. Her administrative appeal was denied, and she timely filed this petition.

Analysis

Two of the issues raised by the Petitioner merit reversal of this academic sanction.

First, Ms. Murray argues that there was a dearth of competent, substantial evidence to support academic dishonesty or plagiarism. Second, she argues that she was denied due process of law where the *mens rea* of academic dishonesty was unsupported by the facts. We find that FIU failed to present sufficient competent, substantial evidence to prove either charge. We further find that finding Ms. Murray culpable for plagiarism and academic misconduct for use of her own prior work violated her due process rights, because she was not put on reasonable notice that her conduct was prohibited.

Academic Dishonesty

The Code defines academic dishonesty as follows:

> a. **Academic Dishonesty**
> 1. In general, by any act or omission not specifically mentioned in the Code and which is outside the customary scope of preparing and completing academic assignments and/or contrary to the above stated policies concerning academic integrity.

The syllabus expounded on the prohibition against academic dishonesty or cheating:

> Misconduct includes:
>
> **Cheating**: The unauthorized use of books, notes, aids, electronic sources; or assistance from another person with respect to examinations, course assignments, field service reports, class recitations; or the unauthorized possession of examination papers or course materials, whether originally authorized or not.
>
> **Plagiarism**: The use and appropriation of another's work without any indication and the representation of such work as the student's own. Any student, who fails to give credit for ideas, expressions or materials taken from another source, including internet sources, is guilty of plagiarism.
>
> As a student taking this class:
> • I will not represent someone else's work as my own.
> • I will not cheat, nor will I aid in another's cheating.
> • I will be honest in my academic endeavors.

Dr. Lobar also furnished the students with a video, which also focused upon the unauthorized use or representation of *another person or source's* work.

FIU proved that Ms. Murray used portions of *her own prior work* concerning the same subject matter in her paper submitted to Dr. Lobar's class. Nothing more. Some of the questions she answered for Dr. Lobar were identical to questions answered in her prior work. Ms. Murray explained further that she worked as a nurse in the ICU at a public hospital on transplant patients and that transplant issues were an area of interest for her. There was no proof through the reports or emails (Ms. Murray was the only live witness because Dr. Lobar chose not to attend the hearing), nor through her testimony that she intended to commit an act of academic dishonesty. In fact, in her email to her professor prompted by the Turnitin report, she alerted Dr. Lobar to the issue with the same explanation she gave at her formal hearing.

We find that the plain language of the code provision on academic dishonesty coupled with the syllabus prohibitions on academic dishonesty and cheating did not clearly proscribe Ms. Murray's conduct and thus, FIU violated her due process rights in sanctioning her for this conduct. A fundamental tenet of due process in proceedings on a charge of misconduct is that the accused have reasonable notice of the improper or unlawful act. In order to comply with due process, the terms of an act or ordinance must be sufficiently explicit to give fair notice to an accused that the conduct is unlawful. For example, in quashing a municipal ordinance which did not adequately describe prohibited conduct, the court in *City of W. Palm Beach v. Chatman,* 112 So. 3d 723 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1020a] quoted with approval the following language in *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926):

> That the terms of a penal statute creating a new offense must be

> sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . . The dividing line between what is lawful and unlawful cannot be left to conjecture.
> * * *

The court in *State v. Llopis,* 257 So. 2d 17, 18-19 (Fla. 1971) likewise rejected a penal provision so vague and uncertain that no reasonable person would be put on notice of what conduct is prohibited:

> '. . . Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in *Cline v. Frink Dairy Co.,* 274 U.S. 445, (47 S.Ct. 681, 71 L.Ed. 1146), 1927 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

(quoting *Brock v. Hardie,* 154 So. 690 (Fla. 1934)).

Here, nothing in the rather vague, catch-all language in the FIU Code of Student Conduct's definition of "academic dishonesty" would put a student like Ms. Murray on reasonable notice that it is unlawful to use *one's own prior work product* when answering the same questions on a paper in a subsequent class. Nor did the professor's syllabus and video apprise her of anything more than that she must not appropriate the work of others. To uphold this sanction would allow the university to subjectively determine—after the fact—whether or not a student's acts constitute dishonesty or are instead permitted. Such arbitrary and subjective enforcement violates the students' due process rights under the Code.

We also find that the evidence presented here fails to satisfy the standard of competent, substantial evidence to support the charge of academic dishonesty, where the only evidence—that Ms. Murray used portions of a prior paper in her current paper—did not establish the charge of academic dishonesty.

Plagiarism

FIU takes the position that using one's own work prior work constitutes plagiarism. Under the plain language of the FIU Code, Ms. Murray's conduct did not constitute plagiarism. The Code defines plagiarism as:

> g. **Plagiarism**
> 1. The deliberate use and appropriation **of another's work** without any indication of the source and the representation of such work as the Student's own.

This student did not use "another's work." If FIU intends to punish use of one's own work as plagiarism, it must amend its code. Under the current definition, use of one's own work is not plagiarism.

Thus, the evidence introduced at the hearing—the complaint, emails and Ms. Murray's own testimony—do not constitute competent substantial evidence to sustain the charge. Neither was Ms. Murray afforded due process, because she was never placed on notice of prohibited conduct under the plain language of the Code's term.

Accordingly, we quash the final decision of academic misconduct imposed upon the Petitioner and remand with directions to remove the sanction from her academic transcript, and the grade penalty for the assignment. (TRAWICK and SANTOVENIA, JJ., concur.)

[1]Ms. Murray also complains that she was deprived of due process for the failure of FIU to call Professor Lobar as a witness. We decline to find that FIU was required to procure a specific witness where nothing in the Code obligated FIU to call witnesses, and Ms. Murray was free to call any witnesses on her own behalf and chose not to call Professor Lobar.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Trooper who found licensee asleep in vehicle unlawfully parked on shoulder of turnpike had probable cause for detention—Further, trooper was justified in conducting welfare check—Trooper's direction that licensee exit vehicle was justified as part of welfare check and by heightened safety concern caused by licensee's excessive movements within vehicle—Licensee was in actual physical control of vehicle where key fob was on front passenger floorboard—Petition for writ of certiorari is denied

JAMES ROBERT McMULLIN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-132-AP-01. L.T. Case No. A76RAVE. December 22, 2020. On Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles. Counsel: Charles D. Barnard, Charles D. Barnard, P.A., for Appellant. Mark L. Mason, Assistant General Counsel, Office of General Counsel, Department of Highway Safety and Motor Vehicles, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) Petitioner challenges the suspension of his driver's license for violating Florida's implied consent law, §322.2615, Fla. Stat. He contends that the officer who approached his parked vehicle lacked probable cause for a stop, thereby invalidating the license suspension. He also contends the officer's post-stop observations did not provide the basis for a request that Petitioner submit to a breath test. Finally, Petitioner argues that there is no substantial competent evidence that he was in actual physical control of the vehicle at the time of the stop.

On April 5, 2020 at about 1:35 a.m., Trooper Meghan Vargo of the Florida Highway Patrol performed a check on a car parked on the shoulder of the Florida Turnpike. Upon approaching the vehicle, Trooper Vargo observed Petitioner asleep in the backseat of the car. Through a window, which was cracked open, she woke Petitioner. When he was aroused, Petitioner responded by saying "I'm in here." Trooper Vargo noticed that when Petitioner responded, he was moving around "excessively."[1] Concerned by her observations, she asked him to get out of the car because "I didn't feel comfortable with him being in the backseat, and me not knowing who he was or what was inside the vehicle at that time." Petitioner responded by "kind of fumbling out of the vehicle" by climbing out through the front passenger door. Trooper Vargo also noticed that there was a "key fob" on the front right passenger floorboard "in plain view." After Petitioner exited the vehicle, she detected an odor of alcohol emitting from his "facial area." According to Trooper Vargo, he had "bloodshot glassy eyes, slurred speech and unsteadiness on his feet." Trooper Vargo performed a field sobriety test, which Petitioner failed to perform satisfactorily. She then placed Petitioner under arrest for DUI. Petitioner later refused a request to submit to a breath test. He was read an implied consent warning but maintained his refusal to submit to the test. As a result, his driver's license was suspended. After a formal review hearing, the hearing officer sustained the suspension. It is from that decision that this petition comes before this Court.

Section 316.1945(1)(a)(11), Fla. Stat., provides, in pertinent part, that it is unlawful for a person to park a vehicle

> On the roadway or shoulder of a limited access facility, except as provided by regulation of the Department of Transportation, or on the paved portion of a connecting ramp; except that a vehicle which is disabled or in a condition improper to be driven as a result of mechanical failure or crash may be parked on such shoulder for a period not to exceed 6 hours.

Further, §316.194(1), Fla. Stat., states:

> Upon any highway outside of a municipality, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave the vehicle off such part of the highway; but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles, and a clear view of the stopped vehicle shall be available from a distance of 200 feet in each direction upon the highway.

Clearly, the record supports the conclusion that Petitioner was in violation of both of the above statutes. Petitioner was parked on the shoulder of a major thoroughfare, the Florida Turnpike, at 1:35 a.m. At the very least this gave rise to reasonable suspicion for Trooper Vargo to approach Petitioner's parked car to investigate. *See Fulmer v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014). Although reasonable suspicion for such a stop is sufficient and the heightened standard of probable cause is not necessary, we find that probable cause was also present when Trooper Vargo observed Petitioner's vehicle. *See State v. Hernandez,* 718 So. 2d 833 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1837b] (driver's commission of traffic infraction provided probable cause for lawful stop and detention of the vehicle).

Additionally, on these facts, Trooper Vargo was justified in conducting a welfare check on Petitioner's vehicle. A police officer may conduct such a search when there is a reasonable concern that a driver may be in need of aid. *Dermio v. State,* 112 So. 3d 551, 555 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]; *Fulmer,* 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014). We therefore reject Petitioner's argument that a lack of probable cause invalidated Petitioner's license suspension.

Petitioner next contends that Trooper Vargo's post-stop observations did not give rise to a reasonable basis for her to request that Petitioner submit to a breath test. In particular, he disputes the conclusion that Petitioner was moving around excessively. Even if this was true, he maintains that this conclusion, coupled with Trooper Vargo's subjective feeling that she wasn't comfortable with Petitioner being in the backseat of the car, was an insufficient basis to ask him to get out of the car. We do not agree. First, these facts, when considered with where the car was parked, the time of day and his being asleep in the backseat, support Trooper Vargo asking Petitioner to get out of the car as part of a welfare check. Second, once a vehicle is lawfully stopped, a police officer may ask an occupant to exit the vehicle without further justification. *See Maryland v. Wilson,* 519 U.S. 408 (1997) (police officer may, as a matter of course, order passengers of a lawfully stopped car to exit the vehicle). Third, these facts give rise to reasonable suspicion that were heightened, not dispelled, by Petitioner's erratic behavior. Further investigation was therefore justified.[2] As a result, for all of these reasons, Trooper Vargo's direction that Petitioner exit his vehicle was appropriate.

Petitioner's final argument is that there was no substantial competent evidence presented to the hearing officer to establish that he was in actual physical control of the vehicle at the time of the stop. This argument is also unavailing. The Petitioner was in the vehicle alone. The vehicle did not magically appear on the roadside of the Turnpike. A key fob was on the front right passenger floorboard.[3] Although the Petitioner would have had to either climb over the backseat (which he did when Trooper Vargo told him to get out of the car) or get out of the car and re-enter through a front door to take hold of the key and start the car, this was enough for the Petitioner to be considered in control of the vehicle. *See State of Florida Dept. of Hwy Safety and Motor Vehicles v. Prue,* 701 So.2d 106 (Fla. 4th DCA 1989) (defendant was the only person in the vehicle and keys were near enough for him to use them to start the vehicle and drive away); *Fieselman v. State,* 537 So. 2d 603 (Fla. 3d DCA 1988) (location of keys and defendant's presence asleep in vehicle are factors to be considered in determining whether defendant was in actual physical control of vehicle); *Harris v. State,* 18 Fla. L. Weekly Supp. 713a (Fla. 19th Cir. Ct. Mar. 18, 2011) (driver passed out in back seat of vehicle with keys inside of vehicle sufficient to conclude driver was in actual physical control). As the Second District Court of Appeal noted in *State v. Fitzgerald,* 63 So. 3d 75, 77 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1076a], quoting *Hughes v. State,* 535 P. 2d 1023, 1024 (Oka. Crim. App. 1975):

> [A]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving the vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the statute.

We therefore find that Petitioner was in actual physical control of the vehicle.

For the reasons indicated herein, the petition for writ of certiorari is DENIED. (WALSH and SANTOVENIA, JJ., concur.)

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[1]It appears that Petitioner only provided a partial copy of the transcript. It is interesting to note that the partial transcript did not include any mention of the Petitioner's movements in the vehicle, an important fact which interestingly was potentially averse to Petitioner's position. Of course, it is the Petitioner's burden to provide a complete record of proceedings below. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla.1979). Despite this omission, the hearing officer referenced Petitioner's movements in her findings. Neither party takes issue with this portion of her findings, and this Court accepts those findings as conclusively established.

[2]In considering the merits of this conclusion, a comparison of these facts with those in *Popple v. State,* 626 So. 2d 185 (Fla. 1993), relied upon by Petitioner, is instructive. In *Popple,* the defendant was seated in a legally parked car in a desolate area in the middle of the day. When a sheriff's deputy approached the car as part of an unrelated investigation, he observed the defendant "acting in a nervous manner, reaching under the seat and 'flipping' about in the car." The deputy asked the defendant to get out of the car, after which he saw a cocaine pipe in plain view on the car's floorboard. The Supreme Court found that in the context of a consensual encounter with no suspicion of criminal activity, the actions of the defendant failed to provide cause for the deputy to direct him to exit his vehicle. In contrast, here Petitioner's awkward behavior during an investigatory stop premised upon reasonable suspicion or probable cause of a statutory violation warranted Trooper Vargo's request that Petitioner exit the vehicle. *See also Popple,* 626 So. 2d at 188 (Overton, J. dissenting).

[3]Petitioner asserts that it was not clear that the "key fob" was in fact a key which would start the car. On these facts, this argument is incongruous, and we reject it out of hand.

* * *

Municipal corporations—Code enforcement—In code violation hearing regarding petitioner's operation of scrap metal recycling business without business tax receipt, special magistrate did not depart from essential requirements of law by failing to recognize and make findings regarding petitioner's defense that it operated as legally nonconforming use where town code reserves determination as to whether entity operates as nonconforming use to town council, and petitioner failed to avail itself of procedure to obtain that determination—No merit to claim that petitioner was denied procedural due process or given insufficient time to come into compliance—Petition for writ of certiorari is denied

GPT 74 ST OWNER LLC—AIM RECYCLING, INC., Appellant, v. TOWN OF MEDLEY, FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-000340 AP. L.T. Case No. ECC2017-161. January 2, 2021. On Appeal from a Special Magistrate Hearing in and for Miami-Dade County. Counsel: Eileen Ball Mehta, Carter N. McDowell, and Elise H. Gerson, Bilzin Sumberg Baena Price & Axelrod LLP, for Appellant. Laura K. Wendell and Jose

L. Arango, Weiss Serota Helfman Cole & Bierman, P.L., for Appellee.

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

OPINION

(WALSH, J.) On November 8th, 2017, the Town of Medley ("Medley") issued a courtesy warning notice to GPT 74 ST OWNER LLC-AIM RECYCLING, INC. ("GPT"), of its violation of Medley Code Section 14-26(B) for operating a scrap metal recycling business without a business tax receipt ("BTR"). A formal notice of violation followed. After a code enforcement hearing on July 10, 2018, a special magistrate found GPT in violation of Section 14-26(B). The order granted GPT 60 days to come into compliance, after which a fine would accrue. GPT filed this petition for certiorari challenging the order.

Background

GPT operated a scrap metal recycling facility on its property. Medley issued a BTR to GPT to operate a junk yard. However, Medley refused to issue a BTR to operate a scrap metal processing facility. Code Section 14-26(B) requires:

> No person shall engage in any business that is carried on within the Town, and no business tax shall be issued, until a business tax for the current year, and all prior outstanding business taxes have been paid for such business and the proper business tax receipt obtained.

See §14-33, Code of Town of Medley.

GPT did not deny that it operated a scrap metal recycling facility without a proper BTR. In 2016, Medley discontinued zoning use for scrap metal recycling or processing, and therefore, GPT could no longer obtain a BTR for this use. GPT claimed that it enjoyed status as a "legally non-conforming use" for scrap metal recycling, and therefore, Medley wrongfully refused to issue a BTR.

The special magistrate allowed GPT to put forth evidence on its past scrap metal recycling business, but ultimately found that whether its scrap metal recycling business qualified as a legally nonconforming use was not a defense to the code violation. GPT's zoning status was not a matter to be determined by a special master in a code enforcement hearing, but rather, was required to be addressed through Medley's zoning process to the Town Council. Following this process, GPT, if successful, could obtain its BTR from Medley. Recognizing that a zoning process could take time, the magistrate gave GPT a 60-day compliance period before imposing fines.

GPT claims in this petition that Medley departed from the essential requirements of law resulting in a severe miscarriage of justice, for failing to accept GPT's status as a legally nonconforming business on the property. Additionally, GPT claims that in refusing to recognize its defense and failing to make findings on its alleged legally nonconforming use, Medley deprived GPT of procedural due process.

Analysis

On review from a final order of code enforcement, a circuit court determines: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.[1] *Haines City Community Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Departure from the Essential Requirements of Law

GPT argues that the special magistrate departed from the essential requirements of law by refusing to entertain its defense that it operated as a legally nonconforming use.

A determination whether the essential requirements of law were observed hinges upon whether the correct law was applied. GPT was cited for violating Section 14-26(b) of the Town of Medley Code. This section provides:

> (b) Requirements to pay business tax. No person shall engage in any business that is carried on within the town, and no business tax receipt shall be issued, until a business tax for the current year, and all prior outstanding business taxes have been paid for such business and the proper business tax receipt obtained.

It is uncontroverted that GPT failed to obtain the "proper business tax receipt" to operate a scrap metal recycling business. Section 14-26(g) of the Medley code requires:

> (g) Separate business.
>
> (1) Each business entity registered with the state shall constitute a single and separate business, requiring a business tax receipt for each registered business entity.
>
> (2) A separate business tax receipt shall be obtained for each separate business at the same location.
>
> (3) Each receipt obtained by a business shall be issued to cover only the business licensed thereby at the location and in the category designated in such receipt.

To be entitled to a business tax receipt, the business owner must obtain a compliant certificate of use. It is undisputed that GPT failed to obtain such a certificate of use, and therefore, Medley could not issue a BTR for scrap metal recycling. Section 14-33(b) provides:

> (b) Certificate of use. No business tax receipt shall be issued until a certificate of use has been issued in accordance with the Town Code, unless its business does not require a certificate of use. The certificate of use shall be issued when the business is in compliance with the Town Code, ...
>
> (1) Before any use of land, building or structure is established, or any established use of land, building, or structure is changed to a different use than that identified in the previously-issued certificate of use and/or business tax receipt which applies to the property, the person seeking to establish the use must obtain a certificate of use from the Town Attorney.

GPT's BTR for operating a junkyard was plainly insufficient under the code to cover its operation as a scrap metal recycling facility. Furthermore, Medley was not required to issue a BTR until GPT obtained a certificate of use for scrap metal recycling.

Zoning which would have permitted scrap metal recycling was discontinued under the Code in 2016. Therefore, Medley would not issue a BTR because scrap metal recycling was not a permitted business use under the current code. In response, GPT claimed that Medley wrongfully denied a BTR based upon GPT's status (asserted but never determined by the Town Council) as a legally nonconforming use. GPT claims that the trial court departed from the essential requirements of law for failing to recognize this legal defense. Again, applying the Medley Code, GPT is wrong.

Medley codified a separate zoning process to determine whether a property or land may maintain business operation as a legally nonconforming use. Section 62-61 addresses nonconforming uses for both buildings and land. A legally nonconforming use must lawfully exist as of the time of the passage of the code and must continue without interruption of more than 90 days. § 62-61(a), Town of Medley Code. *See, e.g., City of Miami Beach v. Beach Blitz, Co.,* 28 Fla. L. Weekly Supp. 461a (Fla. 11th Cir. App. July 21, 2020) (broadly interpreting Miami Beach ordinances related to continuous nonconforming use and abandonment in favor of the property owner). In addition, Medley limits any nonconforming use of land to not more than three years after the zoning is discontinued:

> (1) Unless otherwise waived or extended as provided for below in this subsection (b), where land which is now used for a use excluded from the district in which such land is located and such use is not an accessory to the use of a main building located or the same lot or grounds **such nonconforming use shall be discontinued and all material completely removed by its owner not later than three years from the date of the passage of this chapter** or any subsequent amendment thereto which rendered such use nonconforming.

§ 62-61(b)(1), Town of Medley Code (emphasis added). If GPT's use is deemed legally nonconforming, it expired in 2019, three years after Medley discontinued the use.

Should a property owner seek an extension of the three-year period limiting legally nonconforming use on land, a property owner must apply to the Town Council for a waiver or extension:

> (2) Upon application by a property owner whose use is now excluded from the district in which the land is located, the **Town Council may grant a waiver of the obligation to discontinue the use as required by this subsection or grant the owner an extension of the three-year time period for discontinuance**.
>
> a. In granting such a waiver or extension, the Town Council must find that the obligation to discontinue the **use imposes an unreasonable burden on the property owner or that there is otherwise an overriding public purpose** in granting such relief.
>
> b. In granting a waiver or extension, the Town Council may impose reasonable conditions in order to protect the health, safety and welfare of the public, including the users or occupants of the land and in order to insure the orderly ultimate transition of the property to a use permitted under the applicable zoning district regulations.

§ 62-61(b)(2), Town of Medley Code (emphasis added).

Thus, to establish a legally nonconforming use, GPT must first establish (to the Town Council, not to a special magistrate in a code violation hearing) that its use was continuous and not abandoned. To extend the three-year limitation of such nonconforming use, GPT would need to additionally prove to the Town Council that discontinuation "imposes an unreasonable burden" or that there is an overriding public purpose supporting extension of the nonconforming use. § 62-61(b)(2), Town of Medley Code.

None of this was done. Instead, in a code violation hearing, GPT's attorney proffered that it was granted use by Miami-Dade County (but not Medley) to operate a scrap metal operation. While there was evidence in Medley's records that GPT's predecessors operated as a junkyard, Medley maintained no records that GPT's predecessors operated a scrap metal recycling facility. GPT's law firm's records, however, yielded a 2010-2011 license[2] for a predecessor of GPT, Car Recycling, Inc., to operate a scrap metal recycling facility. (Appellant's Appendix at A. 24). Car Recycling, Inc. also maintained records with Miami-Dade County evincing its sporadic operation as a scrap metal recycling company.

GPT was aware that to solve its zoning problem it must seek a zoning resolution with the Town Council. In fact, GPT's own project manager Mr. Keebler testified that when he requested that a Medley official, Ms. Ayala, disclose past business tax receipts for GPT's predecessors who operated scrap metal recycling, "her position was that the property was not zoned for it; therefore to chase this receipt was—**she was set on us coming to a hearing concerning the zoning, not to get down here and fill out a tax receipt**." (emphasis added)

The special magistrate properly determined that whether GPT operated as a legally nonconforming use was not a defense to a code enforcement proceeding for failure to obtain a BTR. The special magistrate could not recognize such a defense without making a finding that GPT operated as a nonconforming use, a decision reserved by the code to the Town Council. A finding by a special magistrate in a code enforcement proceeding that GPT operated as legally nonconforming use would allow GPT to operate its scrap metal recycling facility without ever being required to comply with sections 14-33 and 62-61 of the Medley Code. Such an end-run around municipal zoning and code provisions is an inappropriate misuse of the code enforcement hearing function. We therefore find no departure from the essential requirements of law.

Procedural Due Process

GPT next asserts that it was deprived of procedural due process for the special magistrate's failure to entertain and make findings regarding its defense. GPT further claims that the Town has not afforded it the opportunity nor means to come into compliance, thus effectively forcing it to cease operations.

Chapter 162, Florida Statutes, sets forth the due process safeguards for a municipal code enforcement hearing. Section 162.06(2), Florida Statutes requires reasonable notice of the violation. If the violation is not corrected, the violator is entitled to a hearing, with testimony presented under oath. Following the hearing, the code enforcement board must issue an order making findings of fact with a compliance date. § 162.07, Fla. Stat.

"Procedural due process requires both fair notice and a real opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Massey v. Charlotte County,* 842 So. 2d 142 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (citation omitted). Here, Medley afforded GPT procedural due process. GPT was issued a courtesy warning notice and a formal notice of its violation and notice of the code enforcement hearing. GPT received a hearing where testimony under oath was presented and GPT had a full opportunity to be heard. As set forth above, the special master was not required to make findings in its order on GPT's alleged defense, because whether GPT was operating as a nonconforming use is a zoning matter to be brought before the Town Council, not a defense to violation of the code. Medley therefore abided by all due process requirements.

GPT's argument that Medley gave it insufficient time or ability to come into compliance is similarly without merit. Even before the hearing, in consideration of the time needed for GPT to complete a zoning process and obtain a BTR, Medley allowed postponements of the hearing from February 13, 2018 until July 10, 2018. The initial warning notice was issued on November 8, 2017. The final order allowed GPT an additional 60 days to come into compliance, or until September 8, 2018. All told, GPT had 10 months to come into compliance. No violation of due process occurred.

Accordingly, we find that there was no departure from the essential requirements of law and no deprivation of due process. The petition for writ of certiorari is therefore denied.

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[1]GPT does not argue that there was a lack of competent, substantial evidence presented below.

[2]It is unclear in the record what type of "license" was in GPT's attorney's files nor who issued the license.

* * *

Counties—Zoning—Non-use variance—Certiorari challenge to county zoning board's denial of non-use variances needed to cure code violations and obtain permission to close road across which petitioners have constructed unpermitted gate and structures is denied—Neighbors' testimony that illegally-constructed gate and structures clashed with character of neighborhood, negatively impacted traffic, and created safety and access issues for neighboring properties was competent substantial evidence supporting denial of variances where testimony was fact-based and directly relevant to non-use variances sought—Weighing competent substantial evidence that supports decision to deny variances against staff report recommending approval is beyond scope of certiorari review—Where board's decision addressed factors set forth in zoning code, decision comported with essential requirements of law

JUAN CARLOS FERNANDEZ, et al., Petitioners, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-1-AP-01. L.T. Case No. CZAB12-14-19. December 21, 2020. On Petition for Certiorari from the Miami-Dade County Community Zoning Appeals Board 12. Counsel: W. Tucker Gibbs, W. Tucker Gibbs, P.A., for Petitioners. Cristina Rabionet and Lauren E. Morse, Assistant County Attorneys, on behalf of Abigail Price-Williams, County Attorney, for Respondent.

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

(WALSH, J.) Petitioners Juan Carlos and Margarita Fernandez seek a writ of certiorari to quash the Miami-Dade County Community Zoning Appeals Board 12 ("CZAB 12") denial of their application for six non-use variances. Respondent, Miami-Dade County, acting through its CZAB, passed Miami-Dade County Zoning Resolution No. CZAB12-14-19 denying the Petitioners' non-use variance applications.

Background

Petitioners own two properties at 655 SW 79th Avenue (Lot 1), and 685 SW 66th Street (Lot 2) in unincorporated Miami-Dade County. These properties are located across from each other on a portion of SW 79th Avenue. Beyond the two properties, the road reaches a dead end. In 2017, without obtaining any approvals from the CZAB or Miami-Dade County, Petitioners built an eight-foot tall wrought iron fence, structures, and a gate across this portion of SW 79th Avenue, closing in both properties behind the gate. In so doing, Petitioners closed and restricted access to a public road.[1]

Miami-Dade County Code Compliance cited the Petitioners for the unpermitted construction. The Petitioners thereafter sought permission from the County to close a portion of SW 79th Avenue to the public. To obtain permission to close the road, Petitioners were required to cure their code violations. To resolve the code violations, Petitioners entered into a consent agreement in which they agreed to obtain six subject non-use variances as a condition to resolve the code violations without having to dismantle and remove the unpermitted gate and structures.

The required non-use variances[2] would: (1) reduce Lot 1 setback from the required 25 feet from one of the residences to 17 feet and three inches; (2) permit curvilinear proposed Lot 1 frontage (less than the required 85 feet) of 73.59 feet; (3) permit a wrought iron fence with columns to encroach on the SW 79 Avenue right-of-way; (4) permit an 8-foot high (exceeding the limit of two feet, six inches) wrought iron fence to be placed within 10 feet of either side of the driveway of proposed Lot 1; (5) permit the gate and columns at a maximum height of 8 feet (exceeding the limit of six feet) along with an abutment into SW 79 Avenue; and (6) permit a pool gazebo setback of only 10.3 feet (less than the required 20 feet minimum) of proposed Lot 2 on the east interior side boundary.

Non-use variances 3, 4, and 5 directly relate to the gate and 8-foot wrought iron fence. Non-use variances 1, 2, and 6 do not directly address the illegal gate and fence but are related to a replat and road closure application required by the Public Works and Waste Management Department. If the closure of SW 79th Avenue is permitted, Public Works and Waste Management would require Lots 1 and 2 to be re-oriented towards SW 66 Street. The site plan, drawings, accessory building plans, maps, and photographs, as well as a zoning analysis in the record, all support the requirements for variances 1, 2, and 6 to reorient the properties if SW 79th Avenue is closed.

At the public hearing before the CZAB, the Petitioners' neighbors offered written letters and testimony. Several neighbors testified that granting the non-use variances would impact traffic on the abutting right-of-way. The neighbors at 6501 SW 79 Court and 7801 SW 66 Street testified that the growing number of dead-end streets created too many road closures, dramatically affecting the character of the neighborhood. In addition, closing the road restricts access to the back of the neighboring property at 6501 SW 79th Court.

Another neighbor at 6600 SW 79 Avenue testified that delivery trucks waiting at the gate to make deliveries block traffic. This neighbor was opposed to the road closure, because it also restricts her own right of access to the public road. Another neighbor testified that the gate impedes visibility of oncoming cars coming through the gate, causing a traffic safety issue.

Memorial Plan Cemeteries and Funeral Homes owns a cemetery adjacent to the Petitioner's properties and submitted a letter complaining that the gate and road closure blocks access to their cemetery, interfering with their business.

The CZAB determined that the six non-use variances were detrimental to the public interest and denied the application by a 5 to 1 vote. Petitioners timely challenged the denial by petition for writ of certiorari.

Analysis

Local government approval of a non-use variance is quasi-judicial and subject to certiorari review. *Park of Commerce Assoc. v. Delray Beach,* 636 So. 2d 12, 15 (Fla. 1994); *Skraggs v. Key West,* 312 So. 2d 549, 551-552 (Fla. 3d DCA 1975); *Broward County v. G.B.V. International, Ltd.,* 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S463a]. We apply a three-part standard of review: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *Board of County Comm'rs of Brevard County v. Snyder,* 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

The Petitioners argue that the decision to deny the non-use variances was not supported by competent, substantial evidence. Petitioners alternatively argue that in denying the non-use variances that CZAB 12 departed from the essential requirements of law.[3]

Competent Substantial Evidence

To determine whether a decision is supported by competent substantial evidence, the reviewing court must review the record for evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of review. If the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's review is complete. *Dusseau v. Metro. Dade County Bd. of County Com'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County,* 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987).

The Petitioners complain that testimony by community members was not properly considered by the CZAB and was not competent substantial evidence. To constitute competent substantial evidence supporting a zoning authority decision on a variance, testimony of affected neighboring property owners must be fact-based, relevant and material. *See Grefkowicz v. Metro. Dade County,* 389 So. 2d 1041 (Fla. 3d DCA 1980) (testimony of affected residents that owners intended to use residential property for commercial purposes went squarely to the variance issue in question and was therefore competent, substantial evidence); *Metropolitan Dade County v. Section 11 Property Corp.,* 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a] ("fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception"); *Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.,* 750 So. 2d 738, 739 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D308a] (the circuit opinion erroneously ignored relevant, material, fact-based testimony of residents "that the establishment of [ ] a facility requires a 2.5-acre lot which is not available at this location").

Here, the neighbors testified that the illegally-constructed gate and structures—the subject of non-use variances 3, 4, and 5—clashed with the character of the neighborhood, blocked traffic when delivery trucks were present, impeded visibility for oncoming traffic and

blocked access to the neighbors' own properties. With respect to non-use variances 1, 2, and 6, required as corollary changes to closing the road, the neighbors testified that the road closure impeded access to their own properties, blocked use of the public road, caused traffic delays and changed the character of their neighborhood. This testimony was directly relevant to the considerations set forth within Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code. The neighbors' testimony was therefore fact-based, relevant and material to the CZAB decision denying the six non-use variances at issue.[4]

Petitioners argue that the testimony of the neighbors was not competent substantial evidence because the neighbors did not testify specifically about each non-use variance. Petitioners rely upon *Jesus Fellowship, Inc. v. Miami-Dade County,* 752 So. 2d 708, 709 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1179b], *citing City of Apopka v. Orange Cty.,* 299 So. 2d 657 (Fla. 4th DCA 1974). Petitioners further argue that the objections of residents of a neighborhood, without more, is not competent, substantial evidence supporting denial of a variance.

Petitioners' argument does not apply to the neighbors' testimony here. In *Jesus Fellowship,* the county granted a permit to enlarge a proposed religious day school but limited the expansion to grades K-6 with a maximum of 150 students. The neighbors in *Jesus Fellowship* testified about changes to the character of the neighborhood, traffic, and loss of green space. This testimony was not relevant or material to the only issue before the county—whether the day school expansion should be limited to grades K-6 and 150 students. Likewise, in *City of Apopka,* the court explained that in considering a zoning exception, a municipal board is not to conduct a plebiscite of neighborhood objectors.

Here, there were no generalized objections or incompetent opinions. Rather, the neighbors' testimony was directly relevant to the non-use variances here.[5] *See Metropolitan Dade County v. Section 11 Property Corp.,* 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a] ("fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception."); *Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.,* 750 So. 2d 738, 739 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D308a] (" . . . not one but six variances are needed in order to shoehorn a church/day care center onto this property. . . . The Commission properly allowed the neighbors to be heard on these issues and lawfully exercised its discretion in accepting their perspective.").

Petitioners additionally claim that because the staff report recommended approval of the non-use variances there is not competent substantial evidence to deny the requests for the variances. True, a staff report recommending approval does not support a decision to *deny* a variance. But Petitioners' argument invites this panel to misapply the standard of review. The question we must determine is not whether there was some evidence supporting approval of the variances, but rather, whether there was competent substantial evidence *in support of the decision to deny the variances. See Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a] (circuit court improperly granted first-tier certiorari by reweighing evidence heard by the city; instead, a circuit court must only determine whether the record contains competent substantial evidence supporting the decision). Here, there was substantial evidence supporting the denial. The fact that other evidence supported granting the non-use variances is beyond the scope of our review. We do not re-weigh evidence.

The testimony of neighbors, coupled with the documentary evidence on file prepared by the staff in the form of reports, diagrams and drawings, support the conclusion that non-use variances which would allow the unpermitted gate and wrought iron fence to remain and the road to remain closed is against the public interest. Because the non-use variances required to further the objective of closing SW 79th Avenue would create incompatibility, safety, and access issues for the neighboring properties, we find that the photographs, diagrams, maps, site plan, and the drawings, coupled with the neighboring residents' testimony, constitute substantial competent evidence to support the denial.

The Essential Requirements of Law

To comply with the essential requirements of law, the decision below must comport with the requirements of Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code, which provides:

> Non-use variances from other than airport regulations. Upon appeal or direct application in specific cases to hear and grant applications for non-use variances from the terms of the zoning and subdivision regulations, the Board (following a public hearing) may grant a non-use variance upon a showing by the applicant that **the non-use variance maintains the basic intent and purpose of the zoning, subdivision and other land use regulations, which is to protect the general welfare of the public, particularly as it affects the stability and appearance of the community and provided that the non-use variance will be otherwise compatible with the surrounding land uses and would not be detrimental to the community. No showing of unnecessary hardship to the land is required.** For the purpose of this subsection, the term "non-use variances" involves matters such as setback lines, frontage requirements, subdivision regulations, height limitations, lot size restrictions, yard requirements and other variances which have no relation to change of use of the property in question.

§ 33-311(A)(4)(b) of the Miami-Dade County Zoning Code (emphasis added). The CZAB decision addressed the factors set forth in Section 33-311(A)(4)(b) of the Miami-Dade County Zoning Code, and thus comported with the essential requirements of law. The CZAB considered evidence that the non-use variances were detrimental to the community and contrary to public welfare. The non-use variances would affect traffic safety, visibility, the character of the neighborhood, would result in blocking traffic and restricting access to the properties of other neighbors. The CZAB properly applied the evidence to the considerations set forth in 33-311(A)(4)(b) and therefore observed the essential requirements of law.

The petition for certiorari is therefore denied. (TRAWICK and SANTOVENIA, JJ., concur.)

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[1]As a result of a prior home invasion burglary, the Petitioners wanted to close the street off for security reasons.

[2]The zoning designation is E-1 residential.

[3]The Petitioners do not argue that they were deprived of their due process rights.

[4]Moreover, it is appropriate to deny a non-use variance if competent evidence shows it was in opposition to the public interest. *See Metropolitan Dade County v. Fuller,* 497 So. 2d 1322 (Fla. 3d DCA 1986).

[5]Likewise, *Miami-Dade Cty. v. Publix Supermarkets, Inc.,* No. 3D19-1203, 2020 WL 2176653, at *1 (Fla. 3d DCA, May 6, 2020) [45 Fla. L. Weekly D1089a] does not apply. In that decision, the Third District quashed the circuit opinion upholding denial of non-use variances that would have permitted a liquor store but relied upon the objectors' evidence, rather than reviewing the record for competent substantial evidence supporting the County's decision. The opinion did not conclude whether the variance below was correctly denied.

* * *

Municipal corporations—Development orders—Intervention—Neighboring landowners' certiorari challenge to city commission's denial of their request to intervene in appeal of historic and environmental preservation board's denial of convent's application for certificate of approval to develop boy's school is denied—Certiorari petition is premature where city commission has deferred action on convent's appeal, and therefore, neighbors have suffered no injury from denial of request to intervene—Neighbors were not denied due process where they were provided notice and opportunity to present testimony like other interested citizens—Denial of request to intervene did not depart from essential requirements of law where city code does not provide for intervention in historic and environmental preservation proceedings—Denial of request was supported by competent substantial evidence

BAYSHORE IN GROVE, INC., RACHEL CARDELLO; ISAAC KODSI; and ALEXANDER MOSKOVITZ, Petitioners, v. THE CITY OF MIAMI and THE CONVENT OF THE SACRED HEART OF MIAMI, INC., Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-157-AP-01. L.T. Case No. Items 6981 and 6982. City Commission of the City of Miami. December 24, 2020. On a Petition for Writ of Certiorari Seeking to Quash the City of Miami Commission's Denial of Intervention Status to the Petitioners. Counsel: Glen H. Waldman, Waldman Barnett, P.L., for Petitioners. Victoria Mendez, City Attorney and John A. Greco, Deputy City Attorney, City of Miami, for Respondent. Elliot H. Scherker, Brigid F. Cech Samole, Ryan Bailine and Ethan Wasserman, Greenberg Traurig, P.A., for The Convent of the Sacred Heart of Miami, Inc., Respondent.

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

(TRAWICK, J.) The Respondent, the Convent of the Sacred Heart of Miami, Inc. ("Carrollton") filed an application with the City of Miami Historic and Environmental Preservation Board ("HEPB") seeking a Certificate of Approval to develop a boy's school on Carrollton's property ("the Property"). The HEPB denied Carrollton's application, and the matter went before the City Commission (The Commission") for an appeal. Petitioners, Bayshore In Grove, Inc. ("Bayshore"), together with Rachell Cardello, Isaac Kodsi and Alexander Moskovitz (the "Immediate Neighbors"), sought intervenor status before the Commission, which was denied. Petitioners now seek to quash the Commission's decision to deny them intervenor status in this petition for writ of certiorari.

The Property is located on South Bayshore Drive, designated as a scenic transportation corridor.[1] It consists of approximately 3.695 acres and includes the Villa Woodbine, a 5,658 square foot historic mansion, currently housing a campus for an all girl's school. An unimproved section of the property includes part of the Coastal Atlantic Ridge, known as Silver Bluff, a protected element of Environmental Preservation District 6.[2] Carrollton is seeking approval from the City to construct an approximately 9,282 square foot auditorium; 23,730 square foot academic building; 70 by 100 square foot swimming pool; and a new upper and lower deck on the Property. Carrollton is also seeking permission to develop and operate a campus for an all-boys school designed for 336 students plus 50 faculty on the Property (the "Project").

The Project requires multiple approvals, including approvals under Chapters 17 (Environmental Preservation) and 23 (Historic Preservation) of the Miami Code of Ordinances (the "Code"), in addition to zoning approval under the Miami 21 (Zoning Code). The HEPB serves as a quasi-judicial instrument for granting or denying the applications for Special Certificates of Appropriateness and Certificates of Approval. *See* Code section 17-29 (Historic and Environmental Preservation Board) and Code section 23-6.2 (Certificates of Appropriateness). Special Certificates of Approval require the approval of the HEPB for new development that involve removal of existing trees from the site or alteration of other environmentally significant features. *See* Code section 17-33(a)(2) (Removal of trees and development activity within preservation districts). Certificates of Appropriateness are "required for any new construction, alteration, relocation, or demolition within a designated historic site. . . ." Code section 23-6.2 (Certificates of appropriateness).[3] The Project also requires a Zoning Permit allowing an exception for development of a school in a residential neighborhood, which can only be obtained upon review by the City's Planning and Zoning Appeals Board (the "PZAB").

The HEPB considered but denied Carrollton's applications for the Special Certificate of Approval and Certificate of Appropriateness,[4] after which Carrollton appealed the HEPB's denial of its applications to the Commission. The Petitioners then sought to intervene in Carrollton's appeal to the Commission to oppose Carrollton's appeal of its applications.[5] The Petitioners are the Immediate Neighbors who own abutting residences that are within 500 feet of the Project, as well as the Association which was formed to advocate on behalf of its members, which includes the Immediate Neighbors. Carrollton's appeal was heard by the Commission on June 25, 2020, and July 23, 2020. The Petitioners and their attorneys participated in these hearings, but their request to intervene was denied by a 3-1 vote of the Commission. The Commission deferred action on Carrollton's appeal first to the September 2020 Commission hearing. The Petitioners filed their Petition for Writ of Certiorari seeking to quash the Commission's denial of their right to intervene. At their September 10, 2020 meeting, the Commission indefinitely deferred action on Carrollton's appeal.

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

As an initial procedural matter, we note that, "[a] party cannot appeal a wholly favorable order." *Bank of New York Mellon v. Pearson*, 212 So. 3d 1071, 1073 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D521a]. Ordinarily, a party may only appeal from a judgment that is adverse to him in some respect. *See Credit Indus. Co. v. Remark Chem. Co.*, 67 So. 2d 540, 541 (Fla. 1953); *see also Van Tran v. Deutsche Bank National Trust Company*, 302 So. 3d 990 fn 1 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1928a]. The HEPB issued adverse decisions against Carrollton when denying its applications for a Special Certificate of Approval and Certificate of Appropriateness. The HEPB's decisions are in line with and not adverse to the Petitioners' position. However, the Commission has deferred a decision on Carrollton's appeal. It is quite possible that the Commission might at some point in the future affirm rather than reverse the HEPB's decisions, which could result in no adverse ruling to the Petitioners. The Petitioners have thus not suffered injury based on an adverse decision. Accordingly, Petitioners' challenge is premature. *See Estate of Tippett*, at 533.

Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding 'if the parties are provided notice of the hearing and an opportunity to be heard.' " *A & S Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341b] (citations omitted). "[T]he opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive." *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2567a]. "The 'core' of due process is the right to notice and an opportunity to be heard." *Carillon v. Seminole County*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a]. Further, "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceed-

ing involved." *Id.* at 9-10.

The Petitioners received notice, they were represented by counsel and they participated in the proceedings just like any other interested citizens. They provided testimony concerning their interests as well as their objections to the proposed Project. Consideration of the fiscal and administrative burdens attendant to quasi-judicial proceedings militate against additional procedural requirements. A determination that the Commission should afford further procedural rights, such as granting all neighboring landowners the right to cross examine witnesses, "would create a cumbersome, unwieldy procedural nightmare for local government bodies. *See Carillon,* 45 So. 3d at 11(citation omitted). Accordingly, there was no violation of due process by the Commission in denying the Petitioners the opportunity to intervene.

Essential Requirements of the Law

Code section 17.40(b) (Appeals) provides in part that, "[a]ny citizen may appeal any decision of the historic and environmental preservation board as it relates to this article, to the city commission. . . .The city commission shall hear and consider all facts material to the appeal . . . ." Furthermore, Code section 23-6.2(e) (Certificates of appropriateness) provides in part that, "[t]he applicant, the planning department, or any aggrieved party may appeal to the city commission any decision of the board on matters relating to . . . certificates of appropriateness . . . . The appeal shall be by de novo hearing and the city commission may consider new evidence or materials." However, neither Chapter 17 (Environmental Preservation) nor Chapter 23 (Historic Preservation) contains a provision providing for the right to intervene. The Commission is obviously aware of their ability to allow intervention, as it specifically provides for intervention in Miami 21 (the City's Zoning Code). Miami 21 section 7.1.4.3.d. (Definitions) defines an Intervenor as "a person whose interests in the proceeding are adversely affected in a manner greater than those of the general public." Section 7.1.4.3.g states that a "[p]arty shall mean the Applicant, the city staff, and any person recognized by the Decision-making body as a qualified Intervenor." As a Party, each intervener has "the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any relevant matter . . . and to rebut evidence." Section 7.1.4.4.a provides that "[a] qualified Intervenor may make a presentation, conduct cross-examination and make final arguments in the order as decided by the chair." Miami 21 Zoning Code 7.1.4.5.b.

Petitioners argue that section 7.1.4.3.d of Miami 21 affords intervention rights in their appeal to the Commission of the HEBP denial. Under the cannon of *expressio unius est exclusio alterius*, the notable absence of any provision for intervention in Chapter 17 and 23 must be construed to mean that the City did not intend to extend such a right in proceedings under those Code Chapters.[6] "Municipal ordinances are subject to the same rules of construction as are state statutes." *Rinker Materials Corp. v. City of North Miami*, 268 So. 2d 552, 553 (Fla. 1973). "When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute." *Joshua v. City of Gainesville*, 786 So. 2d 432, 435 (Fla. 2000) [25 Fla. L. Weekly S641a]. "It is a general canon of statutory construction that when the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally." *L.K. v. Department of Juvenile Justice*, 917 So. 2d 919, 921 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2794a]. Where the Legislature includes in one section of a chapter a certain right and excludes it in another, the courts ordinarily construe this to be a deliberate omission. *National Rental Car v. Sanchez*, 349 So. 2d 829, 830 (Fla. 3d DCA 1977).

As is evident from our review of Chapter 17, Chapter 23 and Miami 21, the City intended to allow intervention in zoning proceedings while not allowing intervention in historic and environmental preservation proceedings. As the Third District Court of Appeal noted in considering different procedures in HEPB and zoning matters

> [T]he Historic Preservation Board has procedures and standards distinct from the board, procedures and standards governing general zoning decisions. Whereas historic preservation is concerned with protecting historic structures and significant existing architecture, zoning concerns the use of land, as well as the density and the location of buildings on the land. [citation omitted] Therefore, a rational basis exists to separate historic preservation from zoning decisions, because historic preservation decisions involve a special expertise and require considerations of criteria and purpose that differ from those of zoning.

Estate of Tippett v. City of Miami, 645 So. 2d 533, 537-8 (Fla. 3d DCA 1994) (Gersten, J.,concurring).

Accordingly, we find that there was no violation of the essential requirements of law in denying intervention under Chapters 17 and 23.

Competent Substantial Evidence

Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Williams v. Crist*, 831 So. 2d 818, 819 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2618a] (citing *Duval Utility Co. v. Florida Public Service Commission*, 380 So. 2d 1028, 1031 (Fla. 1980)). The evidence presented to the Commission included the testimony of the Petitioners and City Attorney, correspondence between the City and Petitioners' counsels, and the language of Resolutions 6981 and 6982. It appears that there was sufficient competent substantial evidence to support the denial the Petitioner's request for intervention.

Based upon the above analysis, the Petition for Writ of Certiorari is hereby DENIED. It should be noted that this opinion in no way addresses the actual merits of the underlying issues presented in the appeal submitted to the Commission for resolution. (WALSH and GUZMAN, JJ., concur.)

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[1]A scenic transportation corridor is a roadway identified as having "a unique landscape character and/or an expansive tree canopy that is of substantial environmental importance to the city, as described in subsection 17-31(3)." Code section 23-2 (Definitions).

[2]Environmental preservation districts are "[g]eographical areas, parcels or corridors, which have been or may be identified, are established by the city commission as significant natural or manmade attributes in need of preservation and control because of their educational, economic, ecological and environmental importance to the welfare of the general public and the city as a whole." Code section 17-2 (Definitions).

[3]Further, alterations or new construction "shall not adversely affect the historic, architectural, or aesthetic character of the subject structure or the relationship and congruity between the subject structure and its neighboring structures and surroundings . . ." Code section 23-6.2(h).

[4]The Petitioners sought to intervene in the HEPB proceedings, but the Board denied intervention.

[5]At the time of the filing of the Petition, the Project had not yet been reviewed by the PZAB.

[6]"Under the canon of statutory construction *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another." *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007) [32 Fla. L. Weekly S177a].

* * *

CENTURY-NATIONAL INSURANCE COMPANY, Appellant, v. PHYSICIANS GROUP, LLC, a/a/o James Greene, Sr., Appellee. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2020 AP 1859 NC. L.T. Case No. 2018 SC 4549 NC. December 29, 2020. Appeal from the County Court for Sarasota County, The Honorable Maryann Boehm, County Court Judge. Counsel: William J. McFarlane, III and Michael K. Mittelmark, McFarlane Law, for Appellant. Chad A. Barr, Law Office of Chad A. Barr, P.A., for Appellee.

[Lower court order at 28 Fla. L. Weekly Supp. 157a]

OPINION

(MCHUGH, J.) Appellant Century-National Insurance Company

appeals the trial court's Final Judgment and Order Granting Plaintiff's Motion for Summary Judgment/Disposition. This Court has jurisdiction. *See* Art. V, § 5(b), Fla. Cont.; § 26.012(1), Fla. Stat. (2004). After a close review of the trial Court's order, the applicable law and having heard the argument of counsel, the trial Court order is **AFFIRMED**.

* * *

Counties—Code enforcement—Prohibition—Petition for writ prohibiting code enforcement board special magistrate from exercising jurisdiction on matter in which appeal is pending in district court of appeal is denied—Prohibition is not appropriate when challenged act has already happened—Further, writ of prohibition will not issue to prevent exercise of jurisdiction that is proper, and any impediment to special magistrate's jurisdiction was removed when circuit court appeal was concluded—Pendency in district court of appeal of a petition for writ of certiorari to review circuit court's appellate decision did not stay enforcement or entry of any order or judgment absent order of the lower tribunal or the DCA

LAWRANCE PROPERTIES, LLC, Petitioner, v. HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-9656, Division C. December 14, 2020. Counsel: Geoffrey Todd Hodges, G.T. Hodges, P.A., Lutz, for Petitioner.

ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION

(CARL HINSON, J.) This case is before the Court on Petitioner Lawrance Properties, LLC's Petition for Writ of Prohibition filed in the District Court of Appeal October 12, 2020, and transferred to this court by order of the District Court November 30, 2020. The petition seeks to prohibit the code enforcement board special magistrate from exercising jurisdiction over a matter Petitioner claims is within the exclusive jurisdiction of the District Court of Appeal in 2D20-2476 *Lawrance Properties, Inc. v. Hillsborough County*. The petition in the District Court follows an appellate decision of the circuit court. In support of this petition, Petitioner contends that the action in the District Court of Appeal deprives the code enforcement special magistrate from jurisdiction to act in the case.

Prohibition is appropriate to prevent a public official from exceeding his jurisdiction and is intended to be preventative, not corrective. *Sparkman v. McClure,* 498 So. 2d 892, 895 (Fla. 1986). It is not appropriate where, as here, the challenged act has already occurred. *Id.; Insko v. State,* 181 So. 3d 1260, 1262 (Fla. 2d DCA 2015) [41 Fla. L. Weekly D25c]. Even if the act had not already occurred, prohibition is intended to prevent an official from exceeding his or her jurisdiction; it is not appropriate to prevent the official's otherwise proper exercise of jurisdiction incorrectly. *Panagakos v. Laufer,* 779 So. 2d 296, 297 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D801b]. Here, where the appeal of the July 22, 2019, order is concluded, and the stay lifted, any impediment to the special magistrate's jurisdiction is removed. Petitioner's petition for writ of certiorari to review this court's appellate decision pending in the District Court of Appeal does not stay enforcement or entry of any order or judgment absent order of the lower tribunal (code enforcement) or the District Court of Appeal. Rule 9.190(e)(1), (3), Fla. R. App. P.

It is therefore ORDERED that the Petition is DISMISSED without need for a response on the date imprinted with the Judge's signature.

* * *

Condominiums—Claim against association's property manager for alleged improper towing of plaintiff's vehicle from its reserved parking space—Complaint—Amendment—Trial court did not abuse discretion in denying motion to amend complaint to add condominium association as party defendant less than three weeks before trial—Moreover, amendment would have been futile because declaration of association requires parties to engage in arbitration and provides that disputes shall not be decided in court of law

ANDREA HICKS, Appellant, v. EXCELSIOR COMMUNITY MANAGEMENT, LLC, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 20-CA-5506, Division X. L.T. Case No. 19-SC-8465. December 16, 2020. On review of a final judgment of the county court for Hillsborough County. The Hon. Frances Perrone, County Court Judge. Counsel: John A. Guyton, III, Rywant, Alvarez, Jones, Russo & Guyton, P.A., Tampa, for Appellant. Bryan D. Hull, Bush Ross, P.A., Tampa, for Appellee.

APPELLATE OPINION

(THOMAS, J.) This case is before the court to review two final orders: the first is the final judgment of the county court denying Appellant Andrea Hicks's claim against the property manager of her condominium association for the alleged improper towing of her vehicle; the second is the court's order denying leave to amend the complaint to add the condominium association as a party. In her appeal Ms. Hicks raises a number of issues. This court affirms the final judgment without comment but writes to address the trial court's denial of leave to amend the complaint.

Appellee Excelsior Property Management, LLC, manages property within the Association on its behalf. Ms. Hicks initially sued Kings Mill Townhome Owners Association, Inc. ("the Association") for the towing of her vehicle from its reserved parking space. Ms. Hicks dropped the Association from the suit without prejudice after becoming aware that she had not complied with the dispute resolution requirement required under the Declaration. The parties thereafter engaged in mediation but did not resolve their dispute.

Ms. Hicks then moved for leave to amend the complaint to add the Association as a party defendant. She set the motion to be heard on December 3, 2019, but for reasons that are not explained, she filed a notice of cancellation just before the hearing. The following week, Ms. Hicks moved for a case management conference and requested that the case be set for trial. Several months passed. Even though her motion to amend still had not been heard, on March 19, 2020, Ms. Hicks filed a notice of final hearing, setting the matter for a non-jury trial on June 8, 2020. She set the motion for leave to amend to be heard on May 19, 2020, less than three weeks before trial. After the hearing the judge denied leave to amend, finding that it would be prejudicial to the Association to be added as a party so close to trial.

Appellate courts review the denial of leave to amend a pleading for an abuse of discretion. *Sorenson v. Bank of New York Mellon as Trustee for the Certificate Holders of CWALT, Inc.*, 261 So. 3d 660, 663 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2559a] (*internal citations omitted*). Florida has a liberal policy that favors amendment. *Id*. This public policy derives from the mandatory language in Rule [of Civil Procedure] 1.190(a) which states that leave "shall be given freely when justice so requires." *Id*. Generally, it has been held that a court abuses its discretion when refusing to allow amendment of a pleading unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Id. See also Hutson v. Plantation Open MRI, LLC*, 66 So. 3d 1042, 1044-45 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1682a]. Here, having sought amendment just once, Ms. Hicks has not abused the amendment privilege.

The liberal policy allowing amendment diminishes the closer a case gets to trial, however. *Sorenson* at 663 (quoting *Marquesa at Pembroke Pines Condo. Ass'n, Inc. v. Powell*, 183 So. 3d 1278, 1280 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D312b]). Although it would have been equally proper for the trial court to have allowed amendment, where reasonable minds could differ as to the propriety of the court's decision, even if it might disagree, this court cannot find that the trial court abused its discretion. *Bass v. City of Pembroke Pines,* 991 So. 2d 1008, 1011 (Fla. 4th DCA 2008) [33 Fla. L. Weekly

D2368a] (*internal citations omitted*). Moreover, in this case the record suggests that amendment would be futile where Article XII, Section 13 of the Declaration of the Association requires the parties to engage in binding arbitration and further provides that disputes between homeowners and the Association "shall not be decided by a court of law." Although Ms. Hicks argues vaguely that the Association, despite not being a party, has waived arbitration, case law she advanced in her reply for this contention is insufficient to support a finding of waiver, and, in turn, an absence of futility, in this context.

It is therefore ORDERED that the judgment below is AFFIRMED. It is FURTHER ORDERED that Appellant's motion for appellate attorney's fees is DENIED. Oral argument is likewise DENIED. (THOMAS, FUSON, and COOK, JJ.)

* * *

ROBERT M. HUCKLEBY, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-4954, Division H. January 8, 2021. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Elana Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(EMMETT L. BATTLES, J.) Because Respondent has presented no facts to distinguish the instant controversy from this court's decision cited below, it is ORDERED that the judgment of the hearing officer is QUASHED on the authority of this court's decision in *Cassandra L. Eckert v. State, Dept. of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 285a (Fla. 13th Jud. Cir. [Appellate] July 1, 2020).

* * *

Insurance—Automobile—Windshield repair—Discovery—Trade secrets—In action alleging that insurer acted in bad faith by underpaying windshield claims from businesses that are not in network with insurer and provider that handles insurer's windshield claims, trial court did not err in ordering disclosure of agreement between insurer and provider with protective measures to safeguard trade secrets—No merit to argument that trial court failed to make necessary findings regarding relevance of agreement where court reviewed agreement in camera, made findings consistent with conclusion that agreement contained relevant information for which plaintiff demonstrated reasonable necessity, and issued order with protective measures—Appellate court clarifies trial court order with specific finding that agreement is trade secret

GOVERNMENT EMPLOYEES INSURANCE COMPANY, Petitioner, v. SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Chris Laibinis, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-2646, Division E. L.T. Case No. 17-CC-21442. December 29, 2020. Counsel: John P. Marino, Smith, Gambrell & Russell, LLP, Jacksonville, for Petitioner. David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Respondent.

The Court sua sponte withdraws its original opinion rendered December 9, 2020, and substitutes the opinion below. The substituted opinion makes minor, non-substantive edits only. The result is unchanged, and the time for rehearing, which has expired, is not extended by this substitution.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF CERTIORARI

(GREGORY P. HOLDER, J.) This case is before the court to review an order compelling Petitioner GEICO General Insurance Company to produce an agreement between it and Safelite Solutions, LLC, a company that, among other things, handles windshield claims for GEICO (hereinafter "provider agreement"). Petitioner contends the provider agreement is both a trade secret and irrelevant to the parties' dispute such that it is not subject to disclosure. Respondent Superior Auto Glass of Tampa Bay, Inc., contends that the provider agreement is necessary and relevant to show GEICO's bad faith in claims handling. As is required when discovery purports to request material that are trade secrets, the trial court conducted an *in camera* review of the provider agreement. The trial court's resulting order determined the provider agreement to be relevant to the underlying dispute. In addition, the order expressly allows redaction, as trade secrets, of a portion of the provider agreement to prevent disclosure of that material to Superior. Finally, the order requires the parties to agree as to the confidentiality of the remainder of the provider agreement while allowing Superior access to it. Even though the court's order did not specify the status as a trade secret of the rest of the document, this court notes that the order's protective measures are consistent with those required for trade secrets that are nonetheless discoverable. The court grants the petition to clarify, in the absence of an express finding by the trial court, the trial court's apparent but unstated conclusion that the provider agreement is a trade secret such that it is entitled to all the protections afforded to trade secrets. With regard to GEICO's contention that the trial court erred in ordering disclosure of the provider agreement because the order fails to make the relevance findings necessary to compel disclosure, the petition is denied.

Orders improperly requiring disclosure of trade secrets or other proprietary information may create irreparable harm and are thus appropriate for certiorari review. *See Ameritrust Ins. Corp. v. O'Donnell Landscapes, Inc.*, 899 So. 2d 1205, 1207 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D991c]. Therefore this court has jurisdiction to review the petition.

This case arose in the county court when Superior sued GEICO for underpayment of a claim for windshield damage. Although GEICO ultimately confessed judgment as to the original complaint, Superior later amended its complaint to assert a claim for bad faith under §624.155, Florida Statutes. In its amended complaint, Superior claimed that GEICO engaged in unfair methods of competition, unfair and deceptive insurance trade practices, failed to act in good faith, and that GEICO did the foregoing with such frequency as to constitute a general business practice. Superior's complaint also alleges that GEICO's bad faith claims processing includes price-fixing.

Superior then submitted a request for discovery seeking production of various documents, specifically the provider agreement. GEICO objected to the request, arguing that the entire provider agreement is a trade secret. As is required by law, the trial judge conducted an *in camera* review of the document. *See Sheridan Healthcorp, Inc. v. Total Health Choice, Inc.*, 770 So. 2d 221, 222 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2503b]. After reviewing the provider agreement, the judge compelled its production, with conditions. For example, the resulting order rendered March 18, 2020, determined that specific portions of the agreement were both trade secrets *and* not relevant to the dispute. The order allowed GEICO to redact those portions to prevent disclosure entirely. GEICO does not challenge that discrete finding. With regard to the remainder of the provider agreement, the order does not say whether it is or is not a trade secret, but the order does require the parties to agree on measures to protect the provider agreement from outside disclosure just as one might protect a trade secret that is subject to production. The next day GEICO filed its petition for writ of certiorari. The provider agreement remained in the trial court's possession. It was not initially provided with the appendix to the petition, but it was eventually provided to this court directly from the county court.[1]

Thereafter, on March 24, 2020, the trial court entered an order staying production during the pendency of this writ proceeding. It

further ordered that upon expiration of the stay, GEICO would produce a copy of the document with the permitted redactions. It requires Superior's counsel of record to "strictly maintain the confidentiality of the Provider Agreement." The order prohibits Superior's counsel from sharing the provider agreement with or otherwise disclosing any of its contents to Superior or anyone else, and prohibits the filing, quoting, or otherwise disclosing any portion of the provider agreement in [the underlying] or any other proceeding.

GEICO contends the trial court erred in two ways. First, in [orally] concluding that the provider agreement is not a trade secret, the county court failed to follow this court's precedent in *GEICO General Insurance Co v. Certified Windshield, LLC, a/a/o Kosta Christodonlakis,* Circuit Case No. 15-CA-6569, Fla. 13th Jud. Cir. [Appellate] February 16, 2016) ("*Christodonlaki*s"). Second, the county court determined that the provider agreement was relevant without making the necessary findings explaining the basis for its conclusion.

Despite GEICO's argument to the contrary, *Christodonlakis* is inapplicable to this case. GEICO either misunderstands, or worse, deliberately misstates the court's holding in *Christodonlakis*. In *Christodonlakis,* this court determined that the trial court's conclusion that the document was a trade secret would not be disturbed where that conclusion was not challenged. The circuit court acting in its appellate capacity did not independently analyze the trial court's trade secret determination. *Christondonlakis* further states that, in light of the trial court's conclusion that the provider agreement was a trade secret, the agreement need not be disclosed because it was not relevant in a case for underpayment of benefits where bad faith or unfair trade practices were not alleged. Here, unlike *Christodonlakis,* the underlying case is no longer solely about a single underpayment, but rather, bad faith.[2]

Addressing the trade secret status of the provider agreement, the trial court's order concludes that it "contains trade secret information" and allows GEICO to redact numeric values on certain formulas before producing the agreement, shielding this information from disclosure entirely. The order does not, however, specify whether the remainder of the provider agreement is or is not a trade secret. On one hand, the trial court *orally* stated that the agreement, other than the portions allowed to be redacted, is not a trade secret. On the other, the protections the subsequent written order affords the provider agreement are consistent with those given to trade secrets. Moreover, counsel for Superior agreed to these protections. Because the challenged order appears to treat the document as a trade secret without an express finding on the issue, clarification is warranted.

To determine whether a document is or contains trade secrets, the court turns to §688.002(4), Florida Statutes, which defines trade secrets. It says:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In support of its contention that the provider agreement is a trade secret, GEICO argues that the agreement contains information regarding GEICO's business processes associated with the administration of its payments nationwide. GEICO adds that its proprietary work-flow techniques allow GEICO to efficiently process hundreds of thousands of claims accurately and effectively in a manner that its competitors have not been able to duplicate. GEICO concludes that, in the highly competitive auto insurance business, the economic value GEICO derives from this trade secret information is as clear as its interest in protecting it.

Without going into unnecessary detail, and noting the trial court's careful treatment of the agreement, this court is satisfied that the requirements of §688.002(4) are met in that GEICO derives independent economic value from its contents not being generally known by others who could derive economic value from its disclosure. In addition, there can be little doubt that GEICO has made significant effort to maintain the provider agreement's secrecy. The status of the document as a trade secret does not necessarily preclude disclosure, however. *Sheridan,* 770 So. 2d at 222; *Gen. Caulking Coating Co., Inc. v. J.D. Waterproofing, Inc.,* 958 So. 2d 507, 508-09 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1400b].

The court's next step is to determine whether the party seeking the discovery can show a reasonable necessity for the information that outweighs GEICO's interest in maintaining confidentiality. *Gen. Caulking* at 508-09*; Ameritrust,* 899 So. 2d at 1207. Only if the party seeking production makes this showing does the court reach the final step to determine whether sufficient protection has been afforded the trade secret. *See generally Laser Spine Institute, LLC v. Makanast,* 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2077b] (when court orders disclosure of trade secrets, it must take appropriate measures to protect the interests of the trade secret holder, the parties, and the interests of justice).

In its complaint, Superior contends GEICO acted in bad faith in underpaying windshield claims from businesses that are not in a network agreement with GEICO and Safelite. GEICO contends, accurately, that the provider agreement affords Safelite no authority to make reimbursement decisions for non-network providers; its authority is limited to processing the payment. In other words, GEICO, not Safelite, determines the prevailing competitive price paid to non-network providers. Superior maintains, however, that the provider agreement may demonstrate practices that manipulate the prevailing competitive price as defined in the policy, thus making it relevant to the dispute.

After reviewing the document in camera, the trial court determined that the provider agreement contains guidelines and calculations which are potentially admissible and reasonably calculated to lead to admissible evidence. Out of deference to GEICO's concern for disclosure, the trial court kept details to a minimum, but said Safelite did more than "cut a check." This court rejects GEICO's contention that the trial court failed to make the necessary findings that the document was relevant to the parties' dispute. GEICO offers no authority to support its contention that these findings were insufficient. GEICO cites *Va. Elec. & Lighting Corp. v. Koester*, 714 So.2d 1164, 1165 (Fla. 1DCA 1998) [23 Fla. L. Weekly D1791a], and *Cooper Tire & Rubber Co. v. Cabrera*, 112 So.3d 731, 733 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1012a] in support of its contention. In both cases, unlike here, the trial court failed to make *any* findings as to the party's need for the requested information, so neither suggests specific requirements. Nor did either case specify how detailed findings must be. As is required by law, the trial court reviewed the document in camera, made findings consistent with the conclusion that the provider agreement contained relevant information for which Superior demonstrated a reasonable necessity, and issued an order with conditions of disclosure that protect the document. On this issue the petition must be denied.

In conclusion, the trial court's only error, if it can be called such, is that it did not make the formal finding that the document is a trade secret. It is for this reason that the petition is granted in part. In light of this clarification, the trial court may revisit measures necessary to protect the provider agreement and balance the rights of the parties as set forth in *Fortune Pers. Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of S. Fla.*, 423 So.2d 545, 546 & n. 6 (Fla. 4th DCA 1982) (court

must weigh the importance of protecting the claimant's secret against the interests in facilitating the trial and promoting a just end to the litigation, and should consider other factors [such] as the potential impact of disclosure upon the holder's business).

For the reasons set forth in this opinion, it is ORDERED that the petition is GRANTED IN PART and DENIED IN PART. It is FURTHER ORDERED that Respondent's motion for appellate attorney's fees is DENIED.

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[1]For this reason, this court determines that *United States Automobile Ass'n, et al. v. Bay Area Injury Rehab Specialists Holdings, Inc.* 2020 WL 4030877 at *4-5, 45 Fla. L. Weekly D1714a (Fla. 2d DCA 2020) is inapplicable to this case. Had the document not come to this court directly from the county court judge, the record would have been incomplete as to preclude review.

[2]In the absence of a need to independently analyze the trial court's trade secret determination in *Christodonlakis,* the appellate court did not review the document.

* * *

GARDENS HEALTH & WELLNESS, INC., a/a/o Natalie Collier, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2020-AP-000037-CAXX-MB. L.T. Case No. 50-2018-SC-016121-XXXX-MB. December 14, 2020. Appeal from the County Court in and for Palm Beach County; Edward A. Garrison, Judge. Counsel: Todd Landau, Hollywood, for Appellant. Kenneth P. Hazouri, Orlando, for Appellee.

(PER CURIAM.) Appellee State Farm Mutual Automobile Insurance Company ("State Farm") filed a confession of error with this Court on October 21, 2020. State Farm concedes that the lower court erred in granting State Farm's motion to strike and motion for summary judgment and that there were issues of material fact that precluded the trial court from granting summary judgment in favor of State Farm. We accept this confession of error and accordingly **REVERSE** the lower court's grant of final summary judgment and its grant of State Farm's motion to strike Appellant's notice of evidence and **REMAND** for further proceedings consistent with this opinion. *See* Fla. R. App. P. 9.315(b). (MARTZ, CURLEY, and HAFELE, JJ., concur.)

* * *

Criminal law—Soliciting for prostitution—Jury instructions—Right to remain silent—Harmless error

VINTYRE FINNEY, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 50-2018-AP-000067-AXXX-MB. L.T. Case No. 50-2016-MM-000377-AXXX-SB. November 30, 2020. Appeal from the County Court in and for Palm Beach County; Caroline C. Shepherd, Judge. Counsel: Logan T. Mohs, Office of the Public Defender, West Palm Beach, for Appellant. Joseph R. Kadis, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) AFFIRMED. (CARACUZZO and J. MARX, JJ., concur. KROLL, J., dissents with an opinion.)

(KROLL, J., dissenting.) Appellant, Vintyre Finney, was charged and ultimately convicted of Soliciting Another to Commit Prostitution. He argues on appeal that the trial court committed reversible error by giving the venire panel an improper instruction regarding his right to remain silent. The lower court acknowledged that the instruction was a mistake, but ultimately concluded that its later curative instruction—along with its repeated reminders to the venire panel that Appellant did not bear any burden of proof—rendered the instruction harmless. In affirming Appellant's conviction and sentence, the majority apparently adopts the reasoning of the trial court in finding the erroneous instruction to be harmless error. Because I do not agree that the error was harmless, I must respectfully dissent.

During voir dire, counsel for Appellant questioned the jury panel about their thoughts if Appellant did not testify or present any evidence during the trial. After defense counsel finished its questioning, the trial court followed up with the potential jurors who indicated their verdict might be affected if Appellant chose not to testify. While speaking with one such potential juror, the following exchange occurred:

> **Venire Person [C]:** I feel like hold it against him is a strong word but I think it will always be in the back of my mind why, why he didn't want to defend himself.
>
> **The Court:** And *that's okay for it to be in the back of your mind.* What's not okay is for you to say, well, because he didn't testify, I'm gonna vote guilty. Or because he didn't testify I'm gonna vote not guilty, that's what's not okay. It's okay for you to think, I wonder why he didn't testify. But you can't think, I wonder what he would have said. I wonder if he didn't testify because he's guilty, you can't do that. So it's okay for you to have that thought rumbling around in the back of your mind.
>
> **Venire Person [C]:** Then I—
>
> **The Court:** But would it, the question is, would it affect your verdict?

After the trial judge finished questioning Venire Person "C," defense counsel moved to strike the jury panel and objected to the instruction. The court denied the motion, but gave the following curative instruction once a jury was selected and sworn:

> **The Court:** I said something and I want to correct it to you, and—okay. When we were discussing whether or not you would like to hear from or whether or not [Appellant] should testify, the constitution requires the State to prove its accusations against the defendant. It is not necessary for the defendant to disprove anything. Nor is the defendant required to prove innocence. It is up to the State to prove the defendant's guilt by evidence. So you may not speculate, if he doesn't testify, on the fact that he may not have testified or what he might have said. So if I said anything that wasn't clear about that, that's the correct law.

After the trial concluded, defense counsel filed a Motion for New Trial arguing that the trial court's remarks were improper and that it was required to grant Defendant's motion to strike the panel. The trial court responded with a written order denying the motion and finding that any error it committed was harmless.

The United States Constitution provides criminal defendants with the absolute right to either testify or to remain silent during their trial. *Lott v. State*, 931 So. 2d 807, 817-18 (Fla. 2006) [31 Fla. L. Weekly S222a]. It is improper for the court, a prosecutor, a codefendant, or any other person to comment on a defendant's silence or right to silence. *See Burgess v. State*, 644 So. 2d 589, 592-93 (Fla. 1994). A comment becomes improper if it is "fairly susceptible of being interpreted by a jury as referring adversely to the defendant's failure to testify." *State v. Grissom*, 492 So. 2d 1324, 1325 (Fla. 1986). Although these improper remarks presumptively create a "high risk of error," the harmless error test is used to determine whether reversal is warranted. *State v. DiGuilio*, 491 So. 2d 1129, 1135-36 (Fla. 1986).

As the trial court conceded below, its comment to Venire Person C was improper since it easily could have been interpreted by the jury as an adverse comment regarding Appellant's decision not to testify. *See Grissom*, 492 So. 2d at 1325.[1] In my view, what precludes this comment from being harmless is that it came from the trial court itself rather than the State or a witness. Unlike the other participants in a trial, the court has both the power and duty to instruct prospective jurors on the law and their duties. We presume that a jury follows all of the trial court's instructions unless there is evidence to the contrary. *See Garzon v. State*, 939 So. 2d 278, 285 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2572a]. Accordingly, comments from the court contain an inherent "imprimatur of authority and credibility," and the district courts have consistently reversed lower courts when statements from the bench could have affected how the jury deliberates and weighs the evidence. *Cf. Osorio v. State*, 186 So. 3d 601, 609-08 (Fla. 4th DCA

2016) [41 Fla. L. Weekly D547b] (citing cases and holding that the lower court's statement to the jury that a testifying chemist was "an expert in the field" was erroneous for conferring additional credibility on the witness). As the Third District Court of Appeal stated in *Del Sol v. State*:

> The firmly established rule in Florida is that the trial judge should avoid making directly to or within the hearing of the jury, any remark which is capable of conveying directly or indirectly, expressly, inferentially, or by innuendo, any intimation as to what view he or she takes of the case or as to what opinion the judge holds concerning the weight, character, or credibility of any evidence adduced.

537 So. 2d 693, 694 (Fla. 3d DCA 1989) (citations omitted). There is no case directly analogous to the instant appeal. However, these cases clearly stand for the proposition that the court's words have exceptional power and sway over laypersons who are summoned to perform jury service. A juror who is told by the court that he or she is allowed to speculate about why a defendant chooses not to testify will not easily disregard that instruction. Given the degree of control and authority the court has over a venire panel, I do not believe that the State has proven, or can prove, beyond a reasonable doubt that there was no reasonable probability the court's instruction affected the verdict. *See DiGuilio*, 491 So. 2d at 1135-36.

The fact the Court gave a curative instruction (after the jury was sworn) only shows further the Court's concern about her comments and the importance of the defendant's right to remain silent. There are times that a defendant simply suffers so much prejudice that a curative instruction "is not sufficient to 'unring the bell.' " *Melehan v. State*, 126 So. 3d 1118, 1125 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1322a] (quoting *Graham v. State*, 479 So. 2d 824, 826 (Fla. 2d DCA 1985)). *See also Jones v. State*, 128 So. 3d 199, 201 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2589e]. Because the trial court gave an improper instruction regarding a fundamental constitutional right, I cannot find that the error is harmless beyond a reasonable doubt and respectfully dissent.

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[1]Although Appellant did ultimately testify at trial, this does not prevent an otherwise improper comment on the right to silence from being reversible error. *Andrews v. State*, 443 So. 2d 78, 84 (Fla. 1983) (citing *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976)).

* * *

Insurance—Personal injury protection—Conditions precedent—Demand letter—Error to enter summary judgment in favor of insurer based on failure to satisfy demand letter condition precedent where insurer did not properly plead that defense—Insurer's first answer that contained general denial of medical provider's satisfaction of all conditions precedent and did not assert affirmative defense as to demand letter issue waived that defense—Insurer's amended answer that specifically raised defective demand letter defense and was filed more than 20 days after first answer could only be effected by leave of court, which was not granted before entry of summary judgment

CAGIGAS MEDICAL CENTER, INC., a/a/o Alberto Lauzurique, Appellant, v. STATE FARM AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000152-CAXX-MB. December 3, 2020. Appeal from the County Court in and for Palm Beach County, Edward A. Garrison, Judge. Counsel: Todd A. Landau, Hollywood, for Appellant. Nancy W. Gregoire, Fort Lauderdale, for Appellee.

(PER CURIAM.) Appellant, Cagigas Medical Center, Inc., ("Cagigas") appeals the trial court's order entering final summary judgment in favor of Appellee, State Farm Automobile Insurance Company ("State Farm"). We hold that the trial court erred by granting summary judgment based on Appellant's failure to satisfy a condition precedent because, in the operative answer, Appellee failed to deny satisfaction of all conditions with particularly as required by Florida Rule of Civil Procedure 1.120(c).

Factual and Procedural Background

The underlying lawsuit arose from a motor vehicle accident involving one of State Farm's policy holders. Cagigas provided medical services, obtained an assignment of benefits from the policy holder, and filed suit against State Farm for nonpayment of PIP benefits. The dispositive issue on summary judgment was the legal sufficiency of Cagigas' pre-suit demand letter per section 627.736(10), Florida Statutes. However, the dispositive issue in this appeal turns on a procedural issue: what pleadings were properly in effect at the time summary judgment was granted.

In its complaint, Cagigas alleged satisfaction of all statutorily required conditions precedent. In its first answer to this complaint, State Farm denied this allegation without elaboration and raised only a single affirmative defense involving the statutory schedule of maximum charges. Cagigas did not reply to State Farm's answer within the twenty day time period provided by Florida Rule of Civil Procedure 1.140.

Nearly six months later, Cagigas sought leave to file a reply. While this motion remained pending, State Farm filed its own motion for leave to amend its answer. The amended answer attached to State Farm's motion added three new affirmative defenses alleging specifically how the Cagigas' pre-suit demand letter failed to meet statutory and/or contractual conditions precedent. *While these motions for leave to amend were still pending*, State Farm filed and prosecuted a motion for final summary judgment based on its new affirmative defenses asserting that Cagigas' pre-suit demand letter failed to comply with section 627.736(10), Florida Statutes. The trial court granted this motion for summary judgment seemingly on its merits, however, neither parties' motions to amend the pleadings were ever set for hearing or otherwise addressed by the trial court.

Analysis

If a defendant wishes to deny plaintiff's allegation that all conditions precedent have been performed or have occurred, that denial "shall be made specifically and with particularity." Fla. R. Civ. P. 1.120(c). The purpose of this rule is "to put the burden on the defendant to identify the specific condition that the plaintiff failed to perform—so that the plaintiff may be prepared to produce proof or cure the omission, if it can be cured." *Suarez v. Wells Fargo Bank, N.A.*, 201 So. 3d 694, 697 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1981a] (quoting *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626, 626 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D601b]. "[T]o construct a proper denial under the rule, a defendant must, at a minimum, identify both the nature of the condition precedent and the nature of the alleged noncompliance or nonoccurrence." *Deutsche Bank Nat. Tr. Co. v. Quinion*, 198 So. 3d 701, 703-04 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D177a]. In this case, State Farm's operative answer at the time of summary judgment did neither.

Here, when the trial court heard State Farm's motion for summary judgment, the operative answer was State Farm's *first* answer, which provided only a general denial of Cagigas' satisfaction of conditions precedent and asserted no affirmative defenses to that issue. If a defendant fails to follow the dictates of Rule 1.120(c) and only denies the allegation of compliance with conditions precedent in general terms, the denial is considered not well-pled and may be appropriately disregarded because the defendant has "no right to demand proof from the plaintiff of conditions precedent that were not preserved in the pleadings." *Cooke v. Ins. Co. of N. Am.*, 652 So. 2d 1154, 1156 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D387a] (reversing grant of directed verdict based on failure to satisfy conditions precedent where issue was only raised in pleadings through general denial); *Scarborough Assocs. v. Fin. Fed. Sav. & Loan Ass'n of Dade Cty.*, 647 So. 2d 1001,

1004 (Fla. 3d DCA 1994) (blanket denial of satisfaction of conditions precedent was insufficient to allow court to grant motion for judgment on the pleadings). In other words, the failure to plead a timely, *specific* denial of whether a condition precedent had occurred or been fulfilled amounts to a waiver of that defense. *See VonDrasek v. City of St. Petersburg,* 777 So. 2d 989, 991 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2123a]; *Bank of Am., Nat. Ass'n v. Asbury*, 165 So. 3d 808, 810 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1230a]; *Gardner v. Broward Cnty.*, 631 So. 2d 319, 321 (Fla. 4th DCA 1994).

Looking only to the first Answer and Affirmative Defenses filed by State Farm, it is clear that State Farm failed to deny Cagigas' general allegation that it satisfied the conditions precedent to its suit with the specificity required by Rule 1.120(c). *See Ingersoll v. Hoffman,* 589 So. 2d 223, 224 (Fla. 1991) ("A general denial is not one 'made specifically and with particularity.' " (quoting Fla. R. Civ. P. 1.120(c))). *See also Keon Rouse v. United Auto. Ins. Co.,* 17 Fla. L. Weekly Supp. 874a (Fla. 9th App. Ct. March 15, 2010). To the extent State Farm argues that its general denial in the first answer was sufficient because it could only have possibly referred to the requirements of section 627.736(10), Florida Statutes, this argument is also rejected by case law. *See Asbury*, 165 So. 3d at 811 ("There is no exception in rule 1.120(c) for claims that have a single condition precedent to their maintenance.").

In response to the foregoing, and despite never obtaining leave to amend, State Farm argues that its amended answer actually controls because Florida Rule of Civil Procedure 1.190(a) gives it the ability to amend its answer as a matter of right. This argument is also rejected by controlling case law. *See Life Gen. Sec. Ins. Co. v. Horal*, 667 So. 2d 967, 969 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D434a]; *Abston v. Bryan,* 519 So. 2d 1125, 1127 (Fla. 5th DCA 1988). Rule 1.190(a) permits a defendant to amend an answer as a matter of right only when (a) no reply has been filed and (b) the amended answer is filed before the expiration of the twenty-day period during which a reply *may* be filed under Rule 1.140(a)(1). Otherwise put, if it has been more than twenty-days since the filing of the defendant's original answer, the defendant must seek leave to amend their answer.

State Farm does not distinguish *Horal* other than to say that it is now "questionable authority" based on *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 566 (Fla. 2005) [30 Fla. L. Weekly S649a] and *Ruble v. Rinker Materials Corporation*, 116 So. 3d 378, 380 (Fla. 2013) [38 Fla. L. Weekly S408a]. However, both *Boca Burger* and *Ruble* involve the amendment of complaints, not answers. Because Rule 1.190(a) focuses on the right to amend on the presence of a "responsive pleading", there is a distinction between a mandatory response, such as an answer, and an optional one, such as a reply. In fact, this distinction forms the basis of *Horal's* holding.

State Farm also cites to *Myers v. Miller*, 581 So. 2d 904 (Fla. 2d DCA 1991), where the defendants sought leave to amend their answer and file a counterclaim. There, the trial court granted leave to amend as to the answer, but did not permit the counterclaim to be filed. *Id.* at 905. On appeal, the defendants argued they were entitled to file the counterclaim as a matter of right per Rule 1.190(a). *Id.* at 906. The Second District agreed that the amendment could occur without leave based on two findings. First, a response filed by the plaintiffs to the first answer did not constitute a valid reply, so no responsive pleading had been filed so as to prevent amendment by right. *Id.* Second, the amended answer and counterclaim were filed only seventeen days after the first answer. *Id.* Accordingly, *Myers* also can be distinguished from the instant case as there the amended answer and counterclaim were asserted within the twenty day time frame during which a Reply could still have been filed under Florida Rule of Civil Procedure 1.140(a)(1). Conversely, in this case, State Farm sought to amend its answer almost six months later.

Conclusion

Based on the foregoing, we hold that the trial court erred when it entered summary judgment in favor of Appellee, State Farm Automobile Insurance Company. State Farm had not properly pled a defense based on failure to satisfy conditions precedent at the time the trial court granted it summary judgment on that same basis. Accordingly, we **REVERSE** and **REMAND** with directions to vacate the order granting summary judgment in favor of Appellee. It is further **ORDERED** that the Appellant's Motion for Attorney's Fees is **GRANTED** per § 627.428(1), Fla. Stat.; Fla R. App. P. 9.400, and we remand to the trial court to determine the amount of said award. (COATES, HAFELE, and CURLEY, JJ., concur.)

* * *

Insurance—Personal injury protection—Summary judgment—Error to reject affidavit of expert on relatedness and medical necessity of treatment where affidavit is based on personal knowledge of affiant who performed independent medical examination of insured and insured's statements to affiant—Trial court also erred in excluding IME report that was authenticated by affiant and incorporated into affidavit by reference—Summary judgment in favor of medical provider is reversed—Attorney's fees—On remand, trial court should determine whether proposal for settlement complies with statute and rule and, if it does, award attorney's fees and costs

UNITED AUTOMOBILE INSURANCE CO., Appellant, v. STUART V. KROST, M.D., P.A., a/a/o Natalie Alexander, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000046-CAXX-MB. L.T. Case No. 50-2013-SC-000683-XXXX-SB. December 2, 2020. On Motion for Rehearing December 10, 2020. Appeal from the County Court in and for Palm Beach County, Reginald Corlew, Judge. Counsel: Michael J. Neimand, House Counsel for United Automobile Insurance Co., Miami, for Appellant. David B. Pakula, P.A., Pembroke Pines; and Ovadia Law Group, P.A., Boca Raton, for Appellee.

[Lower court order at 26 Fla. L. Weekly Supp. 233c]

(PER CURIAM.) Appellant United Automobile Insurance Company ("United Auto") timely appeals the trial court's orders granting summary judgment in favor Dr. Stuart B. Krost, M.D., P.A., as assignee of Natalie Alexander ("Dr. Krost") awarding Dr. Krost his fees relating to his treatment of Natalie Alexander ("Ms. Alexander") pursuant to Personal Injury Protection ("PIP") coverage on an automobile insurance policy issued by United Auto. We reverse the grants of summary judgment and remand for further proceedings consistent with this opinion.

Factual and Procedural Background

On September 16, 2011, Natalie Alexander was a passenger in an automobile when it was struck by another vehicle. The vehicle owner, Emily Alexander, was insured by United Auto, and the policy included PIP coverage. Natalie Alexander allegedly sustained injuries to her shoulder and left arm and received medical treatment including physical therapy and massage therapy.

United Auto arranged for an independent medical examination ("IME") conducted by Renaud Saint-Vil, M.D., on October 18, 2011, who issued his IME report on the same date. Dr. Saint-Vil concluded in his report that ". . . further medical treatment including physical therapy and massage therapy is not considered reasonable, necessary and related to the motor vehicle accident of September 16, 2011."

Subsequently, on April 12, 2012, Ms. Alexander was referred to Dr. Krost by Dr. Thomas Roush. According to his affidavit, Dr. Krost examined Ms. Alexander and "determined she had mechanical low back pain with reactive myofascial spasm, and symptoms of sacroilitis bilaterally. The patient was treated with three bilateral sacroiliac joint injections for diagnostic and therapeutic purposes." Dr. Krost also concluded that Ms. Alexander's malady was related to the September

16, 2011 automobile accident.

Dr. Krost, as assignee of the PIP benefits under the United Auto policy, presented his bill for services rendered to United Auto, which denied payment. Dr. Krost filed suit in Palm Beach County Court, Small Claims Division, on January 13, 2015. On May 16, 2016 he filed a motion for partial summary judgment on the issues of "relatedness" of the injuries to the September 16, 2011 accident and the "medical necessity" for his treatments. Attached as Composite Exhibit "D" to Dr. Krost's motion was his aforementioned affidavit as well as his records and reports of Ms. Alexander's office visits, treatment plan, and physical examination.

In response to the motion, on October 25, 2017, United Auto filed a Notice of Filing Affidavit, attaching an affidavit of Dr. Saint-Vil. Dr. Saint-Vil detailed in his affidavit the examination of Ms. Alexander that he performed in October 2011, which included not only tests relating to the shoulder and arm injury for which she was being treated but also tests that included her lower back area, which he opined to show no abnormalities. Twice in the affidavit Dr. SaintVil stated, "*For further details of these findings please see the report of my October 18, 2011, physical examination of Nattali* [sic] *Alexander, attached hereto and expressly incorporated herein by reference as though fully set forth*." (Emphasis in original.) The IME attached to Dr. Saint-Vil's affidavit contains much the same information as stated in Dr. Saint-Vil's affidavit and provides additional data regarding the test results.

The trial court granted Dr. Krost's motion for summary judgment on the issues of "relatedness" to the September 16, 2011 accident and "medical necessity," finding that Dr. Krost's affidavit was sufficient to meet his burden of proof on those issues. The trial court ruled that Dr. Saint-Vil's affidavit relied on hearsay and thus excluded all of Dr. Saint-Vil's affidavit except paragraph 15, which offered his ultimate conclusions, and determined that that part of the affidavit was merely "conclusory in nature." The trial court also excluded Dr. Saint-Vil's IME report, attached to his affidavit, on the ground that it was not admissible as a business record, relying on *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D111a].

United Auto moved for reconsideration, which the trial court summarily denied. Dr. Krost then moved for final summary judgment on the remaining issue of reasonableness of his charges. United Auto did not contest the reasonableness of Dr. Krost's charges, and on March 5, 2019 the trial court entered final summary judgment awarding Dr. Krost $439.16. United Auto filed its notice of appeal on March 27, 2019.

Analysis

United Auto contends that the trial court erred in excluding the bulk of Dr. Saint-Vil's affidavit and his IME report, which was attached to his affidavit and duly authenticated. (The panel notes that Dr. Krost likewise submitted his own reports and records as part of Bulk Exhibit "D," although they were not referenced in or authenticated in Dr. Krost's affidavit.) United Auto contends that, had the trial court considered Dr. Saint-Vil's affidavit and attached IME report, those documents presented genuine issues of material fact precluding summary judgment on the issues of "relatedness" and "medical necessity." We agree.

The standard of review is *de novo*, as the appeal involves the trial court's interpretation of law; here, the law governing summary judgment evidence. *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1571a]. Additionally, appeals from grants of summary judgment are reviewed *de novo*. *Volusia Cty. v. Aberdeen of Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

In summary judgment practice, "[t]he evidentiary matter offered must be both relevant and competent as to the issues in the cause. But it need not be in the exact form, or cover all the preliminaries, predicates, and details which would be required of a witness, particularly an expert witness, if he were on the stand at the trial." *Holl v. Talcott*, 191 So. 2d 40, 45 (Fla. 1966). " 'On hearing a motion for summary judgment . . . a court is authorized to consider forms of evidence, such as affidavits, which would normally be inadmissible at trial.' " *Neiman v. Kahn, Chenkin & Resnick, P.L.*, 137 So.3d 551, 553-54 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D806b] (quoting *Baskin v. Griffith*, 127 So. 2d 467, 473-74 (Fla. 1st DCA 1961). Nonetheless, when documentary evidence is relied upon as a basis for seeking or resisting summary judgment, it must be presented in a manner that conforms to admissibility requirements. Fla. R. Civ. P. 1.510(c), (e). *See also Servedio v. U.S. Bank, N.A.*, 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (noting that documents submitted on summary judgment must be authenticated).

(a) Dr. Saint-Vil's affidavit.

While affidavits generally are not admissible at trial except for impeachment purposes, Rule 1.510(c) and (e), Florida Rules of Civil Procedure, establish that affidavits are admissible in summary judgment practice when they are based upon "personal knowledge." Fla. R. Civ. P. 1.510(e). Here, Dr. Saint-Vil's affidavit is based upon his personal knowledge, as he was the one who performed the IME, and his statements contained in his affidavit were based upon his performance of the IME and thus would be admissible and competent for introduction at trial through testimony of Dr. Saint-Vil. *Id.* Thus, the trial court erred in excluding the bulk of his affidavit on the basis of hearsay. Furthermore, to the extent that any statements contained in Dr. Saint-Vil's affidavit were based upon information provided to him by Ms. Alexander during the course of his examination of her, those statements are not hearsay under section 90.803(4), Florida Statutes, as those statements were provided by Ms. Alexander to Dr. Saint-Vil for purposes of medical diagnosis or treatment.

(b) The IME report attached to Dr. Saint-Vil's affidavit.

The trial court also erred in excluding from consideration, on summary judgment, Dr. Saint-Vil's IME report, which was attached to Dr. Saint-Vil's affidavit and duly authenticated by Dr. Saint-Vil and incorporated by reference into his affidavit. Under Rule 1.510(e), where an affiant references documents in an affidavit submitted in summary judgment practice, those documents must be attached to the affidavit and either sworn to or certified. Thus, because Dr. Saint-Vil referenced his IME report in his affidavit, the rule required that it be attached, and in his affidavit Dr. Saint-Vil duly authenticated the report.

The trial court's reliance upon *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D111a] to exclude Dr. Saint-Vil's IME report was misplaced. In *McElroy*, the lower court allowed the introduction, *at trial*, of expert witness reports for a plaintiff expert and a defense expert. On appeal, the Second District Court of Appeal ruled that neither report should have been admitted because they were both lacked "trustworthiness" under the business records exception to the hearsay rule, section 90.803(6)(a), Florida Statutes. *Id.* at 125-26.

The panel here acknowledges that, *at trial*, reports created by a testifying witness usually are denied admission on grounds of cumulativeness, but here the trial court was at the summary judgment stage. The IME report attached to Dr. Saint-Vil's affidavit was submitted as part of summary judgment practice, in accordance with Rule 1.510(e), and in an effort to resist summary judgment by demonstrating genuine issues of material fact. Under summary judgment practice, the trial court should have considered the IME report attached to Dr. Saint-Vil's affidavit.

In reviewing the trial court's grant of summary judgment *de novo*, the panel concludes that the affidavit of Dr. Saint-Vil and his IME

report, when considered in light of the foregoing rulings, presented "summary judgment evidence," as that term is used in Rule 1.510(c), sufficient to establish genuine issues of material fact precluding summary judgment. Accordingly, the trial court's entry of summary judgment on Dr. Krost's motion regarding "relatedness" and "medical necessity," as well its subsequent grant of final summary judgment on Dr. Krost's fees, which depended upon its grant of summary judgment on the issues of "relatedness" and "medical necessity," are reversed. Additionally, any order of the trial court entered on Dr. Krost's motion for costs and attorney's fees is reversed.

United Auto requested and is entitled to its appellate attorneys' fees and costs pursuant to sections 768.79(1) and 59.46, Florida Statutes. The trial court is instructed to consider an award upon timely application by appellant.

The trial court's grants of summary judgment addressed in this opinion are hereby **REVERSED and REMANDED** with instructions to proceed in accordance with this opinion. Additionally, any awards of attorneys' fees and costs to appellee that might have been awarded by the trial court after this appeal was lodged are **REVERSED**. Finally, on remand the trial court, upon timely application by appellant under Florida Rule of Civil Procedure 1.525, is to determine United Auto's reasonable appellate fees and costs and award them accordingly. (COATES, CURLEY, and HAFELE, JJ., concur.)

BY ORDER OF THE COURT:

THIS CAUSE came before the Court upon Appellee's Motion for Rehearing. The Motion is denied as to all claims except as to the point regarding the trial consideration, on remand, of whether appellant/defendant's proposal for settlement complied with applicable statutes and rules. On remand, and upon timely application by appellee/defendant United Auto Insurance Company for an award of its appellate attorneys' fees, the court should determine whether United Auto Insurance Company's proposal for settlement complied with the requirements of the applicable statute and rule and, if so, to determine its reasonable appellate fees and costs and award them accordingly. *State Farm Fire & Cas. Co. v. Rembrandt Mobile Diagnostics,* 93 So. 3d 1161, 1162 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1836a]. Accordingly, it is

ORDERED that Appellee's Motion for Rehearing is **DENIED** in part and **GRANTED** in part. The clerk shall close the file. (COATES, CURLEY, and HAFELE, JJ.)

* * *

CHRIS THOMPSON, P.A., Appellant, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2020-AP-000047-CAXX-MB. L.T. Case No. 50-2019-SC-017054-XXXX-SB. December 17, 2020. Appeal from the County Court in and for Palm Beach County; Reginald R. Corlew, Judge. Counsel: Michael R. Prince, GED Lawyers, LLP, Boca Raton, for Appellant. Abbi Freifeld Carr and Veresa Jones Adams, ROIG Lawyers, Deerfield Beach, for Appellee.

(PER CURIAM.) Appellee Peak Property and Casualty Insurance Corporation ("Peak") filed a confession of error with this Court on October 22, 2020. Peak concedes that the lower court erred in granting a motion to dismiss in favor of Peak and requests that this Court reverse the lower court and order it to vacate its order granting the motion to dismiss. We accept this confession of error and summarily reverse the lower court. *See* Fla. R. App. P. 9.315(b).

We also note that this Court will lose jurisdiction of this appeal on January 1, 2021 due to the Legislature's recent amendment of section 26.012, Florida Statutes. *See* Ch. 2020-61, §§ 3, 6, 8, Laws of Fla.; *see also In re*: Transfer of Pending Appeals From Circuit Court to the Fourth District Court of Appeal, 15th Jud. Cir. Admin. Order No. 8.103 (Dec. 10, 2020). Although, by rule, the Clerk is instructed to issue a mandate fifteen (15) days after this Court has rendered a decision, the Court may also order the Clerk to issue the mandate sooner. *See* Fla. R. App. P. 9.340(a). To avoid any jurisdictional issues that may be caused by the statutory change, the Court shall order the Clerk to issue the mandate before January 1, 2021. Any motion for rehearing, clarification, or certification **must** be filed by **December 28, 2020**. *See* Fla. R. App. P. 9.330(a)(1) (setting the time for filing such a motion within fifteen days "or within such other time set by the court").

Accordingly, we **REVERSE** the lower court's order granting Appellee's motion to dismiss and **REMAND** for further proceedings consistent with this opinion. We also **GRANT** Appellant's Motion to Tax Attorney's Fees. The **CLERK** is **ORDERED** to issue this Court's mandate no later than **December 31, 2020**. (MARTZ, CURLEY, and HAFELE, JJ., concur.)

* * *

Landlord-tenant—Attorney's fees—Prevailing party—In small claims action for return of security deposit, trial court erred in awarding attorney's fees to prevailing tenant where tenant raised claim for fees for first time in post judgment motion

MATTHEW KUTNER, Appellant, v. DOUGLAS WRIGHT CARMACK, JR., Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000091-CAXX-MB. L.T. Case No. 50-2017-SC-009006-XXXX-MB. December 2, 2020. Appeal from the County Court in and for Palm Beach County; Nancy Perez, Judge. Counsel: James S. Telepman, North Palm Beach, for Appellant. Jeffrey B. Lampert, West Palm Beach, for Appellee.

(PER CURIAM.) Mathew Kutner ("Defendant") appeals the trial court's amended final judgment awarding Douglas Wright Carmack, Jr. ("Plaintiff") attorney's fees. Defendant argues it was error for the trial court to award Plaintiff his attorney's fees because Plaintiff did not plead a claim for attorney's fees prior to entry of the final judgment. We agree and therefore reverse the fee judgment.

The underlying small claims action concerned the return of a residential lease security deposit. When Plaintiff filed his Statement of Claim, he was unrepresented by counsel and did not plead a claim for attorney's fees. Plaintiff later retained counsel, however, counsel did not amend Plaintiff's Statement of Claim to plead a claim for attorney's fees. Following a bench trial, the trial court entered a final judgment awarding Plaintiff a partial return of the security deposit. Thereafter, Plaintiff filed a postjudgment motion raising, for the first time, a claim for attorney's fees. The trial court granted the motion and entered an amended final judgment awarding Plaintiff entitlement to attorney's fees. This appeal follows.

The issue of whether a prevailing party may raise a claim for attorney's fees for the first time through a postjudgment motion was addressed in *Stockham v. Downs*, 573 So. 2d 835 (Fla. 1991). In *Stockham*, the court held that claims for attorney's fees, whether based on statute or contract, must be pled otherwise the claims are waived. *Id.* at 837. The court explained that the underlying purpose of this pleading requirement is to provide notice because the existence of a claim for attorney's fees may be determinative in the opposing party's decision to pursue, dismiss, or settle a claim and the opposing party "should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him." *Id.*

The Thirteenth Judicial Circuit of Florida has since addressed the issue of whether the *Stockham* pleading requirement is applicable to cases governed by the Florida Small Claims Rules. *Ringhaver Equipment Co. v. White Rose Nursery, Ltd.*, 4 Fla. L. Weekly Supp. 374a (Fla. 13th Cir. Ct. Dec. 4, 1996). In *Ringhaven*, the defendant did not file an answer, and as a result, did not plead a claim for attorney's fees, but instead raised a claim for attorney's fees for the first time

through a postjudgment motion. *Id.* The defendant argued that the *Stockham* pleading requirement was not applicable because, under the Florida Small Claims Rules, the filing of an answer is optional. *Id.* The Thirteenth Circuit disagreed and noted that " '[m]odern pleading requirements serve to notify the opposing part of the claims alleged and to prevent unfair surprise . . . [r]aising an entitlement to attorney's fees only after judgment fails to serve either of these objectives.' " *Id.* (citing *Lindberg v. Lindberg*, 651 So. 2d 1294 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D674c]; *Grasland v. Taylor Woodrow Homes Ltd.*, 460 So. 2d 940 (Fla. 2d DCA 1984)). Although *Ringhaver* is not controlling law, we believe that it is nevertheless persuasive.

Furthermore, we do not agree with Plaintiff's argument that the decisions in *Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So. 2d 1261 (Fla. 1998) [23 Fla. L. Weekly S438a] and *Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Insurance Co.*, 140 So. 3d 529 (Fla. 2014) [39 Fla. L. Weekly S360a] suggest that the *Stockham* pleading requirement is strictly limited solely to cases governed by the Florida Rules of Civil Procedure. In *Green*, the court created an exception to the *Stockham* pleading requirement and held that where cases are dismissed before the filing of an answer, it is permissible for a defendant to raise a claim for attorney's fees in a motion to dismiss or in a separate motion filed within thirty days after dismissal of the action. 730 So. 2d at 1263. In *Advanced Chiropractic*, the court held that the *Stockham* pleading requirement should not be applicable to original proceedings brought under Florida Rule of Appellate Procedure 9.100 because such proceedings are essentially appellate proceedings which are different in nature that trial proceedings. 140 So. 3d at 535. Neither case suggests that the *Stockham* pleading requirement is not applicable to trial proceedings governed by the Florida Small Claims Rules.

Here, because Plaintiff did not raise a claim for attorney's fees in his Statement of Claim, Defendant did not receive notice pursuant to *Stockholm* that Plaintiff was seeking attorney's fees until after entry of the final judgment. As a result, it was error for the trial court to award attorney's fees in. Accordingly, we **REVERSE** the trial court's award of attorney's fees in favor of Plaintiff. (CURLEY, KELLEY, and FEUER JJ., concur.)

* * *

Costs—Appellate—Motion for costs on appeal cannot be filed in district court, but must be filed in lower tribunal after jurisdiction has been returned to that body by appellate court's mandate

FIRST PROTECTIVE INSURANCE CO., d/b/a FRONTLINE INSURANCE CO., Appellant, v. JOSEPH SHEEHAN and WENDY SHEEHAN, Appellees. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000155-CAXX-MB. L.T. Case No. 50-2019-CC-008891-XXXX-MB. November 25, 2020. Appeal from the County Court in and for Palm Beach County; Edward Garrison, Judge. Counsel: Phillip J. Sheehe and Karen D. Fultz, Sheehe & Associates, PA, Miami; and Jay M. Levy and Ryan L. Marks, Jay M. Levy, PA, Miami, for Appellant. Mark A. Nation and Paul W. Pritchard, The Nation Law Firm, Longwood, for Appellees.

(PER CURIAM.) AFFIRMED.

As it relates to appellate attorney's fees, Appellees' Motion for Appellate Attorney's Fees and Costs is GRANTED and the matter is remanded to the trial court to award a reasonable amount of fees. As it relates to appellate costs, Appellees' Motion for Appellate Attorney's Fees and Costs is DISMISSED because a "motion for appellate costs cannot be filed in the [appellate court] but must be filed in the lower tribunal after jurisdiction has been returned to that body by [the appellate court's] mandate." *Superior Protection, Inc. v. Martinez*, 930 So. 2d 859, 860 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1669b] (citing *Vella v. Vella*, 691 So. 2d 612 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D954r]); *see also* Fla. R. App. P. 9.400(a) (stating that "[c]osts shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (KERNER, MARTZ, and J. KEYSER, JJ., concur.)

* * *

Criminal law—Battery—Sentencing—Trial court erred in finding that defendant's battery conviction was "crime of domestic violence" that subjected defendant to enhanced penalties where jury did not find necessary facts for classification of offense as crime of domestic violence, and it is not clear beyond reasonable doubt that jury would have done so—Error is harmless where defendant did not receive enhanced penalties not available in sentencing any other defendant convicted of battery that does not qualify as crime of domestic violence

KINSLER BRICE JEAN BART, JR., Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 50-2019-AP-000119-AXXX-MB. L.T. Case No. 50-2018-MM-011876-AXXX-MB. November 30, 2020. Appeal from the County Court in and for Palm Beach County; Debra Moses Stephens, Judge. Counsel: Robert Porter, Office of the Public Defender, West Palm Beach, for Appellant. Joseph R. Kadis, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, Kinsler Brice Jean Bart, Jr., appeals his judgement and sentence for battery in county court. The trial court sentenced Appellant to twelve months of probation with the special conditions that he attend a parenting class and a batterers' intervention program; it also ordered Appellant to pay restitution and a $201 domestic violence surcharge pursuant to section 938.08, Florida Statutes (2018). We affirm, but write to address Appellant's argument that the trial court imposed an illegal sentence when it found that Appellant's battery conviction qualified as a "crime of domestic violence." We hold that, in doing so, the trial court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but that the trial court's error was harmless.

Under *Apprendi*, a court is prohibited from finding any fact which "increases the penalty for a crime" unless that fact is submitted to a jury and proven beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103 (2013) [24 Fla. L. Weekly Fed. S310a] (citing *Apprendi*, 530 U.S. at 490). In short, the court exceeds its authority when it inflicts a punishment that the jury's verdict does not allow since the jury has not found all the facts which the law makes essential to punishment. *See Blakely v. Washington*, 542 U.S. 296, 304 (2004) [17 Fla. L. Weekly Fed. S430a]. Nevertheless, an error based on *Apprendi* or its progeny is subject to the harmless error test. *See Williams v. State*, 242 So. 3d 280, 290 (Fla. 2018) [43 Fla. L. Weekly S91a]; *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). Such an error is harmless if it is "clear beyond a reasonable doubt" that a jury would have also the requisite facts needed by the trial court to impose a harsher sentence. *See Galindez v. State*, 955 So. 2d 517, 522 (Fla. 2007) [32 Fla. L. Weekly S89a].

Section 741.28(2), Florida Statutes (2018), allows certain crimes (such as battery, assault, or kidnapping) to be classified as a "crime of domestic violence" when the offense results "in physical injury or death of one family or household member by another family or household member." If a defendant is adjudicated guilty of one of the predicate offenses and the crime is classified as a crime of domestic violence, the defendant is then subject to additional, *mandatory* penalties such as completion of a batterers' intervention program and/or a minimum sentence of up to twenty days in the county jail. *See* §§ 741.281, 741.283, Fla. Stat. (2018).

Since finding an offense to be a crime of domestic violence increases the penalties a defendant faces, the lower court erred in finding that the battery committed by Appellant was domestic in nature. *See Williams*, 242 So. 3d at 288 (quoting *Alleyne*, 570 U.S. at 115). Not only should a jury have been responsible for finding the necessary facts, but the record is not "clear beyond a reasonable doubt" that a jury would have done so. *See Galindez*, 955 So. 2d at

522. However, this error is harmless because Appellant did not receive an enhanced penalty that was unavailable to any other defendant convicted of a non-domestic violence misdemeanor battery. *See Alleyne*, 570 U.S. at 112. Although Appellant was ordered to attend and complete a batterers' intervention program, which is a mandatory special condition of probation if a defendant is found guilty of a crime of domestic violence, the lower court had discretion to impose this special condition in the instant case regardless of a domestic violence finding since attendance in this program bears a relationship to the crime for which Appellant was convicted. *See Spano v. State*, 60 So. 3d 1108, 1109 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D924a]. Likewise, although Appellant argues that the trial court's imposition of the domestic violence surcharge qualifies as an enhanced penalty, the surcharge is imposed for any battery conviction, without regard for the domestic violence designation. *See* § 938.08, Fla. Stat. (2018) (citing § 784.03, Fla. Stat.).

Since any *Apprendi* error was harmless, we **AFFIRM** the judgment and sentence of the lower court. (SHEPHERD, G. KEYSER, and SCHER, JJ., concur.)

* * *

Criminal law—Driving under influence—Evidence—Prior bad acts—Error to allow state to impeach defendant with fact that he had previously taken field sobriety exercises—Defendant did not open door to impeachment by testifying that in instant case, he took extra step and stepped on his toes during walk-and-turn exercise in order to show officer that he could walk more and that he was complying with officer's directions—Testimony was not so misleading as to leave state no choice but to rely on otherwise inadmissible evidence to correct false impression—Error was not harmless

ELMER FELICIANO RAMIREZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 50-2019-AP-000107-AXXX-MB. L.T. Case No. 50-2018-CT-021772-AXXX-MB. November 24, 2020. Appeal from the County Court in and for Palm Beach County; Judge Leonard Hanser. Counsel: Logan T. Mohs, Office of the Public Defender, West Palm Beach, for Appellant. Joseph R. Kadis, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Elmer Feliciano Ramirez appeals his conviction and sentence for driving under the influence. He argues that the trial court committed reversible error when it allowed the State to impeach him with the fact that he had previously taken roadside sobriety tests. Appellant argues that his prior testimony had not "opened the door" to impeachment with his prior bad acts and that, even if he did, the impeachment was unduly prejudicial. We agree with Appellant that he did not open the door to being impeached with his previous roadside sobriety tests and hold that this impeachment constituted reversible error. Accordingly, we reverse the judgment and sentence of the trial court and remand for a new trial.

Factual Background

At trial, the State relied on the testimony of the arresting officers, Deputy Brian Lembo and Deputy Adolfo Sentmanat. Deputy Lembo testified that he performed a traffic stop on Appellant's vehicle after he noticed it had an expired tag. When the officer approached Appellant, he noticed that Appellant had bloodshot eyes, a strong odor of alcohol, and "slow, heavy speech." Deputy Lembo also noticed, sitting in plain-view on the passenger seat, a half-full 2.5 liter bottle (or handle) of rum. Given Appellant's appearance and the handle of rum, Deputy Lembo called the on-duty DUI investigator, Deputy Sentmanat, to the scene. Deputy Sentmanat also noticed that Appellant had bloodshot eyes, slurred speech, and was swaying side-to-side in a circular pattern. Appellant also admitted to Deputy Sentmanat that he had drank three to four beers earlier that night.

Based on these observations, Deputy Sentmanat asked Appellant to perform several roadside sobriety tests. The officer first performed a penlight test which requires the driver to follow a light with their eyes without moving their head. Appellant could not follow the light without moving his head, and Deputy Sentmanat noticed he visibly swayed from side-to-side. Deputy Sentmanat then asked Appellant to do the "walk-and-turn" which required Appellant to walk in a straight line with *nine* heel-to-toe steps. Appellant initially stumbled, took *ten* steps instead of nine, and did not walk completely heel-to-toe. After this second test, Appellant refused to perform any other roadside sobriety tests and was consequently arrested for DUI.

In response, Appellant testified in his own defense. Appellant testified that he only had two beers[1] that night, did not feel intoxicated or impaired, and that he did not know the handle of rum was in the car with him (nor did he drink from it). Appellant admitted to taking an extra step during the walk-and-turn test, but only because he wanted to show the officer "that I wasn't drunk, that I could walk more than I could." He also stated that he refused to do further roadside tests because he was not drunk and he saw no reason to continue to do them.

Before cross-examining Appellant, the State requested a bench conference. At the conference, the State argued it should be able to impeach Appellant with his previous DUI convictions. The State's position was that Appellant was lying about why he took ten steps during the walk-and-turn test and that it was a manufactured excuse to explain why he had failed two straight field sobriety tests. The defense argued that Appellant was not lying and that he had made no references to his previous DUIs. The trial court ruled that the State could not impeach Appellant with his prior DUI convictions but could ask him whether he had previously performed field sobriety tests. The lower court maintained its ruling even when defense counsel argued that the impeachment would allow the jury to infer he had previously been arrested for other DUIs. Appellant acknowledged on cross-examination that he had previously taken roadside sobriety tests. The jury ultimately found Appellant guilty of DUI as charged in the Information. This appeal follows.

Legal Analysis

The sole issue on appeal is whether or not the trial court erred in allowing the State to impeach Appellant with previous roadside sobriety tests he had taken prior to the charged offense. The State argues that this impeachment was proper because the Appellant "opened the door" to being impeached with prior bad acts since his testimony could have misled the jury. Appellant counters that he did not open the door and that the State's impeachment was unduly prejudicial. We hold that the trial court improperly allowed the State to impeach Appellant with prior bad acts after incorrectly finding that Appellant "opened the door" and that this error requires reversal.

Generally, Florida's evidence code forbids the introduction of prior convictions or other bad acts (also known as *Williams* rule evidence) since it is inherently prejudicial to a defendant. § 90.404(2)(a), Fla. Stat. (2019); *Williams v. State*, 110 So. 2d 654, 662 (Fla. 1959). *See also Craig v. State*, 510 So. 2d 857, 863 (Fla. 1987) ("it is generally improper to admit evidence tending to show that the accused committed crimes other than those of which he stands accused."). However, a defendant can "open the door" to the introduction of *Williams* rule evidence if he or she presents "misleading testimony" that can only be corrected or properly contextualized by otherwise inadmissible evidence. *Calloway v. State*, 210 So. 3d 1160, 1186 (Fla. 2017) [42 Fla. L. Weekly S45a]. Even when the defendant "opens the door," such evidence must be carefully admitted because of its inherently prejudicial nature. *See Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000) [25 Fla. L. Weekly S89a]. Since evidence that suggests or implies that a defendant has committed prior bad acts can have a powerful effect on the trier-of-fact, the improper admission of such material is usually reversible error unless the State can prove

beyond a reasonable doubt that the error was harmless. *See Bozeman v. State*, 698 So. 2d 629, 631-32 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2073b].

"The mere fact that testimony may be characterized as incomplete or misleading" is not sufficient to open the door to inadmissible evidence. *Brown v. State*, 294 So. 3d 367, 372 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2747b]. A witness must first "offer misleading testimony or make a specific factual assertion which the opposing party has the right to correct so that the jury will not be misled." *Siegel v. State*, 68 So. 3d 281, 288 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1633a] (citations omitted). The State must then "demonstrate a legitimate need to resort to such evidence to correct a false impression." *Ayalavillamizar v. State*, 134 So. 3d 492, 496 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D332b] (quoting *Redd v. State*, 49 So. 3d 329, 333 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2706a]; *see also Melendez v. State*, 135 So. 3d 456, 460 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D601b] (the State must demonstrate that impeachment is "legitimately necessary to qualify or explain any misleading or incomplete impression"). If a defendant does open the door to impeachment with *Williams* rule evidence, the trial court must ensure that the impeachment is strictly limited to be congruent with the defendant's testimony. *Compare Baker v. State*, 102 So. 3d 756, 759 (Fla. 4th DCA 2012) [38 Fla. L. Weekly D13a] (holding that State could properly impeach defendant with his prior arrests—but not the specifics of the arrest—after he claimed that his bad experiences with the police were due to "profiling"), *with Hill v. State*, 933 So. 2d 667, 669-70 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1892a] (finding that defendant's testimony about the length of time an interrogation took place did not open the door to the State impeaching defendant with the fact he confessed to multiple robberies during the same interview).

Appellant testified on direct that he took ten steps instead of nine to show "that I wasn't drunk, that I could walk more than I could," and that he stepped on his toes during the exercise to show the officer he was complying with his directions. He also categorically denied being under the influence of alcohol. While this testimony may or may not have been truthful, Appellant's testimony was not so misleading as to leave the State with no choice but to rely on otherwise inadmissible evidence to correct this false impression. *See Brown*, 294 So. 3d at 372. Appellant's testimony was an alternative explanation for what the State's witnesses previously testified to, and it did not place the State at an unfair advantage by omitting contextually appropriate facts. *See Siegel*, 68 So. 3d at 288. The testimony merely presented Appellant's version of the events which the jury would be free to believe or disregard as with any other piece of witness testimony. *Cf. Hayward v. State*, 59 So. 3d 303, 306 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D829a] (finding that a defendant's claim that he did not trust the results of a breath test based on anecdotal reports "was not misleading or incomplete" and reversing the conviction after the trial court incorrectly found the door had been opened to impeach the defendant with his prior DUI conviction).

The improper admission of *Williams* rule evidence is presumptively harmful. *Pulcini v. State*, 41 So. 3d 338, 346 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1620a]; *Hayward*, 59 So. 3d at 305. In order to overcome this presumption, the State has the burden to prove, beyond a reasonable doubt, that there is no reasonable probability that the error contributed to the conviction. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). The State fails to do so in this case, as they do not even attempt to argue that the error was harmless. In addition, the overall strength of the State's other evidence at trial does not render the error harmless. The harmless error test does not focus on the sufficiency or quality of the properly admitted evidence, but instead looks at the improper evidence and whether or not it could have affected the verdict. *See Chavez v. State*, 25 So. 3d 49, 54 (Fla. 1st DCA 2010) [34 Fla. L. Weekly D2521b] ("[d]espite the significant evidence of guilt, the trial court's error in admitting the statements was not harmless under the controlling precedent of *DiGuilio*."). For this reason, we cannot say that the improper impeachment was harmless beyond a reasonable doubt.

Conclusion

When the trial court allows evidence that suggests a defendant has committed other crimes or bad acts based on the mistaken belief that the defendant has "opened the door," the error cannot be considered harmless. *See Bozeman*, 698 So. 2d at 631. Accordingly, we **REVERSE** Appellant's conviction and sentence and **REMAND** for a new trial. (CARACUZZO and GILLEN, JJ., concur. SHEPHERD, J., concurs in result only.)

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[1]On redirect examination, Appellant instead stated that he had three or three-and-a-half beers.

* * *

Landlord-tenant—Eviction—Subject matter jurisdiction—County court lacked subject matter jurisdiction over dispute regarding possession of property where parties intended for quitclaim deed on property to act as security for $65,000 mortgage held by plaintiff—Action should have been brought as foreclosure action in circuit court rather than as eviction action—No merit to argument that appellate court is bound to respect stipulation agreement in which defendant agreed to vacate premises and not engage in further litigation because county court lacked jurisdiction to accept or enforce stipulation

DOV SAMUEL MARKOVICH, Appellant, v. ELIAV JECOBY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000207-CAXX-MB. L.T. Case No. 50-2019-CC-012003-XXXX-SB. November 30, 2020. Appeal from the County Court in and for Palm Beach County; Judge Marni A. Bryson. Counsel: Dov Markovich, Pro se, Delray Beach, for Appellant. Ron Renzy, Wallberg & Renzy, P.A., Coral Springs, for Appellee.

(PER CURIAM.) Appellant, Dov Markovich, appeals a final judgment and writ of possession evicting him from a residence purportedly owned by Appellee, Eliav Jecoby. Markovich asserts that the final judgment is void because the county court did not have subject matter jurisdiction over the instant case. Jecoby argues that he and Markovich entered into a binding stipulation agreement which renders any issues on appeal moot. After careful review of the record below, we conclude that the county court lacked subject matter jurisdiction over the parties and that the only proper action is to dismiss the case below. Consequently, we reverse the final judgment of the county court and order it to dismiss the case for lack of subject matter jurisdiction.

Factual Background

On September 12, 2019, Jecoby filed a Complaint in county court seeking to evict Markovich from a residence in Delray Beach, FL. Jecoby alleged that Markovich failed to pay rent for two months and that he had been served notice to pay rent or deliver possession on September 5, 2019. Markovich filed a counterclaim against Jecoby seeking quiet title. In his counterclaim, Markovich alleged that he purchased the property from a third party on September 13, 2018 and that the property was transferred to him via quitclaim deed. Contemporaneous with this transfer, Markovich entered into a balloon mortgage with Jecoby whereby Jecoby would provide a loan in the amount of $65,000.00; Markovich would then pay Jecoby $650.00 a month for a period of sixty (60) months with a balloon payment at the end of the term. Markovich alleged that, on June 20, 2019, Jecoby fraudulently recorded a quitclaim deed which purportedly conveyed the property from Markovich to Jecoby. Markovich claimed that he had a valid ownership interest in the property from the original quitclaim deed and that no landlord-tenant relationship between him and Jecoby existed.

On October 11, 2019, the lower court *sua sponte* entered an order setting mediation and a final hearing on possession for October 23, 2019. In doing so, the lower court explicitly found that the Residential Landlord and Tenant Act governed the proceedings. On October 17, 2019, Markovich filed a motion seeking to set aside the court's October 11, 2019 Order. The motion alleged that the county court did not have subject matter jurisdiction over the matter because it was not a landlord-tenant matter. Markovich instead argued that the dispute was governed by section 26.012(2)(g), Florida Statutes (2019), because the instant case was a matter of ejectment or foreclosure and not the violation of a lease between a landlord and tenant (which Markovich claims did not exist). The lower court denied this motion the same day.

On November 20, 2019, the lower court entered a "Stipulation for Payment with Judgment Upon Default and Disbursal of Any Registry Deposits" which was signed by both parties and the county court judge. Based on the terms of the stipulation, Markovich agreed to vacate the premises and not engage in any further litigation; Jecoby agreed to dismiss the case, not to seek any monetary damages, and to provide Markovich with certain documents related to the property. Shortly thereafter, both parties filed documents claiming that the other party refused to comply with the stipulation. On December 9, 2019, the county court entered a final judgment against Markovich and issued a writ of possession. This appeal followed.

Legal Analysis

Appellant Markovich's sole argument on appeal is generally a restatement of his October 17, 2019 motion arguing that the county court lacked subject matter jurisdiction because the action below was not an eviction proceeding. Whether or not a court has subject matter jurisdiction is "vital to a court's power to adjudicate the rights of individuals," and so it is imperative that this Court address the issue first. *See 84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1298 (Fla. 2d DCA 1994). "Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1806b]. If the trial court lacks subject matter jurisdiction, any judgment it renders is void. *Miller v. Preefer*, 1 So. 3d 1278, 1282 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D383a]. Lack of subject matter jurisdiction is a fundamental error and can be raised at any time, including for the first time on appeal. *See 84 Lumber*, 656 So. 2d at 1298.

Both county courts and circuit courts have jurisdiction over matters of real property. In some cases, they may even have concurrent jurisdiction with one another. The county court has exclusive jurisdiction to handle eviction proceedings between a landlord and tenant, but both the county and circuit court can consider other landlord-tenant disputes (provided the amount in controversy is within the jurisdictional limits of each court). *Compare* § 83.59(2), Fla. Stat. (2019), *with* § 34.011(1), Fla. Stat. (2019). *See also* § 34.011(2), Fla. Stat. (2019) (county courts have exclusive jurisdiction of eviction actions); *accord Bell v. Kornblatt*, 705 So. 2d 113, 114 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D264a]. Similarly, both courts have some overlapping jurisdiction in regards to other property disputes. Circuit courts have exclusive jurisdiction over "actions of ejectment" and "actions involving the title and boundaries of real property." § 26.012(2)(f), (g), Fla. Stat. However, county courts may hear "all matters in equity involved in any case" so long as the amount in controversy meets the jurisdictional limits of county court. § 34.01(4), Fla. Stat. Our supreme court has taken this to mean that circuit courts and county courts have concurrent jurisdiction of foreclosures where the amount in controversy is below the county court's jurisdictional limit. *See Alexdex Corp. v. Nachon Enters., Inc.*, 641 So. 2d 858, 861 (Fla. 1994).

Although Markovich previously contested the validity of the quitclaim deed that Jecoby executed in July of 2019, he concedes on appeal that whether or not deed is fraudulent is not properly before this Court. Instead, Markovich argues that section 697.01, Florida Statutes controls since the quitclaim deed acted as security for the mortgage he entered into with Jecoby. Markovich posits that, because this action was a foreclosure and not an eviction, the county court lacked jurisdiction.[1] Section 697.01 defines instruments that should be construed as a mortgage as follows:

> All conveyances . . . or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money . . . shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

§ 697.01(1), Fla. Stat. In order to determine whether such a conveyance is a mortgage, the "essential point" is the intent of the parties since no conveyance can be a mortgage unless it was used to secure the payment of a debt. *Williams v. Roundtree*, 478 So. 2d 1171, 1172 (Fla. 1st DCA 1985). If a conveyance is considered a *de facto* mortgage, any foreclosure thereof is governed by the same rules applicable to any other mortgage foreclosure. *Lunn Woods v. Lowery*, 577 So. 2d 705, 707 (Fla. 2d DCA 1991).

Here, the record is clear that the parties intended the quitclaim deed to act as part of a secured mortgage. The mortgage Markovich and Jecoby entered into was secured by both a note and the second deed. The former owner of the property, Celina Gelerman, provided a notarized statement stating that Jecoby had actually purchased the property for Markovich and that the mortgage was created so that Markovich could have the benefits of establishing Florida residency (including homestead benefits) while also providing a mechanism for Markovich to fulfill his debt to Jecoby. Gelerman also stated that the second quitclaim deed was explicitly created as security for Jecoby in case Markovich could not make payments under the mortgage. Gelerman's statement is supported by the language of the mortgage itself which states that, in addition to a note, the property is further secured by a quitclaim deed "that the Mortgagee may file in the event the Mortgagor is in default for over sixty (60) days." These facts clearly show that the intent of the parties was for quitclaim deed to act as security for the mortgage.

In seeming anticipation of this potential issue, the Note backing the mortgage contains an additional provision whereby "the Note Holder shall retain the right to repossess the property upon written notice to [the borrower] without filing a judicial foreclosure proceeding." The language of the Note confirms that the quitclaim deed was meant to be a mechanism to transfer the property while avoiding a foreclosure proceeding. This provision is completely unenforceable since it contradicts Florida's foreclosure law. A mortgage is, by definition, a specific lien on the property described and *not* "a conveyance of legal title or of the right of possession." § 697.02, Fla. Stat. By law, a mortgagee can *only take possession of the property through judicial foreclosure. Orlando Hyatt Assocs., Ltd. v. F.D.I.C.*, 629 So. 2d 975, 977 (Fla. 5th DCA 1993) (quoting *In re Aloma Square*, 85 B.R. 623, 625 (Bankr. M.D. Fla. 1988)). Despite the language of the Note and Mortgage, it cannot abrogate Florida law and waive the foreclosure requirement.

Since the quitclaim deed at issue was meant to secure a mortgage, and given that mortgages require a judicial foreclosure in order to gain possession, it is clear this action should have been brought as a foreclosure, rather than an eviction. While a county court can have jurisdiction over a foreclosure, the foreclosure cannot exceed the amount in controversy of the county court which, at the time the action was filed, was $15,000.00. § 34.01(1)(c)1., Fla. Stat.; *see also*

Coral Springs Tower Club II Condo. Ass'n, Inc. v. Dizefalo, 667 So. 2d 966, 967 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D433b]. The mortgage in this case was for a sum of $65,000.00. Since the value of the mortgage plainly exceeds the county court's jurisdictional limits, only the circuit court had subject matter jurisdiction over this action.[2] Consequently, the final judgment entered by the county court is void for lack of jurisdiction and this Court must reverse the final judgment.

Despite this clear jurisdictional defect, Jecoby insists that Markovich's appeal has no merit due to the stipulation agreement they entered into. A stipulation that is properly entered into is binding upon the court and all of the parties, *Gunn Plumbing, Inc. v. Dania Bank*, 252 So. 2d 1, 4 (Fla. 1971), and a court is bound to enforce the stipulation unless one of the parties can demonstrate a ground for rescission such as mistake, fraud, or misrepresentation. *See EGYB, Inc. v. First Union Nat. Bank of Fla.*, 630 So. 2d 1216, 1217 (Fla. 5th DCA 1994). Markovich does not allege any grounds for rescission, and so Jecoby argues that this Court is bound to respect the stipulation regardless of any jurisdictional issues. Subject matter jurisdiction is conferred by the constitution or a statute and parties can never agree or consent to subject matter jurisdiction if it does not otherwise exist. *See Citizens Prop. Ins. Corp. v. Scylla Properties, LLC*, 946 So. 2d 1179, 1181 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D60a]; *Snider v. Snider*, 686 So. 2d 802, 84 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D299a]. Therefore, the lower court still lacked jurisdiction to enter the final judgment.

Conclusion

Because the action brought by Jecoby against Markovich was actually a foreclosure with an amount in controversy over $15,000.00, the county court lacked subject matter jurisdiction to adjudicate the action from its onset. Although the parties did enter into a stipulation agreement, the agreement cannot and did not confer jurisdiction on the county court. As a result, we **REVERSE** the county court's entry of final judgment against Markovich. We **REMAND** the case back to the county court to **DISMISS** the action for lack of subject matter jurisdiction. Finally, we also **DENY** Jecoby's "Renewed Motion for Costs and Attorney's Fees." (KERNER, MARTZ, and J. KEYSER, JJ., concur.)

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[1]In further support of his argument that the action below could not be an eviction proceeding, Markovich points out that no written or oral rental agreement existed between him and Jecoby. While the record does contain a written lease, that lease was not signed by either party; thus, we concur with Markovich that there is no evidence that the terms of a lease were executed or agreed upon. *See Toledo v. Escamilla*, 962 So. 2d 1028, 1030 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1876a] (holding that, without proof of a written or oral rental agreement, the Landlord Tenant Act does not apply).

[2]The county court also lacked jurisdiction because Markovich raised a counterclaim for quiet title which is an action that can only be raised in circuit court. *See Blackton, Inc. v. Young*, 629 So. 2d 938, 940 (Fla. 5th DCA 1993), *abrogated on other grounds Alexdex Corp.*, 641 So. 2d at 861.

* * *

Contracts—Implied-in-fact—Action by subcontractor against property owner to recover compensation for additional work outside of scope of landscaping subcontract that was performed by subcontractor at owner's request—Error to enter summary judgment in favor of owner where record is ambiguous as to whether there was mutual assent required to create binding implied-in-fact contract for additional work —Subcontractor cannot recover from owner under quasi-contract/unjust enrichment claim where subcontractor has not exhausted all available remedies against general contractor

NATURE'S LAWN CARE, INC., d/b/a NATURE'S LANDSCAPING, Appellant, v. RHYTHM & HUES, LLC, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000185-CAXX-MB. L.T. Case No. 50-2018-CC-011701-XXXX-NB. December 1, 2020. Appeal from the County Court in and for Palm Beach County; Judge Frank S. Castor. Counsel: John Farina, Boyes, Farina & Matwiczyk, Palm Beach Gardens, for Appellant. Michael R. Brennan, Evans Law, Boca Raton, for Appellee.

(PER CURIAM.) Appellant, Nature's Lawn Care, Inc. ("Nature's Lawn"), entered into a subcontract worth $11,309.00 with general contractor, IBIS Building Corporation ("IBIS"), to perform landscaping services for a children's activity center owned by Appellee, Rhythm & Hues, LLC. Nature's Lawn brought suit against Rhythm & Hues in county court, claiming that it was owed an additional $7,110.00 in compensation for work that was outside of the scope of the subcontract. Rhythm & Hues moved for summary judgment, arguing that Nature's Lawn was precluded from recovery based on the Fourth District's decision in *Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc.*, 695 So. 2d 383 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1379b] (*en banc*). The lower court summarily granted Rhythm & Hues' motion for summary judgment. After a careful review of the record, the Court holds that there were genuine issues of material fact as to whether the parties mutually assented to an implied-in-fact contract. Because there are disputed facts in the record, we must reverse the county court's order granting summary judgment.

Factual Background

In its complaint, Nature's Lawn alleges that Rhythm & Hues entered into a contract with IBIS to build a children's activity center for Rhythm & Hues (the "Prime Contract"). IBIS then subcontracted Nature's Lawn to perform landscaping on the project for $11,309.00 (the "Subcontract"). Nature's Lawn alleges that, during the course of the project, it performed an additional $7,110.00 worth of work that was outside the scope of the Prime Contract and Subcontract at Rhythm & Hues' request, but was never paid for this work.

Rhythm & Hues moved for summary judgment, primarily relying on the deposition testimony of its sole owner and manager, Courtney Palacios. In her deposition, Ms. Palacios stated that she was not satisfied with the landscaping plan proposed by IBIS and Nature's Lawn and arranged a meeting with Ryan Ackner, the vice president and co-owner of IBIS, and Mark Campbell, the owner of Nature's Lawn, to discuss modifying the landscaping plan. The three then walked the property while Ms. Palacios described the changes she wanted. Ms. Palacios left the meeting believing that these changes would not affect the Subcontract price since her understanding was that "what I was replacing was equal in value." She also stated that she expected to see plant samples from the nursery before installation and that it would operate like any other change order on the project. Ms. Palacios also provided a hand-drawn diagram to Nature's Lawn outlining the modified landscaping proposal.[1]

Several weeks later, Ms. Palacios noticed that landscaping was being installed, despite the fact she did not recall agreeing to any final changes, and told the supervisor on-site to stop the installation. Ms. Palacios called Ryan Ackner, but he convinced her to continue with the installation of the new landscaping. Ms. Palacios eventually received and refused to pay an invoice for $18,428.00—$7,119.00 more than the Subcontract price. Nature's Lawn eventually filed a Claim of Lien on the property in the amount of $18,428.00. IBIS paid Nature's Lawn the $11,309.00 due under the Subcontract and Nature's Lawn executed a Waiver and Release of Lien with IBIS. After sending a demand letter to Rhythm & Hues, Nature's Lawn filed the instant suit.

Legal Analysis

On appeal, Nature's Lawn argues that the additional work it completed for Rhythm & Hues constituted either an implied-in-fact contract or a quasi-contract (also known as an implied-in-law contract). It argues that the lower court erred in granting summary judgment because there were genuine issues of material fact as to whether these implied contracts were formed. Rhythm & Hues asserts

that the Prime Contract and Subcontract govern this dispute and that, even if they did not, Nature's Lawn is precluded from recovery as a matter of law due to the Fourth District's decision in *Commerce*. An appellate court reviews an order granting summary judgment *de novo*. *Maguire-Ress v. Stettner*, 268 So. 3d 171, 172 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D982a]. The party moving for summary judgment must demonstrate that there are no disputed issues of material fact and that the nonmoving party's arguments are either insufficient as a matter of law or are not supported by the facts. *770 PPR, LLC v. TJCV Land Trust*, 30 So. 3d 613, 618 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D557a] (citations omitted). All ambiguities and inferences must be viewed in favor of the non-moving party. *Orlando v. FEI Hollywood, Inc.*, 898 So. 2d 167, 168 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D663d].

First, the Court agrees with Nature's Lawn and holds that no express contract governs this dispute. The interpretation of a contract's terms is a matter of law, and thus the language of a contract is reviewed *de novo*. *See Scott v. Simpson*, 774 So. 2d 881, 883 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D109b]. Rhythm & Hues relies on the testimony of Ms. Palacios, who stated that she believed that the additional landscaping constituted a change order and not a new contract, as evidence that either the Prime Contract or Subcontract apply. Both contracts directly refute this assertion as both require any change order to be done in writing. Section 10.1 of the Prime Contract states that:

> The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of addition, deletions or other revisions, the Contract Sum and Contract Time *being adjusted accordingly in writing*.

Similarly, Section 4 of the Subcontract allowed IBIS to "make changes, additions and/or deletions" to the work performed by Nature's Lawn, with or without notice. However, if a change order "is deemed by Subcontractor to require an increase in the Subcontract Consideration or a compensable change in the Subcontract schedule," then Nature's Lawn had to provide IBIS with notice and written proof of the increased costs within five days. Since none of the parties followed the dictates of the Prime Contract or Subcontract regarding a change order it is clear that no express contract governed the additional $7,119.00 in landscaping.

Since the facts indicate that the parties did not form a change order, the next question is whether the meeting between Palacios, Ackner, and Campbell manifested a new implied-in-fact contract or a quasi-contract. Although the two are often conflated, quasi-contracts and implied in-fact contracts are separate and distinct legal concepts. *See Commerce*, 695 So. 2d at 387 (noting that there has been a "blurring of the distinction between contract implied in fact and quasi contract" because both theories could potentially apply to the same factual pattern). The distinction between the two types of implied contracts is important as a party cannot recover based on a quasi-contract if an implied-in-fact contract exists. *See id.*; *Baron v. Osman*, 39 So. 3d 449, 451 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1464a]. When the facts indicate that either could apply, a court is required to "view the facts as they might apply to both" and determine which theory could apply. *Commerce*, 695 So. 2d at 387.

A quasi-contract is technically not a contract but is instead "an obligation imposed by the court to bring about justice and equity" when one party is unjustly enriched at the expense of another and compensation is required for equitable reasons. *14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc.*, 43 So. 3d 877, 881 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2001b] (quoting *Williston on Contracts* § 1:6). Conversely, an implied-in-fact contract exists when the parties implicitly assent to the terms of a contract through their conduct or dealings with one another. *See Baron*, 39 So. 3d at 451; *Rabon v. Inn of Lake City, Inc.*, 693 So. 2d 1126, 1131 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D1304e]. Unlike a quasi-contract, an implied-in-fact contract is an actual, enforceable contract that is comparable to any oral or written contract under law. *See, e.g.*, *Doug Hambel's Plumbing, Inc. v. Conway*, 831 So. 2d 704, 705 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2368a] (holding that an implied-in-fact contract satisfies the contract requirement of Florida' Construction Lien Law).

The main difference between an implied-in-fact contract and a quasi-contract is that the parties must assent to the terms of an implied-in-fact contract. *See Rite-Way Painting & Plastering, Inc. v. Tetor*, 582 So. 2d 15, 17 (Fla. 2d DCA 1991). Likewise, the difference between an express contract and an implied-in-fact contract is how the parties manifest their assent. An express contract requires an explicit verbal or written agreement whereas assent in an implied-in-fact contract is "manifested in language or by implication from other circumstances." Restatement (Second) of Contracts, § 4 cmt. a (1981); *Rabon*, 693 So. 2d at 1131. One final difference between the two implied contracts is that an implied-in-fact contract can only be found if an express contract does not exist, but a quasi-contract can only be established if there is neither an express contract nor an implied-in-fact contract. *Baron*, 39 So. 3d at 451.

Both parties rely on the *Commerce* case because it discusses quasi-contracts *vis a vis* a subcontractor and the owner of property, which is exactly the same posture as the instant appeal. In *Commerce*, the subcontractor acknowledged that no express contract existed between it and the owner, but argued that a quasi-contract existed because it conferred a benefit on the owner and it would be unfair for the subcontractor to go uncompensated for that benefit. 695 So. 2d at 384-85. The *Commerce* court agreed that a quasi-contract *could* apply between a subcontractor and an owner, but held that the subcontractor had to plead two additional elements to show that the enrichment of the owner was unjust: 1) the subcontractor exhausted all remedies available to it against the general contractor, and 2) the owner did not give any consideration for improvements furnished by the subcontractor. *Id.* at 388-89 (citing *Maloney v. Therm Alum Indus., Corp.*, 636 So. 2d 767, 768-80 (Fla. 4th DCA 1994)).

Insofar as Rhythm & Hues asserts that a quasi-contract cannot exist as a matter of law, we agree. A subcontractor cannot recover under a quasi-contract/unjust enrichment claim if it has not exhausted all available remedies against the general contractor. *Id*. Nature's Lawn could have and should have demanded full payment from IBIS and IBIS could have then sought indemnity from Rhythm & Hues. *See id.* at 389 ("The contractor with whom the subcontractor is in privity is always the pocket of first resort."). Nature's Lawn argues that the instant case is distinguishable from *Commerce* since IBIS (as the general contractor) was also never paid by Rhythm & Hues; thus, Nature's Lawn was under no obligation to exhaust its remedies against IBIS. This is a distinction without a difference as whether or not a general contractor is paid is irrelevant to an action between an owner and subcontractor. *Id.* at 384-85; *see also Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc.*, 353 So. 2d 840, 842 (Fla. 1977) (holding that a subcontractor still has the right to recover from a general contractor even when the general contractor has yet to be paid by the owner).

However, the legal existence of a quasi-contract is irrelevant if there is a valid implied-in-fact contract. As outlined above, the key distinction between an implied-in-fact contract and a quasi-contract is whether mutual assent can be adduced from the conduct of the parties. *CDS & Assocs. of Palm Beach, Inc., v. 1711 Donna Road Assocs., Inc.*, 743 So. 2d 1223, 1224 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2577a] (quoting *Commerce*, 695 So. 2d at 385). Mutual

assent occurs where *both* parties demonstrate an objective intent to be bound by the essential terms of a contract. *See Bus. Specialists, Inc. v. Land & Sea Petroleum, Inc.*, 25 So. 3d 693, 695-96 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D199a]. Whether the mutual assent required to create a binding contract exists is a factual issue which precludes the entry of summary judgment if there are ambiguities in the record. *See Med-Star Cent., Inc. v. Psychiatric Hosp. of Hernando Cty., Inc.*, 639 So. 2d 636, 637 (Fla. 5th DCA 1994).

Based on the record below, there is ambiguity as to whether or not the parties assented to an implied-in-fact contract. The record is clear that the parties agreed to modify an already existing plan to landscape the property. It is also clear that Ms. Palacios drew up a rough diagram of her proposed landscaping plans and discussed where she wanted specific plants to be located. However, it is also undisputed that many essential terms, including price, were not discussed in the meeting between Palacios, Ackner, and Campbell. *See Sam Rodgers Prop., Inc. v. Chmura*, 61 So. 3d 432, 437 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D871a] ("Price is typically an essential element of a contract."); *but see Commerce*, 695 So. 2d at 387 (holding that an implied-in-fact contract may exist "where one party has performed services at the request of another without discussion of compensation"). Ms. Palacios also clearly testified that she did not agree to final terms which is why she initially attempted to stop additional landscaping from being installed at the property (even though she later allowed the landscaping to continue). Since the record is, at best, ambiguous as to whether there was mutual assent, summary judgment should not have been granted. *See Graf v. Liberty Mut. Ins. Co.*, 636 So. 2d 539, 542 (Fla. 5th DCA 1994). We express no opinion, however, as to whether a valid implied-in-fact contract was actually formed.

Conclusion

Because there are disputed issues of material fact as to whether the parties entered into an implied-in-fact contract, the lower court erred in granting summary judgment. We **REVERSE** the lower court's order and **REMAND** for further proceedings consistent with this opinion. (CURLEY, KELLEY, and SCHOSBERG FEUER, JJ., concur.)

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[1]To rebut the deposition testimony, Nature's Lawn submitted an affidavit completed by Ryan Ackner. Mr. Ackner stated that Ms. Palacios "made it clear to Mr. Campbell that [Rhythm & Hues] would be responsible for paying [Nature's Lawn] for the additional cost of labor and materials," and that it was the intention of Mr. Ackner and Ms. Palacios that this additional landscaping "constituted an agreement separate and distinct" from the subcontract. Mr. Ackner did admit, however, that he was still involved in supervising this additional work and that he forwarded Nature's Lawn's invoice to Ms. Palacios with the offer that IBIS would pay for the work directly to avoid overhead costs.

* * *

Landlord-tenant—Eviction—Error to enter final judgment against tenants who failed to appear at trial without entering default against tenants or conducting uncontested trial on merits—No merit to arguments that inadequate record from day of trial can be basis for affirmance, that summary procedure applicable to eviction proceedings preempts requirement to enter default before entering final judgment, or that tenants' issue of fundamental error was not preserved for appellate review

JESSY MARCELIN and VENEL ALDAJUSTE, Appellants, v. ISLAND SHORES APARTMENT, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2019-AP-000059-CAXX-MB. L.T. Case No. 50-2019-CC-003186-XXXX-MB. December 1, 2020. On Motion for Rehearing December 4, 2020. Appeal from the County Court in and for Palm Beach County; Paige Gillman, Judge. Counsel: Samuel A. Walker and Tee Persad, CPLS, P.A., Orlando, for Appellants. Cory S. Carano, Kelley & Grant, P.A., Boca Raton, for Appellee.

(PER CURIAM.) In this eviction proceeding, tenants Jessy Marcelin and Venel Aldajuste (collectively "the Appellants") appeal the county court's final judgment awarding the landlord/Appellee, Island Shores Apartment ("Island Shores"), possession of the property. The Appellants allege that they never received notice of their trial date and that the lower court deprived them procedural due process by entering a final judgment without first entering a default or holding a trial on the merits. After careful review, we reverse the county court and hold that it erred in entering a final judgment against the Appellants.

In support of their position, the Appellants principally rely on two cases: *Powers v. Gentile*, 662 So. 2d 374 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2254a] and *Delancer v. Advanced Mortgage Investment Co.*, 546 So. 2d 130 (Fla. 3d DCA 1989). In *Powers*, the appellant filed an answer to the complaint against them but did not appear for trial because they erroneously believed that the proceedings were stayed. *Powers*, 662 So. 2d at 375. Although the landlord appeared at the trial, the record indicated that no evidence or testimony was heard and that the scheduled trial never took place; nevertheless, the trial court entered a final judgment against the absent appellant. *Id.* The Fifth District held since the appellant had filed an answer, due process required that the trial court enter a default against the appellant before entering final judgment. *Id.* (citing Fla. R. Civ. P. 1.500(b)). The *Delancer* court held the same under similar facts, concluding that the trial court erred in entering a final judgment "without conducting even an uncontested trial on the issues raised by the pleadings." *Delancer*, 546 So. 2d at 130 (citations omitted).

We agree with the Appellants that these cases are directly on point. In the instant appeal, the Appellants filed an answer and previously appeared at a hearing to calculate the amount of rent allegedly owed. After they failed to appear at trial, the lower court simply entered a final judgment without first entering a default against the Appellants or conducting an uncontested trial on the merits. This was error. *Powers*, 662 So. 2d at 375; *see also Baleanu v. Sandulescu*, 78 So. 3d 98, 99 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D226a] (citing *Powers* with approval). Whether the Appellants actually received notice of the trial is immaterial, the law is clear that "when a defendant fails to appear for trial, the court has two options: proceed with the trial, requiring the plaintiff to put on its case, or enter a default due to the failure to defend." *Baleanu*, 78 So. 3d at 99. Since the lower court did neither, it erred.

Island Shores does not contest the validity of *Powers* and *Delancer*, but instead argues that the instant case is distinguishable. None of Island Shores' arguments are meritorious. First, Island Shores reliance on *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979) is misplaced. While the record is not clear as to what exactly took place on the day of the scheduled trial, an inadequate record under *Applegate* cannot be the basis of an affirmance where the appellate court is deciding pure legal issues. *See Gonzalez v. Chase Home Finance LLC*, 37 So. 3d 955, 958-59 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1344a]. In addition, there is nothing in the record that suggests any evidence or testimony was heard on the day of the trial, and, in fact, the final judgment expressly states that it was granted because the Appellants "fail[ed] to appear at a court-ordered hearing."

Second, Island Shores' argument that summary procedure—which applies to eviction proceedings—preempted the requirement to enter a default is unsupported by the text of the eviction statute itself. Although summary procedure can preempt the Florida Rules of Civil Procedure, those rules can only be preempted if the statute creating the cause of action specifically provides for a different procedure. § 51.011, Fla. Stat.; *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1254 (Fla. 2008) [33 Fla. L. Weekly S503a]. The Court finds that nothing in the text of chapter 83 that specifically preempts rule 1.500 or otherwise modifies the mechanisms of default. *See Pro-Art Dental Lab*, 986 So. 2d at 1254. *See also Geraci v.*

Preferred Capital Mkts., Inc., 802 So. 2d 479, 481-82 (Fla. 3d DCA 2001) [27 Fla. L. Weekly D76b] (applying rule 1.500 to an eviction proceeding); *Family First Health Plans, Inc. v. MROD Realty Corp.*, 28 Fla. L. Weekly Supp. 595b (Fla. 15th Cir. Ct. Sept. 9, 2020) (applying rule 1.500(b) to an ejectment and commercial eviction proceeding). Since there is no express preemption, the Court finds that a default (or trial on the merits) is still required before entering a final judgment in eviction proceedings.

Finally, Island Shores' claim that the Appellants' argument was not properly preserved is unavailing. A judgment is rendered void, and procedural due process is denied, if a party is denied notice and an opportunity to be heard in the proceedings leading to the judgment. *Tannenbaum v. Shea*, 133 So. 3d 1056, 1061 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D137a]. The denial of procedural due process constitutes fundamental error and may be raised for the first time on appeal. *Pena v. Rodriguez*, 273 So. 3d 237, 240-41 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a].

Because the lower court entered a final judgment against the Appellants without first entering a default or holding a trial, it deprived the Appellants of procedural due process and rendered a void judgment. Accordingly, we **REVERSE** the county court's entry of final judgment in favor of Island Shores and **REMAND** for further proceedings consistent with this opinion. The Appellants' "Motion for Appellate Attorney's Fees" is **GRANTED**. Island Shores' "Motion for Appellate Attorneys' Fees and Response to Appellant's Motion for Fees" is **DENIED**. (CURLEY, KELLEY, and SCHOSBERG FEUER, JJ., concur.)

BY ORDER OF THE COURT:

THIS CAUSE came before the Court upon Appellee's "Motion for Rehearing and/or Clarification as to Award of Attorney's Fees to Appellant" pursuant to Florida Rule of Appellate Procedure 9.330(a). Appellee moves for clarification of our opinion issued on December 1, 2020 which, in part, granted Appellants' motion for appellate attorney's fees but did not explicitly state that this award was contingent upon Appellants ultimately prevailing in the litigation below. In granting a motion for appellate attorney's fees, this Court merely authorizes the lower court to award appellate attorney's fees when it becomes appropriate. *Foley v. Fleet*, 652 So. 2d 962, 963 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D821a]. Any award of appellate attorney's fees granted by this Court is always contingent on the party ultimately prevailing below, to hold otherwise would usurp the province of the lower courts. *See Aksomitas v. Maharaj*, 771 So. 2d 541, 543-44 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2080a] (*en banc*). Accordingly, it is hereby

ORDERED that Appellee's Motion for Rehearing and/or Clarification as to Award of Attorney's Fees to Appellant is **GRANTED** for the limited purpose of clarifying that the Court's grant of appellate attorney's fees to Appellants is contingent upon whether they prevail in the lower court. It is the responsibility of the lower court to award appropriate appellate attorney's fees at that time. All other portions of the Court's opinion remain unchanged. (CURLEY, KELLEY, and SCHOSBERG FEUER, JJ.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Officer responding to BOLO based on tip from identifiable citizen informant was not required to independently corroborate report that intoxicated driver was driving erratically before stopping licensee who was driving vehicle described in tip—Petition for writ of certiorari is denied

ROBERT MATTHEW PHILLIPS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 2020-CA-000403-K. November 20, 2020. Counsel: Samuel J. Kaufman, Law Offices of Samuel J. Kaufman, P.A., Key West, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

Opinion

(KOENIG, J.) This cause came before this Court upon the Petition for Writ of Certiorari timely filed by the Petitioner on June 29, 2020. Petitioner seeks review of the Findings of Fact, Conclusions of Law and Decision entered by the Respondent, Florida Department of Highway Safety and Motor Vehicles (Department), on May 28, 2020, which sustained the administrative suspension of Petitioner's driving privilege for refusing to submit to a breath test. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c) and sections 322.2615(13), 322.64(13), and 322.31, Florida Statutes.

Factual Background and Procedural History:

On March 20, 2020, a citizen informant placed a 911 call to the Monroe County Sheriff's Office stating that the driver of a black GMC truck with a three-wheeled bicycle in the truck bed was intoxicated and driving erratically. She reported that the vehicle had just left the area of the Hurricane Restaurant. Deputy Guerra aired a Be on the Lookout (BOLO) for the Marathon area in response to this tip. Sergeant Slough observed a vehicle matching the description in the area of Sombrero Beach Road a few minutes later. The truck was driving slowly through the parking lot of a Publix grocery store with its window partially down. As Sergeant Slough's patrol car closed the distance to make contact with the driver of the vehicle, the vehicle quickly pulled into a parking spot and the driver rolled up his window.

Sergeant Slough approached the vehicle on foot, knocked on the rear window and asked the driver to roll the window down. The driver complied and was identified as the Petitioner. Sergeant Slough observed that the Petitioner's eyes were glassy and bloodshot, and a strong odor of an alcoholic beverage was emanating from him. The Petitioner's actions appeared delayed and his speech was slurred. Deputy Lones arrived on scene to conduct a DUI investigation, including the administration of field sobriety exercises. Following the Petitioner's poor performance on the exercises, Deputy Lones placed the Petitioner under arrest for DUI. The Petitioner refused to submit to a breath test and was read the implied consent warning. The Petitioner was issued a DUI citation which also informed him of the suspension of his driving privilege for refusing to submit to a lawful breath, blood, or urine test.

The Petitioner timely requested an administrative hearing before the Department's Bureau of Administrative Reviews pursuant to section 322.2615, Florida Statutes to challenge the lawfulness of his driver license suspension. Petitioner's counsel argued in the lower tribunal that the initial stop was unlawful because Sergeant Slough did not personally observe a violation of law and did not independently corroborate the citizen informant's report of reckless driving. The Department hearing officer denied this motion in the final order rendered May 28, 2020. Petitioner's counsel timely sought judicial review of this final order through the filing of a petition for writ of certiorari on June 29, 2020. The Department filed a Response to the Petition on August 14, 2020, and this Court heard oral argument on November 18, 2020.

Standard of Review:

The scope of the circuit court's review of a hearing officer's suspension order is limited. In reviewing an administrative order by certiorari, the circuit court must determine (1) whether procedural due process is accorded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. The hearing

officer's findings of fact are not subject to dispute, as the Petition only argues that the legal conclusion applied to those facts departed from the essential requirements of the law. Therefore, this Court's scope of review in this matter is limited to determining whether the final order's legal conclusion that the stop was lawful complies with the essential requirements of the law.

Analysis:

This Court finds that Sergeant Slough's stop of the Petitioner's vehicle pursuant to the BOLO was lawful. Specifically, the 911 tip of an intoxicated driver and an erratic driving pattern came from an identifiable citizen informant. The Florida Supreme Court held in *State v. Maynard,* 783 So. 2d 226, 230 (Fla. 2001) [26 Fla. L. Weekly S182b] that a tip received from a citizen informant is at the high end of the tip-reliability scale. Therefore, such a tip does not require the same level of independent corroboration of suspicious or illegal activity as an anonymous tip.

Furthermore, the U.S. Supreme Court held in *Navarette v. California,* 572 U.S. 393, 397 (2014) [24 Fla. L. Weekly Fed. S690a] that an anonymous tip of drunk driving provides a lawful basis for a stop without independent corroboration of the tip in certain circumstances. In *Navarette,* the court held that since the anonymous caller used the 911 system, this increased the reliability of the tip because 911 calls can be traced. The court also noted that there was a close temporal proximity between the 911 call and law enforcement locating a vehicle matching the description in the area.

In this case, the information was received as a result of the 911 call, the caller's identity is known, and a vehicle matching the description was located by Sergeant Slough in the nearby area within a few minutes of the call. Pursuant to *Maynard* and *Navarette,* this Court finds that the lower tribunal's ruling complies with the essential requirements of the law.

Based on the above, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby DENIED.

* * *

Torts—Conversion—Action against motor vehicle dealer by assignee of retail installment agreements which, pursuant to agreement with borrower/purchaser, were cross-collateralized by liens on two motor vehicles, alleging dealer submitted to the Department of Motor Vehicles a satisfaction of lien on which it had forged the signature of plaintiff's authorized representative and converted one of the two vehicles to its own use and ownership without satisfying borrower's outstanding debt— Trial court erred by failing to consider plaintiff's reply to dealer's amended affirmative defense in which plaintiff not only denied dealer's affirmative defense, but also asserted its possessory interest in vehicle based on borrower's default on payments due under retail installment contract—Issue of plaintiff's possessory interest was tried by consent where defendant did not raise objection to introduction of testimony or evidence of borrower's default as basis of plaintiff's possessory right in vehicle until plaintiff moved to amend pleadings to conform to the evidence, although both parties presented arguments surrounding borrower's default throughout trial—County court abused its discretion when it denied plaintiff's ore tenus motion to conform pleadings to the evidence where, although defendant objected to motion, there was no prejudice to defendant under circumstances—Final judgments in favor of dealer and in favor of borrower on dealer's third-party complaint for indemnification is reversed—Because dealer's claim against borrower for indemnification rests on the resolution of the main claim between plaintiff and dealer, dealer is entitled to maintain its third-party complaint against borrower—Remand for further proceedings—Attorney's fees awarded, contingent upon appellant prevailing under section 768.79

NATIONWIDE FINANCIAL SERVICES, LLC, Appellant/Cross-Appellee, v. HOLLYWOOD IMPORTS LIMITED, INC., d/b/a AutoNation Honda Hollywood, Appellee/Cross-Appellant, and JAVIER FERNANDO MURICA, Third-Party Defendant/Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-007577 (AP). L.T. Case No. COSO13-012404. September 24, 2020. On Motion for Rehearing, November 13, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Arlene S. Backman, Judge. Counsel: Ronald R. Torres, Torres Law Offices, Weston, for Appellant. Nancy W. Gregoire, Birnbaum, Lippman, & Gregoire, PLLC, Ft. Lauderdale, for Appellee. Holiday H. Russell, Holiday Hunt Russell, PLLC, Ft. Lauderdale, for Third-Party Defendant/Appellee.

OPINION

(PER CURIAM.) Nationwide Financial Services, LLC, ("Nationwide") appeals a Final Judgment entered on March 5, 2018 in favor of Defendant and Third-Party Defendant. 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, Nationwide filed suit to recover damages on a 2012 Volkswagen which was allegedly converted by Hollywood Imports Limited, LLC, d/b/a AutoNation Honda Hollywood, ("AutoNation"). On or about April 20, 2012, Javier Fernando Murica, ("Murica"), purchased a 2012 VW from Motor Cars of Stuart[1] pursuant to a retail installment contract ("RIC") which was assigned to Nationwide. The RIC provides that Murica made a down payment of $9,000 and would make 9 monthly payments of $2,018.45 beginning in May 2012 through January 2013. According to the affidavit of Michele Hanner, title clerk for Nationwide, Murica failed to make the last payment for January 2013.

On or about July 28, 2012, Murica purchased a 2010 BMW 7 Series from Motor Cars of Stuart pursuant to a RIC which is assigned to Nationwide. The RIC provides that Murica made a down payment of $10,000 and would make 48 monthly payments of $1,646.16 beginning in August 2012. According to the affidavit of Ms. Hanner, Murica failed to make payments for the months of February 27, 2013, March 27, 2013, and the rest of the remaining payments.

On August 27, 2012, Nationwide and Murica signed a Cross Collateralization Agreement ("CCA") in relation to both vehicles, which provided that if there is a default on either installment contract it would be deemed a default on the other RIC.

In April 2013, Murica traded in the 2012 VW to AutoNation in order to purchase a new 2013 Honda Odyssey. Murica represented to AutoNation that there were no liens or encumbrances on the 2012 VW. Murica signed an Application for Duplicate Title to enable AutoNation to obtain the title on the VW. In order to receive a duplicate title, AutoNation submitted a lien satisfaction form to the DMV. Jacki Malca, title clerk for AutoNation testified she received a signed lien satisfaction form reflecting Nationwide's lien interest had been satisfied.

Nationwide claims that it maintained a perfected lien on the 2012 Volkswagen, and AutoNation was obligated to satisfy Murica's debt as part of the sales contract. Nationwide alleges that AutoNation forged the lien satisfaction document with the signature of Nationwide's authorized representative. Nationwide claims that AutoNation attempted to avoid payment of Murica's debt and converted the 2012 Volkswagen to its own use and ownership.

In Nationwide's initial complaint, it alleges damages in the amount of $11,882.69. On February 26, 2016, Nationwide filed its Motion to Amend Complaint by Interlineation. On March 23, 2016, the complaint was amended through an Agreed Order, which only changed the recovery of damages equal to the fair market value of the 2012 VW from 11,882.69 to $15,000.00. On May 10, 2016, AutoNation filed its Answer and Affirmative Defenses to Amended Complaint. On May 20, 2016, Nationwide filed its Reply to Answer and Affirmative Defenses to Amended Complaint.

On July 13, 2016, the county court granted AutoNation's ore tenus Motion to Assert Third-Party Complaint. On July 19, 2016

AutoNation filed its Third-Party Complaint against Murica for breach of contract, fraud, and indemnification. On September 21, 2016, Murica filed his pro se Answer to Third Party Complaint. On June 26, 2017, Murica filed his Motion to Deposit $15,000 into the court registry pursuant to a Settlement Agreement between himself and AutoNation. An agreed order was entered on the motion to deposit. On August 7, 2017, Murica filed his Motion to Enforce Settlement Agreement and for Entry of an Order of Dismissal with Prejudice. The case proceeded to a non-jury trial on August 8, 2017 and August 25, 2017. On March 5, 2018, the county court entered a Final Judgment in favor of AutoNation against Nationwide, and in favor of Murica against AutoNation.

On appeal, Nationwide argues the county court erred when failing to consider the Plaintiff's Reply to the Amended Affirmative Defenses in order to determine its possessory interest in the 2012 Volkswagen, and failing to determine that the issue of whether Plaintiff had a possessory interest in the 2012 Volkswagen had been tried by the implied consent of the parties. Last, the county court abused its discretion when denying Plaintiff's ore tenus motion pursuant to Florida Rules of Civil Procedure ,1.190(b), to conform its pleadings to the evidence. The standard of review of a non-jury trial follows as such,

> When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. *See In re Estate of Sterile,* 902 So. 2d 915, 922 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1407a]. This is because "the trial judge is in the best position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses.' " *Id.* (quoting *Shaw v. Shaw,* 334 So. 2d 13, 16 (Fla.1976)). However, where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo. Id.*

Acoustic Innovations, Inc. v. Schafer, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D544a]. Moreover, "in the absence of an abuse of discretion, a trial court's ruling on a motion to amend the pleadings will not be disturbed on appeal.". *Three Palms Assocs. v. U.S. No. 1 Fitness Centers Inc.,* 984 So. 2d 540, 541-42 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1047a] (quoting *Frenz Enters., Inc. v. Port Everglades,* 746 So. 2d 498, 503 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2654a]).

Nationwide argues the county court erred when failing to consider its Reply to the Amended Affirmative Defenses in order to determine its possessory interest in the 2012 Volkswagen. Nationwide argues although not asserted in its amended complaint, the issue regarding Murica's default on the RIC agreement as its basis for the right of the vehicle was still pled. The county court relied on *Chandler v. Chandler,* 330 So. 2d 778 (Fla. 1st DCA 1976) and *Collins v. Bannon,* 774 So. 2d 66 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2611a], for the proposition that under Florida law, a judgment cannot be based upon an issue that has not been framed by the pleadings. Pursuant to Florida Rule of Civil Procedure, 1.100(a), "if an answer or third-party answer contains an affirmative defense and *the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance.* No other *pleadings* will be allowed.". (emphasis added). "The rationale for this requirement is that '(t)his is necessary in order to lay a predicate for such proofs so that *the parties may prepare accordingly*.' ". *North American Philips Corporation v. Boles,* 405 So. 2d 202, 203 (Fla. 4th DCA 1981) (quoting *Moore Meats, Inc. v. Strawn,* 313 So. 2d 660 (Fla.1975)). (emphasis added).

In *North American Philips Corporation v. Boles,* 405 So. 2d 202 (Fla. 4th DCA 1981), the plaintiff filed a complaint for specific performance of a stock option agreement. The defendant filed its answer and affirmative defenses, one in which asserted the plaintiff failed to fulfill certain conditions precedent. The plaintiff's reply simply denied the affirmative defenses. At trial, the plaintiff took the position that certain conditions precedent were waived due to the defendant's conduct. The defendant objected to the testimony being introduced due to the fact it was not relevant to the issues outlined in the pleadings. The lower court overruled the objection and entered a judgement in favor of the plaintiff. The Fourth District Court reversed and remanded the case and reasoned the following:

> By failing to *specially* plead avoidance and by *only interposing a denial,* the plaintiff allowed pre-trial preparation to center on the stock option agreement and those steps which the plaintiff took to seek its enforcement. Yet, with the introduction of the testimony at issue, *the focus of the trial suddenly shifted to the conduct of the defendant . . . what it had said or done to excuse* plaintiff's performance of the conditions precedent. In truth, t*his was a blind issue which veered into the midst of the trial without warning and without an opportunity to negate.* Its *prejudice* to the defendant is evident since it formed the basis of the court's verdict. Thus, we hold that the admission of this testimony over objection is so antithetical to basic notions of fairness as to constitute reversible error.

Id. at 203. (emphasis added). Conversely, in Nationwide's reply, it addressed AutoNation's affirmative defense labeled "H". Nationwide states, "on the date of conversion, May 25, 2013, [Nationwide] had the right of possession to the 2012 Volkswagen automobile inasmuch *Murica was in default of his retail installment contract payment obligations*.". Nationwide further asserts in its reply that AutoNation's affirmative defense is avoided as a matter of law. *See Pond v. McKnight,* 339 So. 2d 1149 (Fla. 2d DCA 1976) (reversing part of order enjoining certain actions of appellants "when no such relief was requested by the appellees by way of counterclaim or any other pleading"). Nationwide does more than simply deny AutoNation's affirmative defense, it also asserts its possessory interest in the 2012 VW due to Murica's default of the RIC.

Next, Nationwide argues the issue of whether it had a possessory interest in the 2012 VW pursuant to Murica's default on the RIC agreement was tried by the implied consent of the parties. "Generally, 'courts are not authorized to grant relief not requested in the pleadings.' ". *Fed. Home Loan Mortg. Corp. v. Beekman,* 174 So. 3d 472, 475 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1927a] (quoting *Cardinal Inv. Grp., Inc. v. Giles,* 813 So. 2d 262, 263 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D841a]). "An exception to the rule requiring relief to be pled is if the issue is tried by consent of the parties.". *id*; *See Fla. R. Civ. P.* 1.190(b). ("When issues not raised by the pleadings are tried by express or implied consent, they shall be treated in all respects as if they had been raised in the pleadings."). "An issue is tried by consent '*when there is no objection to the introduction of evidence on that issue*.' ". *Id.* (quoting *Scariti v. Sabillon,* 16 So. 3d 144, 145-46 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D901a]). (emphasis added). In *Smith v. Mogelvang,* 432 So. 2d 119 (Fla. 2d DCA 1983), the appellate court held, in order to determine "whether an issue has been tried by implied consent is whether *the party opposing* introduction of the issue into the case would be *unfairly prejudiced* thereby.". *Mogelvang,* 432 So. 2d at 122; *See also, Dixie Farms, Inc. v. Timmons,* 323 So. 2d 637 (Fla. 3d DCA 1975). (emphasis added). "Under that broad test, an unpleaded issue is considered as having been tried or not tried by implied consent under two interrelated criteria involving (a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded.". *Id.*

At trial, AutoNation did not raise an objection to the introduction of testimony or evidence of Murica's default as the basis of its possessory right of the 2012 VW *until* Nationwide moved to amend

the pleadings to conform to the evidence pursuant to Florida Rules of Civil Procedure, 1.190(b). (T.T. 173; PDF. 175). In its opening statement, Nationwide introduces its argument that it has a possessory interest in the 2012 VW through Murica's default of his contractual payment obligations, and AutoNation does not object. Counsel for Nationwide, Ronald Torres, states in pertinent part,

> *Mr. Torres: The payment terms for the Volkswagen was nine payments of $2,018.45.*
>
> *Mr. Torres: The evidence will show that JavierMurica did not make all the payments, he only made eight out of the nine payments on the 2012 Volkswagen.*
>
> *Mr. Torres: . . .therefore technically in default of his payment obligations.*
>
> *Mr. Torres: According to the contract, when Javier Murica defaulted on his payment obligations, Nationwide had the right to repossess the vehicle.*
>
> *Mr. Torres: Three months after defaulting on his payment obligations, in April of 2013, Javier Murica took his 2012 Volkswagen to AutoNation Hollywood Honda with the intent to trading in towards the purchase of a new car*[2].

(T.T. 25; PDF. 27). Shortly thereafter, AutoNation proceeds with its opening statements wherein it addresses the issue surrounding Murica's nine payments for the 2012 VW. Counsel for AutoNation, Richard Ivers, states in pertinent part:

> *Mr. Ivers: According to the plaintiff's testimony, the payments under the retail installment contract relating to the 2012 Volkswagen had all been made.*
>
> *Mr. Ivers: . . .Murica... represented to the dealership that he did not owe any money on the 2012 Volkswagen and he wanted to trade that vehicle in.*

(T.T. 36; PDF. 38). After opening statements, Nationwide calls Michele Hanner, owner of Nationwide and Motor Cars of Stuart to testify. During her testimony she was asked questions regarding Murica's payments on the 2012 VW, and not once did AutoNation object. (T.T. 57-64: PDF. 59-66.). Furthermore, on redirect examination, AutoNation questioned Ms. Hanner on Murica's payments on the vehicle. (T.T. 91- 97; PDF. 93-99). Throughout the entire trial, both parties presented arguments surrounding Murica's default on the last payment for the 2012 VW, the authenticity surrounding the lien satisfaction form, and title to the vehicle. Pursuant to *Mogelvang,* the evidence and testimony presented at trial, AutoNation had a fair opportunity to defend against the issue regarding Murica's default on his last payment and even offered evidence and testimony in opposition of whether AutoNation knew if any payments were outstanding. AutoNation would not, and in fact was not, prejudiced by the introduction of evidence and testimony regarding Murica's payments on the 2012 VW pursuant to the RIC agreement as Nationwide's possessory interest in the 2012 VW.

Last, Nationwide argues that the county court abused its discretion when denying its ore tenus motion pursuant to Florida Rules of Civil Procedure, 1.190(b), to conform its pleadings to the evidence. Florida Rules of Civil Procedure, 1.190(b), states the following:

> (b) Amendments to Conform with the Evidence. When issues *not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.* Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby *and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.*

1.190(b), Fla. R. Civ. P. (emphasis added). The record reflects that AutoNation did object to Nationwide's ore tenus motion to conform the pleadings to the evidence. However, as argued above, there was no prejudice to AutoNation in allowing Nationwide to conform its evidence to the pleadings that it had a possessory interest in the 2012 VW pursuant to Murica's default of the RIC agreement. At trial AutoNation called Murica, Mr. Fede, their sales associate, and Ms. Malce, their title clerk, as witnesses and asked each of them questions relating to the payments on the 2012 VW. (R. 236; 254-255; 273-274; PDF. 238; 256-257; 275-276). Nationwide, using this evidence and testimony as a basis for its possessory interest in the 2012 VW was not prejudicial. Whether Murica made his last payment on the 2012 VW, and if AutoNation knew about any outstanding payments, was a part of both Nationwide and AutoNation arguments at trial. *See Tracey v. Wells Fargo Bank, N.A. as Tr. for Certificateholders of Banc of Am. Mortg. Sec., Inc.,* 264 So. 3d 1152, 1156 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D577a] ("Prejudice under rule 1.190(b), appears to turn on whether a litigant's right to notice of what to prepare for at trial has been infringed."); *see also, Surf Drugs, Inc. v. Vermette,* 236 So. 2d 108, 111 (Fla. 1970) ("A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluffs and legal gymnastics."). Therefore, the county court abused its discretion when not allowing Nationwide to conform the evidence to the pleadings pursuant to 1.190(b), Florida Rules of Civil Procedure.

AutoNation argues if this court reverses the Final Judgment, then it must also reverse the final judgment as it pertains to Murica. AutoNation argues that it should be entitled to maintain its claims against Murica if liable to Nationwide for the 2012 VW. Since the Final Judgment is being reversed as to the main claim, AutoNation is entitled to assert its claims as presented in its third-party complaint against Murica. *See generally, Landahl, Brown & Weed Assocs., Inc. v. City of Cape Coral,* 502 So. 2d 16, 17 (Fla. 2d DCA 1986) (A third party complaint could not survive where the main claim has been dismissed); *see also,* 1.180, Fla. R. Civ. P. (A third-party complaint, in addition to asserting a claim for indemnification, contribution, or subrogation, "may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim."). In the instant matter, there is only a claim for indemnification against Murica, which falls on the resolution of the main claim between Nationwide and AutoNation. "The policy behind the rule (1.180, Fla. R. Civ. P.) is to avoid multiple actions.". *Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams,* 769 So. 2d 484, 486 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2477a].

Accordingly, the Final Judgment entered in favor of Defendant, Hollywood Imports Limited, Inc., and Third-Party Defendant, Javier Fernando Murica, on March 5, 2018 is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellant/Cross-Appellee's Motion for Appellate Attorney's Fees is **GRANTED**, with the amount to be determined by the county court upon remand. Further, Appellee/Cross-Appellant's Motion for Appellate Attorney's Fees and Third-Party Defendant/Appellee's Motion for Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

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[1]Motor Cars of Stuart is the dealership that sells vehicles, and Nationwide is a business that finances some of the vehicles sold by Motor Cars of Stuart. (T.T. 50-51). Both businesses an owned and operated by the same individuals that are Plaintiff in this action (T.T. 50).

[2]The record reflects the undisputed fact that Murica traded in the 2012 VW to AutoNation in order to purchase a new 2013 Honda Odyssey. (R. 408; PDF. 428).

ORDER ON APPELLEE/CROSS-APPELLANT'S MOTION FOR REHEARING

(BOWMAN, J.) THIS CAUSE is before this Court, in its appellate capacity, on Appellee/Cross-Appellant's Motion for Rehearing, filed October 7, 2020. Having carefully considered the motion, the record, and the applicable law, it is hereby:

ORDERED that Appellee/Cross-Appellant's Motion for Rehearing is hereby GRANTED. Furthermore, this Court's Opinion dated September 24, 2020, is hereby modified to reflect that Appellant/Cross-Appellee's award of attorney's fees is contingent upon it being the prevailing party under section 768.79, Florida Statutes. *See, State Farm Fire & Cas. Co. v. Rembrandt Mobile Diagnostics, Inc.*, 93 So. 3d 1161, 1162 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1836a].

* * *

BANK OF AMERICA, N.A., Appellant, v. MILLIRET MONCADA RESENDIZ, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-026606 (AP). L.T. Case No. COCE19-021611 (53). December 22, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Robert W. Lee, Judge. Counsel: Carlos Cruanes, Law Offices of Andreu, Palma, & Andreu, PL, Miami, for Appellant. Milliret Moncada Resendiz, pro se, Hollywood, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the brief, the record, and the applicable law, the Order Denying Plaintiff's Motion for Relief from Judgment and the Final Judgment in Favor of Defendant are hereby **AFFIRMED**. **(**BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. BEVERLY CAPASSO, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-26AC10A. L.T. Case No. 17-10884MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Markenzy Lapointe and Shani Rivaux, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in granting Appellee's motion to dismiss. (FEIN, MURPHY, III, and SIEGEL, JJ., concur.)

* * *

LUIS CERDA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 16-59AC10A. L.T. Case No. 16-5280MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mardi Levey Cohen, Judge. Counsel: Lisa S. Lawlor, for Appellant. Nicole Bloom, for Appellee.

OPINION

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

* * *

STATE OF FLORIDA, Appellant, v. ROCKY RODRIGUEZ, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-23AC10A. L.T. Case No. 17-10881MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Gene Reibman and Bruce M. Lyons, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in granting Appellee's motion to dismiss. (FEIN, MURPHY, III, and SIEGEL, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. CHRISTOPHER URE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-25AC10A. L.T. Case No. 17-10882MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Sherleen M. Mendez and Bruce H. Lehr, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in granting Appellee's motion to dismiss. (FEIN, MURPHY, III, and SIEGEL, JJ., concur.)

* * *

THULSIE BHARAT, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-54AC10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kal Evans, Judge. Counsel: Jaime A. Aird, for Appellant. Nicole Bloom, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, and the applicable law, we hereby **AFFIRM** the trial court's denial without prejudice of the Appellant's Amended Motion to Excuse Ignition Interlock Device and Vehicle Immobilization. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. BRIAN KELLY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-49AC10A. L.T. Case No. 18-11145MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Melinda Brown, Judge. Counsel: Nicole Bloom, Assistant State Attorney, for Appellant. Mark Wilensky, for Appellee.

OPINION

Having carefully considered the Initial Brief of Appellant, the Answer Brief of Appellee, the record on appeal, and applicable law, we find the County Court did not err in granting Appellee's motion to dismiss and affirm its ruling thereon. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. LINDA ROBISON, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-24AC10A. L.T. Case No. 17-10883MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Eric S. Adams and Mark P. Rankin, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in granting Appellee's motion to dismiss. (FEIN, MURPHY, III, and SIEGEL, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. LYNN BARRETT, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-22AC10A. L.T. Case No. 17-10909MM10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Roberto Martinez and Thomas Allen Kroeger, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in granting Appellee's motion to dismiss. (FEIN, MURPHY, III, and SIEGEL, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. WILLIAM R. MCCABE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-31AC10A. L.T. Case No. 18-5467MU10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mindy F. Solomon, Judge. Counsel: Nicole Bloom, for Appellant. Marcelo E. Lescano, for Appellee.

OPINION

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

* * *

RAFAEL SUAREZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-55AC10A. November 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Christopher Pole, Judge. Counsel: Yoel Molina, for Appellant. Nicole Bloom, for Appellee.

OPINION

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing officer's finding that request for breath test was incident to lawful arrest was supported by competent substantial evidence—Documents before hearing officer were not in hopeless conflict and consistently reported timeline of stop, arrest, reading of implied consent warning and test refusal—Petition for writ of certiorari is denied

STEPHANIE LYNN TUORTO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Glades County, Civil Action. Case No. 20-CA-66. October 21, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JACK E. LUNDY, J.) THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Certiorari" and accompanying appendix, filed on June 29, 2020 pursuant to Fla. Stat. §322.2615(13) and Fla. R. App. P. 9.030(c)(2) and 9.100. Respondent filed a Response on August 21, 2020. The Court has reviewed the petition, the response, and applicable law, and finds the following:

1. Petitioner challenges the Final Order of License Suspension entered by the Department of Highway Safety and Motor Vehicles (Respondent) on May 29, 2020. The order was entered following a formal review hearing held on May 21, 2020 before Hearing Officer Miriam Jrade. The Hearing Officer sustained Respondent's suspension of Petitioner's driving privileges pursuant to Fla. Stat. section 322.2615 after a formal administrative review of her arrest for driving under the influence and related failure to submit to a breath test.

2. At the hearing, Respondent did not present any live testimony and relied on written documents submitted by law enforcement detailing the traffic stop and DUI investigation of Petitioner that lead to her license suspension. Those documents were entered into record evidence as numbered exhibits, to-wit: 1) the DUI traffic citation, 2) the refusal affidavit, 3) the probable cause affidavit (i.e., the arrest report), 4) the DUI detection sheet, 5) the implied consent form, 6-9) four additional traffic citations, 10) Defendant's surety bond, 11) the record of the first appearance hearing, 12) the certificate of compliance of the FCIC/NCIC requirement, and 13) the breath alcohol test affidavit. Petitioner's counsel argued that this documentary evidence was insufficient to conclude that the breath test refusal was incident to arrest because they contained contradictions in the timing of the arrest, the refusal, and reading of the implied consent warning. In the written Final Order issued on May 29, 2020, the Hearing Officer found that the breath test was indeed incident to arrest and made specific findings as to the time of the arrest and implied consent warnings. As will be discussed more thoroughly below, Petitioner argues in the present Petition for Writ of Certiorari that this ruling was not supported by competent, substantial evidence.

3. Under § 322.2615(7)(b), when a license is suspended for refusing to submit to a breath, blood or urine alcohol test, the scope of a formal review hearing on the suspension is limited to the following issues:

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

If the above criteria are met, § 322.2615(8)(a) mandates that the license suspension be sustained.

4. The decision of the Hearing Officer is appealable by petition for writ of certiorari filed in circuit court. The applicable standard of review by a circuit court of an administrative agency decision, such as the present case, is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. See *Haines City Community Development v. Heggs,* 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]. Under § 322.2615(13), the certiorari process is explicitly not the same as a *de novo* appeal. "It is neither the function nor the prerogative of a circuit court to reweigh the evidence and make findings when it undertakes a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So.2d 20, 21 (Fla. 5th DCA 1989). Rather, the hearing officer's responsibility is to act as the trier of fact, assess witness credibility and resolve conflicts in the evidence. *See id.* When applying the "competent, substantial evidence" standard, a

court must "review the record to assess the evidentiary support for the agency's decision. . . [T]he reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence. . . As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

5. Petitioner's argument centers around the fact that the documents submitted to the Hearing Officer for consideration are inconsistent as to the precise timeline of Petitioner's traffic stop, arrest, breath test refusal and implied consent warning. Petitioner argues that because the documents do not clearly indicate that the breath test refusal was incident to an arrest, and no other evidence was presented by Respondent, then the license suspension must be overturned, citing *Fla. Dep't. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S648c].

6. The Court makes the following observations from the available record, which is attached as an appendix to the Petition. Thirteen documents were submitted at the review hearing for review by the Hearing Officer; these record documents were the sole evidentiary basis for the Order, as no witnesses were called or other evidence presented. The documents state the following as to the precise timing of the events in DUI investigation at issue this case:

a. **EXHIBIT DDL-1**, the DUI traffic citation issued to Petitioner, does not state when the offense was committed; the box to indicate the time of the offense is left blank, with only "A.M." checked to indicate that the offense occurred on or between 12:00 AM and 11:59 AM. No field is provided for the officer to record when any arrest was made. The citation indicates that Petitioner refused to submit to a breath test but provides no field to record the time of the refusal.

b. **EXHIBIT DDL-2**, the affidavit of refusal to submit to a breath test, states that Petitioner was put under arrest for DUI "on or about. . . 0700 hours" with a box checked for "A.M." and that a breath test was requested "on or about. . . 0700," with no box checked for either A.M. or P.M. The form affidavit goes on to state that the attesting officer thereafter read the implied consent warning to Petitioner and she repeated her refusal.

c. **EXHIBIT DDL-3**, the arrest report, is the most detailed account of the DUI investigation and arrest available in the record. This exhibit states that the officer responded to a report of a reckless driver at approximately 5:43 A.M., and under the "Incident Information" section, lists the time of the incident itself as "05:57." The arrest report further details the traffic stop itself, including Petitioner's failure of field sobriety exercises, her unsteady balance and odor of alcohol, and a visible open alcoholic drink inside her vehicle. The arrest report does not provide a specific time for when Petitioner was placed under arrest, was transported to the Glades County Sheriff's Office, was read the implied consent warning, or refused the breath test. However, the narration indicates that Petitioner was arrested for DUI *prior* to being read the implied consent warning and refusing the breath test.

d. **EXHIBIT DDL-4**, the DUI detection sheet, appears to be a form used by law enforcement to document the details of the DUI traffic stop and investigation. At the top of the first page, "0557 HOURS" written on a blank line for "Time." Several lines down, a second line for "Time of Stop" also has "0557 HOURS" written in the blank. On the fifth page of this exhibit, Petitioner's refusal of the breath test is documented as occurring at "0700 ". Her refusal to sign her name on the same page is also documented as occurring at "0700."

e. **EXHIBIT DDL-5**, the implied consent warning, indicates that Defendant refused to take the breath test at "0700 hrs." As with exhibit DDL-4, Defendant refused to sign this form; its date and time appears to be filled out by the officer.

f. **EXHIBITS DDL-6—DDL-9** are traffic citations for other infractions allegedly committed by Petitioner. They do not contain any direct information about the DUI arrest or breath test refusal. The stated time of the offense on each of the four citations is "12:13 PM," but they are also marked as "companion citations."

g. **EXHIBITS DDL-10—DDL-12** include the first appearance order, surety bond, and FCIC/NCIC certificate of compliance. They include no information relating to the timeline of the DUI arrest and investigation.

h. **EXHIBIT DDL-13** is titled "Florida Department of Law Enforcement Alcohol Testing Program Breath Alcohol Test Affidavit." This document provides details on the type of testing device used in this case. It states that the observation period of Petitioner began at "7:00" and that one breath test refusal occurred at "07:42." A few other diagnostic checks, air blanks and control tests were conducted between "7:40" and "07:43."

7. A transcript of the review hearing is also available in the record as part of the Petition's appendix. At the hearing, Petitioner's counsel argued that the conflict between DDL-1 and DDL-2 regarding the timing of the arrest and breath test refusal rendered the documents legally insufficient to establish that Petitioner was arrested prior to the refusal and implied consent warning.

8. Having considered the record, and being mindful of the limited scope of review, the Court finds that Petitioner has failed to demonstrate that the decision is not supported by competent substantial evidence. The documents before the Hearing Officer are not in "hopeless conflict" as Petitioner alleges. They are consistent in reporting that the traffic stop occurred at 5:57 A.M. and the arrest occurred at 7:00 A.M. The arrest report establishes that the arrest occurred prior to the reading of the implied consent warning and any breath test refusal. Whether the evidence before the Hearing Officer could support some other result is irrelevant to this Court's determination that the Order's conclusion was supported by competent, substantial evidence. See *Fla. Dep't. of Highway Safety & Motor Vehicles v. Colling,* 178 So. 3d 2 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]; *Fla. Dep't. of Highway Safety & Motor Vehicles v. Wiggins,* 151 So.3d 457 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a].

It is therefore

ORDERED AND ADJUDGED the Petition for Writ of Certiorari is DENIED.

* * *

Licensing—Driver's license—Hardship license—Denial—Driving within past 5 years—Hearing officer's denial of application for hardship license is supported by competent substantial evidence where, although licensee testified that he was driving electric bicycle that is excluded from definition of motor vehicle at time he received citation for failing to stop at stop sign within past five years, citation states that licensee was driving electric scooter—Petition for writ of certiorari is denied

SETH D. CIANI, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 20-AP-02. October 1, 2020. Counsel: Joshua J. Faett, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HUGH D. HAYES, J.) THIS CAUSE comes before the Court on Seth D. Ciani's Petition for Writ of Certiorari, brought pursuant to Fla. Stat. § 322.31. Having reviewed the petition, the response, the appendix, and the applicable law, and upon due consideration, the Court finds as follows:

1. Petitioner is challenging Respondent's Final Order Denying

Early Reinstatement issued after an informal review hearing, which denied Petitioner's application for early reinstatement. (See copy of Final Order Denying Early Reinstatement provided in Petitioner's appendix) [Editor's note: Copy not included].

2. Petitioner's driver's license was permanently revoked for incurring 4 or more DUI convictions pursuant to Fla. Stat. § 322.28(2)(d). Petitioner requested a hardship license pursuant to Fla. Stat. § 322.271.

3. An informal review hearing was held on March 10, 2020.[1] At the hearing, the Hearing Officer went over Petitioner's 10 previous convictions, which included a conviction from March 16, 2018, for failing to observe a stop sign. (T. 5-7). Petitioner informed the Hearing Officer that on March 16, 2018, he was riding an electric bicycle. (T. 12-13). The Hearing officer asked Petitioner if the officer that issued him the citation informed him that he was cited for driving an electric scooter. (T. 13). The record reflects that on March 16, 2018, Petitioner was cited for failing to observe a stop sign while driving an electric scooter. (See copy of Citation provided in Petitioner's appendix). Petitioner informed the Hearing Officer that he did not contest the citation because he did not have the time to do so. (T. 13). At the conclusion of the hearing, the Hearing Officer informed petitioner that she was going to review his testimony and driving record, and would notify Petitioner of her decision with 3 to 5 days. (T. 18).

3. In the Final Order Denying Early Reinstatement, dated March 10, 2020, the Hearing Officer found that Petitioner is not eligible for a hardship license because Petitioner continued to drive while his license was revoked. The order also informed Petitioner that at the informal review hearing, Petitioner testified that he drove on March 19, 2018.[2]

4. In the instant Petition for Writ of Certiorari, Petitioner argues that, the Hearing Officer's findings are not supported by competent substantial evidence because Petitioner testified that he was riding an electric bicycle rather than an electric scooter. Therefore, since electric bicycles are specifically excluded from the "motor vehicle" definition in Fla. Stat. §§ 320.01, 322.01, they cannot be considered a motor vehicle. Petitioner further argues that the only evidence indicating that he was driving a motorized scooter is the citation.

5. The applicable standard of review by a circuit court of an administrative agency decision is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Id.*

6. In the instant matter, Petitioner requested a hardship license pursuant to Fla. Stat. § 322.71. Respondent afforded Petitioner an opportunity for a hearing. At the hearing Petitioner had to demonstrate that he:

> (1) Has not been arrested for a drug-related offense during the 5 years proceeding the filing of the petition;
>
> (2) *Has not driven a motor vehicle without a license for at least 5 years prior to the hearing*;
>
> (3) Has been drug-free for at least 5 years prior to the hearing; and
>
> (4) Has completed a DUI program licensed by the department.

Fla. Stat. 322.271(4)(a) (emphasis added).

7. The Hearing Officer denied Petitioner's application for early reinstatement because Petitioner testified that he drove without a license on March 19, 2018.[3] The Court notes that the Hearing Officer informed Petitioner that the conviction for the citation issued on March 16, 2018, was included in his driving record. (T. 5-7). Petitioner contends that at the hearing he testified that he was riding an electric bicycle and the only evidence to the contrary was the citation. However, at this point in time, the Court is not permitted the weigh the sufficiency or the credibility of the evidence that was presented at the hearing. *Heggs,* 658 So. 2d at 530. Having considered the record, and being mindful of the limited scope of review, the Court finds that the record does contain competent substantial evidence to support the decision of the Hearing Officer to deny Petitioner's application for early reinstatement.

It is therefore,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

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[1]A copy of the Transcript of Proceedings of the informal review hearing was filed in the record and will be referenced herein as (T.).

[2]The Hearing Officer informed Petitioner that the citation was issued on March 16, 2018. (T. 7). The Court notes that the citation attached to Petitioner's appendix is dated March 16, 2018. However, the Final Order Denying Early Reinstatement indicates that the citation was issued on March 19, 2018.

[3]See Footnote 2.

* * *

Volume 28, Number 11
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CIRCUIT COURTS—ORIGINAL

Counties—Mask ordinance—Curfew—Constitutionality—Complaint for declaration that mask and curfew ordinances are unconstitutional and emergency relief enjoining enforcement of ordinances is denied—Plaintiff business owner failed to allege any injury incurred as result of curfew ordinance sufficient to establish standing to challenge that ordinance—"As applied" challenge to mask ordinance fails where plaintiff has failed to prove that application of ordinance to him was any more stringent or different than application to county residents as a whole—Right to privacy is not infringed by requirement to wear mask in public places—Mask ordinance has rational relationship to legitimate governmental objective of promoting health and welfare of residents and is not unconstitutionally vague

GERALD E. CARROLL, Plaintiff, v. GADSDEN COUNTY, a political subdivision of the State of Florida, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-542-CA. August 25, 2020. David Frank, Judge. Counsel: Anthony F. Sabatini, Clermont, for Plaintiff. Clayton F. Knowles, Quincy and Tallahassee, for Defendant.

FINAL JUDGMENT

This cause came before the Court on August 21, 2020 for non-jury trial and the Court having heard the evidence and argument of the parties, reviewed the case file, and being otherwise fully advised in the premises, finds

The legal tenets that will guide the ruling in this case developed as early as 1824 when United States Supreme Court Chief Justice Marshall described the powers retained by the states after the ratification of our federal Constitution, which include:

> [E]very thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, . . . are component parts of this mass.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 78, 6 L.Ed. 23 (1824).

These state powers are commonly referred to as a state governments' "police powers." "Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort and general welfare. It is a generally accepted ground that the state is the primary judge of and may, by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, welfare or morals. Legislative action exercised under the state's police power is valid if such exercise is confined to those acts which may reasonably be construed as expedient at least for the protection of public safety, public welfare, public morals or public health. A great deal of discretion is vested in the Legislature to determine public interest and measures for its protection." *Newman v. Carson*, 280 So.2d 426, 428 (Fla. 1973).

This is not to say that there are no bounds to a state or local government's police powers. Individual rights are not erased and must be guarded, even in times of emergencies. Legislative enactments that are, "clearly erroneous, arbitrary, or wholly unwarranted" will not stand if challenged. *Patronis v. United Ins. Co. of America*, No. 1D18-2114, 2020 WL 2897023, at *2 (Fla. 1st DCA June 3, 2020) [45 Fla. L. Weekly D1359d] (citations omitted).

The core question in this case is whether the ordinances at issue are a proper exercise of Gadsden County's police powers or an unconstitutional overreaching.

Procedural History

In July 2020, a Centers for Disease Control and Prevention ("CDC") internal government document designated Gadsden County, Florida a COVID-19 virus hotspot based on it being one of ten U.S. counties reporting the highest number of cases per 100,000 over a two-week period.

On July 17, 2020, the Gadsden County Board of County Commissioners ("County") passed Resolution 20-39 which mandated the wearing of masks in certain places and a curfew. *See* ordinances attached.[1]

On July 27, 2020, plaintiff Gerald Carroll ("Carroll"), the owner of a small electrical contracting company in Havana, Florida filed a lawsuit challenging Resolution 20-39 , Gadsden County's mask and curfew ordinances.

Carroll asks this Court to strike down these laws as unconstitutional because they violate Florida's Constitution. Specifically, he asserts that the ordinances deny his constitutional rights to privacy and substantive due process of law. Carroll pursues "facial" and "as applied" challenges to the ordinances. He seeks a declaratory judgment that the ordinances are unconstitutional and an emergency injunction to halt their operation and enforcement.

On August 7, 2020, the Court convened a case management conference. At the hearing, the parties agreed to set the trial on the request for temporary injunction and the declaratory judgment action for the same day, August 21, 2020. The parties also agreed on all pretrial and trial procedures to include the deadline for defendant's response to the complaint, limited discovery, the disclosure of witnesses, and the procedure for exhibits. The only objection to pretrial or trial procedure was defendant's *ore tenus* motion at trial to strike or limit plaintiff's expert due to his disclosure being one day late. The motion was denied.

The trial was conducted on August 21, 2020 as set. Two witnesses testified—Carroll's expert witness, Dr. Boscom, and Carroll.

"As Applied" or "Facial"

Carroll has filed a challenge to the constitutionality of two local ordinances based on alleged deprivations of two State of Florida Constitution provisions—Article I Sections 9 and 23. Claims arising in Gadsden County and based on the state Constitution are properly before this Court. *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *6 (S.D. Fla. May 14, 2020) ("In the rare cases where a federal court is asked to strike a state's use of its police-power authority, the court has correctly declined the invitation."). The first step is to determine whether Carroll's claims are "as applied" or "facial."

An "as applied" challenge to the constitutionality of a law is what it sounds like. The law as written is not being challenged, only the application of the law to the particular plaintiff. "An as-applied challenge . . . is an argument that a law which is constitutional on its face is nonetheless unconstitutional as applied to a particular case or party, because of its discriminatory effects; in contrast, a facial challenge asserts that a statute always operates unconstitutionally." *Miles v. City of Edgewater Police Dep't/Preferred Governmental Claims Solutions*, 190 So.3d 171, 178 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D985a].

Carroll testified that "[his] freedoms have been removed." When asked to explain, he stated that he was unable to get people to work at his office because "no one wants to work with a mask on." Important here is that Carroll did not identify any specific persons who declined a job offer or left his employ because of the mask requirement and there is no record evidence establishing this allegation. Nor was he able to point to any loss of revenue that could be attributed to this. In fact, Carroll admitted during examination by defense counsel that his

earnings were up slightly since the effective date of the ordinances.

Defense counsel asked Carroll if he had told commissioners during a meeting that he was "ignoring your mask requirement," and if he in fact was refusing to wear a mask. Carroll confirmed both. Defense counsel then asked how he was harmed by a requirement to wear a mask if he was not wearing a mask. Carroll replied that the indirect effect of the ordinance was to limit his travel to Quincy, a Gadsden County city next to Havana, because he had heard that law enforcement officers were giving people citations. When asked how that could happen when the citation forms had not yet even been printed, and would he be surprised to know that there had not been a single citation issued, Carroll replied, "I don't know, I'm not the police."

Carroll has not offered any facts that would tend to prove the application of the subject ordinances to him was any more stringent or different that the application to Gadsden County residents as a whole.[2] Carroll's claims, therefore, are a "facial" challenge to the ordinances.

Florida's First District Court of Appeal has recently provided a very instructive outline on the nature and contours of a proper facial challenge to legislative enactments:

> The theory of the insurers' case is that the three challenged portions of the 2016 act are facially unconstitutional under the state due process clause, meaning they have no possible lawful applications. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) [43 Fla. L. Weekly S236a] ("To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid."); *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1026b] (a facial challenge "must fail unless no set of circumstances exists in which the statute can be constitutionally applied"). Stated differently, if a challenged portion has any lawful application, the insurers' facial challenge fails as to that portion. Showing that a statute "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face," which explains why a "facial challenge to a statute is more difficult than an 'as applied' challenge" as a general matter. *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1763c] (quoting *Cashatt*, 873 So. 2d at 434); see also *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) [39 Fla. L. Weekly S421a] (statute "will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some hypothetical circumstances"). Moreover, courts do not overturn statutes casually. That's because "statutes come clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." *Brinkmann v. Francois*, 184 So. 3d 504, 507-08 (Fla. 2016) [41 Fla. L. Weekly S25a] (citations omitted). The presumption of constitutionality is overcome only upon a showing of invalidity "beyond reasonable doubt," meaning that the presumption "applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted." *State v. Hodges*, 506 So. 2d 437, 439 (Fla. 1st DCA 1987) (citing *State v. State Bd. of Educ. of Fla.*, 467 So.2d 294 (Fla. 1985). "All doubts as to validity must be resolved in favor of constitutionality, . . . and if a constitutional interpretation is available, the courts must adopt that construction." *Hodges*, 506 So. 2d at 439 (internal citation omitted).

Patronis v. United Ins. Co. of America, No. 1D18-2114, 2020 WL 2897023, at *2 (Fla. 1st DCA June 3, 2020) [45 Fla. L. Weekly D1359d].

The merits of Carroll's facial challenge to the subject ordinances are the same as the merits of his substantive due process challenge, which are discussed below.

Right to Privacy Claim

"The right of privacy is a fundamental right which we believe demands the compelling state interest standard." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 547 (Fla. 1985); see also *Weaver v. Myers*, 229 So.3d 1118, 1130 (Fla. 2017) [42 Fla. L. Weekly S906a].

Florida's right to privacy, however, is not absolute. The Florida Supreme Court has ruled, "Although we choose a strong standard to review a claim under article I, section 23, 'this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.' The right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests." *Winfield* at 547.

To state a claim for a denial of the right to privacy, a plaintiff must establish that there is "a reasonable expectation of privacy" for the specific conduct at issue. "There is no reasonable expectation of privacy as to whether one covers their nose and mouth in *public places*, which are the only places to which [a] Mask Ordinance applies." *Josie Machovec, et al. v. Palm Beach County*, Case No. 2020CA006920AXX, In the Circuit Court of Palm Beach County, Florida (July 27, 2020) [28 Fla. L. Weekly Supp. 498b] (emphasis in the original), citing *Winfield* at 547; see also *Picou v. Gillam*, 874 F.2d 1519, 1521 (11th Cir. 1989) (rejecting a claim that one has a "right to be let alone" from Florida's helmet laws and stating, "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road.").[3],[4]

The facts as alleged and proven at trial in this case do not frame a cognizable action based on the denial of Florida's right to privacy. The right is fundamental, but not at issue in the present lawsuit.

Substantive Due Process—Rational Relationship—Mask Ordinance

Carroll claims the County has exceeded its legislative power by enacting a law that has no rational relation to the stated interest of the County. In other words, he claims the ordinance does not help protect Gadsden County residents from the devastation of the current pandemic. Because Carroll has not set forth or identified a "fundamental" constitutional right that has been denied, the standard to apply here is the rational basis test, not strict scrutiny.[5]

"[T]he Florida Supreme Court adopted a substantial body of law governing the rational basis test. This body of law focuses on five essential principles: (1) "reasonable" means "fairly debatable"; (2) the party challenging the constitutionality of a law bears the burden of proof; (3) legislative findings are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data; (4) legislation can be based on nothing more than experiment; and (5) the Constitution does not prohibit the legislature from enacting unwise or unfair laws." *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So.3d 13, 19 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D618a].

The evidence presented by Carroll to prove that the mask requirement is not rationally related to the stated purpose of promoting public health in Gadsden County boils down to one publication and the testimony of his expert, Dr. Bostom.

According to his recently published article, "Maskerade: COVID-1984 and Evidence-Free Compulsory Masking," in *Conservative Review*, Andrew Bostom, M.D., M.S., is an associate professor of family medicine (research) at the Warren Alpert Medical School of Brown University.[6]

The publication that Carroll relies upon, that Dr. Bostom incorrectly referred to as a "CDC study," was a ". . .systematic review" of ten reported estimates of the effectiveness of face masks in reducing laboratory-confirmed influenza virus infections in the community from literature published during 1946—July 27, 2018." Xiao J., Shiu E.Y., Gao H., Wong J.Y., Fong M.W., Ryu S. Nonpharmaceutical measures for pandemic influenza in nonhealthcare settings-personal protective and environmental measures. Emerg Infect Dis.2020;26

doi: 10.3201/eid2605.190994.

Dr. Bostom testified that the takeaway from this review is that there is no reliable evidence that masks reduce the transmission of viruses such as COVID-19.

The authors of the review did, however, warn readers of the limited reliability of their face mask conclusions. "Most studies were underpowered because of limited sample size, and some studies also reported suboptimal adherence in the face mask group." *Id*. Moreover, the conclusions as stated in the review itself do not appear completely consistent with Dr. Bostom's overall, generalized opinion:

> In lower-income settings, it is more likely that reusable cloth masks will be used rather than disposable medical masks because of cost and availability. There are still few uncertainties in the practice of face mask use, such as who should wear the mask and how long it should be used for. In theory, transmission should be reduced the most if both infected members and other contacts wear masks, but compliance in uninfected close contacts could be a problem. Proper use of face masks is essential because improper use might increase the risk for transmission. Thus, education on the proper use and disposal of used face masks, including hand hygiene, is also needed.

Id. The reference to "low income settings" is significant, see discussion below.

Even assuming the authors of the Xiao, et al. review intended to convey the message that masks do not help, as Dr. Bostom basically opines, the notion has been overshadowed by the legion of recent studies that conclude masks do indeed help reduce the transmission of COVID-19, specifically. For just some examples, see:

> Centers for Disease Control and Prevention Online Newsroom | *CDC calls on Americans to wear masks to prevent COVID-19 spread; JAMA editorial reviews latest science—case study shows masks prevented COVID spread*, Tuesday, July 14, 2020, , Press Release, For Immediate Release: Tuesday, July 14, 2020, https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html
>
> CDC Editorial in JAMA: Brooks JT, Butler JC, Redfield RR. *Time for universal masking and prevention of transmission of SARS-CoV-2*, JAMA. Published online July 14, 2020. doi:10.1001/-jama.2020.13107 https://jamanetwork.com/journals/jama/fullarticle/-10.1001/jama.2020.13107
>
> McMaster University. "*Evidence supports physical distancing, masks, and eye protection to help prevent COVID-19*: The systematic review and meta-analysis was commissioned by the World Health Organization." ScienceDaily. ScienceDaily, 1 June 2020. www.sciencedaily.com/releases/2020/06/200601194159.htm
>
> Chughtai AA, Seale H, Macintyre CR. *Effectiveness of cloth masks for protection against severe acute respiratory syndrome coronavirus 2*, Emerg Infect Dis., Original Publication Date: July 22, 2020, https://doi.org/10.3201/eid2610.200948.
>
> Emma P. Fischer, Martin C. Fischer, David Grass, Isaac Henrion, Warren S. Warren, Eric Westman. *Low-cost measurement of facemask efficacy for filtering expelled droplets during speech*, Science Advances, August 7, 2020; DOI: 10.1126/sciadv.abd3083
>
> Siddhartha Verma, Manhar Dhanak, John Frankenfield. *Visualizing the effectiveness of face masks in obstructing respiratory jets*, Physics of Fluids, 2020; 32 (6): 061708 DOI: 10.1063/5.0016018
>
> Texas A&M University. "*Face masks critical in preventing spread of COVID-19: Study found that wearing a face mask stopped person-to-person spread of the virus*." ScienceDaily. ScienceDaily, 12 June 2020. <www.sciencedaily.com/releases/2020/06/2006121722-00.htm>.

And then there is:

> Travel Med Infect Dis. 2020 May 28 : 101751, doi: 10.1016/j.tmaid.2020.101751 [Epub ahead of print], PMCID: PMC7253999, PMID: 32473312, *Efficacy of face mask in preventing respiratory virus transmission: A systematic review and meta-analysis.* ***Important here is the conclusion—"this study adds additional evidence of the enhanced protective value of masks" and the fact that the Xiao, et al. review relied upon by Dr. Bostom is included in the analysis.***

Dr. Bostom attempted to buttress his opinion with his conclusion that there have been no "randomized clinical trials" regarding the efficacy of masks, so there is nothing to really consider because "observational studies" are not reliable and do not constitute real evidence.

Dr. Bostom did not explain why observational studies would not at least be persuasive or helpful if not conclusive. More importantly, it appears that there have been randomized clinical trials on the efficacy of masks. C. Raina MacIntyre, Abrar A. Chughtai, Holly Seale, Dominic E. Dwyer, and Wang Quanyic, *Human coronavirus data from four clinical trials of masks and respirators*, Int J Infect Dis. 2020 Jul; 96: 631-633, Published online 2020 Jun 1. doi: 10.1016/j.ijid.2020.05.092, PMCID: PMC7263249, PMID: 32497810.

After being prodded during cross examination, Dr. Bostom reluctantly conceded that any analysis of the transmission of the COVID-19 virus in a rural county with little resources, like Gadsden County, should take local factors into consideration.

Gadsden County's profile and demographics make it exceptionally vulnerable to the devastation of COVID-19. This includes: nearly a quarter of the residents in the state's only majority-minority county have diabetes, heart disease and cancer plague the County, the County has a sprawling geography, and there is a lack of transportation and medical facilities. Nada Hassanein, Tallahassee Democrat, *Distanced from assistance: Rampant health problems in Gadsden mirror coronavirus risk* factos, August 21, 2020, https://www.tallahassee.com/story/news/2020/08/21/coronavirus-magnifies-gadsden-county-health-disparities/5615366002/. Simply put, "The virus has magnified deep-seated systemic health-care inequities, including access to services, which have put minority communities like Gadsden at greater risk for health complications." *Id*.

According to state health department statistics, 29 Gadsden County residents have died from the COVID-19 virus, the same death toll as Leon County. Leon County has a population of almost 300,000. Gadsden County has a population of approximately 46,000.

Following the above, mostly good news about masks, and mostly bad news about the condition of the County, commissioners enacted a mask ordinance, pursuant to their inherent police powers and emergency management under Sections 252.31-252.90, Florida Statutes. The commissioners meet every week to review emergency ordinance and monitor the situation.

It is Carroll's burden to prove that the basis underpinning the County's mask ordinance was *less than* "rational speculation unsupported by evidence or empirical data." *Silvio Membreno & Fla. Ass'n of Vendors, Inc.* at 19. It was more. So much more that the enactment of the ordinance would pass the strict scrutiny analysis, were that the standard, because it is necessary to promote a compelling governmental interest and is narrowly tailored to advance that interest.

The County's mask ordinance is logically related to the objective of promoting the health and welfare of Gadsden County residents during a pandemic. It was readily available, consistent with CDC guidelines, and reasonably expected to reduce hospitalizations and death. The ordinance passes constitutional muster.

Substantive Due Process—Vagueness—Mask Ordinance

To survive a constitutional vagueness challenge, "a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct." *State v. Catalano*, 104 So.3d 1069,

1076 (Fla. 2012) [37 Fla. L. Weekly S763a]. "To withstand constitutional scrutiny, however, statutes do not have to set determinate standards or provide mathematical certainty." *Id*. "The legislature's failure to define a statutory term does not in and of itself render a provision unconstitutionally vague." *Davis v. Gilchrist Cty. Sheriff's Office*, 280 So.3d 524, 532 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2407b] (citation omitted).

Carroll challenges the following phrases as unconstitutionally vague: "anyone who has trouble breathing," and "where other social distancing measures are difficult to maintain." Complaint at 7.

The Court does not believe that "persons of common intelligence" in Gadsden County would be so flummoxed by these two phrases that they would have to guess at what they mean. The phrases are not so vague that they render the mask ordinance unconstitutional.

Substantive Due Process—Rational Relationship—Curfew Ordinance[7]

Carroll asserts that the County's curfew ordinance is constitutionally infirm because it denies him substantive due process in that, "The nightly curfew contained within Resolution 20-39 bears to (sic) rational relationship to any legitimate government interest. . . ." Complaint at 6.

The Florida Supreme Court has provided the minimum requirements for standing in a constitutional challenge case. "First, a plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.' Second, a plaintiff must establish 'a causal connection between the injury and the conduct complained of.' Third, a plaintiff must show 'a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact.' *State v. J.P.*, 907 So.2d 1101, 1113 (Fla. 2004) [30 Fla. L. Weekly S331a] (citations omitted). The standing requirement applies to facial constitutional challenges. *Guest v. Dep't of Juvenile Justice*, 786 So.2d 677 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1522c].

Although minimal and perilously close to being deemed insufficient for standing purposes, Carroll did outline the activities of his business life that he believed were being harmed by the mask ordinance. He did not do so regarding the curfew ordinance. He did not testify that he was required to be out past the curfew for his business, thus, susceptible to being cited. He did not testify that he refrains from going out after curfew because of a fear he will be cited. He has not alleged an injury sufficient to meet the standing requirement and, thus, cannot challenge the curfew ordinance.

Separation of Powers

There is an important purpose behind the law discussed above. The strong deference courts give legislative action is to honor the principle of separation of powers, an essential doctrine that is one of the engines that keeps our democracy driving safely. Elected leaders have the heavy burden of deliberating and enacting laws that protect the people in their districts. If residents of a county disagree with the policy or law promulgated by the county commission, they have the right to attend meetings and seek redress, and if that does not work, there is always the ballot box. Courts do not pick policy winners and losers; they only intercede when legislative action exceeds the bounds provided in the federal and Florida Constitutions. That has not happened here.[8]

Conclusion

Foregoing certain comforts for the greater good is not new for Americans. Laws and regulations rationed food and fuel during World War II. Smokers have been prohibited from enjoying cigarettes in closed public spaces. And, more recently, Florida residents have been told they may not text while driving.

Gadsden County residents are temporarily required to put a piece of cloth over the lower portion of their faces for short periods of time.

County commissioners had deliberated and decided it was not too much to ask. They considered the devastating effects of COVID-19 on their county and the evidence provided by medical professionals and institutions across the country. They are performing their solemn responsibility to enact laws that promote the safety and wellbeing of their constituents.

At the end of the day, commissioners were asked to choose between sparing residents the minuscule inconvenience of wearing a mask and saving lives. They chose saving lives. And they did so in conformity with the Florida Constitution.

Accordingly, it is ORDERED and ADJUDGED that plaintiff's complaint for declaratory judgment and injunctive relief is DENIED, and judgment is ENTERED in favor of defendant against plaintiff.

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[1]At trial, and to expedite matters by avoiding a re-do, the parties stipulated on the record that the specific resolution to be addressed by the Court is the currently effective resolution 20-44 (August 21, 2020). The current resolution differs only slightly from the resolution named in the complaint. The main relevant difference is that the penalty for violations is now civil citation only. For ease of formatting, an unsigned MS Word copy of the fully executed resolution is attached.

[2]There is a question whether the facts of this case, as alleged by Carroll, meet the minimum requirements for standing to challenge this ordinance. However, standing will be assumed for the purposes of the mask ordinance.

[3]Although not addressed at trial, the complaint references "medical privacy" without elaboration or authorities. Mask requirements and curfews are safety precautions, not invasive medical procedures that would raise privacy issues. This ground is wholly without merit and needs no further attention.

[4]This Court's rationale here is the same as that stated in the well written ruling of my learned colleague, Circuit Judge Kastrenakes, in *Machovec*. Indeed, at least four other courts have rejected challenges to local Florida mask ordinances that are stated exactly as stated in the present case. This begs the question, when is enough enough? The Court's ruling in this case should not be considered a criticism of Mr. Carroll, nor a minimization of his concerns. Mr. Carroll is authentically offended by the ordinances and seeks to vindicate important individual rights. However, his counsel, Mr. Sabatini, is the attorney who filed the same claims in the other four lawsuits, possibly more now, to include one in this very circuit. The Court urges Mr. Sabatini to reflect on the possibility that, at some point, he could be sanctioned for filing frivolous lawsuits. Once the law on a particular subject is well established, a lawsuit based on consistently rejected grounds will be frivolous unless there is, "*a reasonable argument* for the extension, modification, or reversal of existing law." *Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482, 491 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2003a] (emphasis added).

[5]The generalized opportunity to "maintain a business or earn a profit" is not "a fundamental right" for substantive due process purposes. *Support Working Animals, Inc. v. DeSantis*, No. 4:19CV570-MW/MAF, 2020 WL 1991479, at *18 (N.D. Fla. Apr. 27, 2020), citing *Fraternal Order of Police, Metro. Dade Cty., Lodge No. 6 v. Dep't of State*, 392 So. 2d 1296, 1301-1302 (Fla. 1980) ("The right to earn a livelihood by engaging in a lawful occupation or business is subject to the police power of the state to enact laws which advance the public health, safety, morals or general welfare.").

[6]During cross examination, Dr. Bostom was asked why there was a mask requirement at his place of employment, Brown University. His response was that he could not say. He was "baffled" by it.

[7]Carroll does not challenge the curfew ordinance on vagueness grounds.

[8]"Under this same modern understanding of the proper separation of powers, however, courts' power and responsibility to determine whether a law violates substantive due process and equal protection are at their absolute minimum concerning laws, such as business and economic regulations, that do not establish suspect classes and do not infringe fundamental rights. In these areas, courts have little or no guidance from pre-existing constitutional rules and constitutional policies as to whether to replace a legislative choice with a judicial choice. For such laws, courts undertake only a limited review that is highly deferential to the legislature's choice of ends and means. This review is the rational basis test. . . . This framework for the separation of powers was the product of over a half-century of conflict between the judicial and political branches of government." *Silvio Membreno & Fla. Ass'n of Vendors, Inc.* at 21-22 (citation omitted).

* * *

Torts—Negligence—Automobile accident—Count of complaint alleging negligent hiring, training, supervision, and entrustment of at-fault truck driver by employing company is dismissed—Claims based on company's own negligence are precluded since both plaintiff and company assert that driver's conduct was within course and scope of his employment, direct negligence claims are duplicative of vicarious liability claims, and complaint lacks allegations required to state cause of action for direct negligence claims

JEFFERY AUBERY YOHN, Plaintiff, v. JESSE DOYLE MORGAN and RDA SERVICE COMPANY, INC., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 19-1167-CA. February 10, 2021. David Frank, Judge. Counsel: Gregory M. Noonan, The Corry Law Firm, P.A., Tallahassee, for Plaintiff. Jesse Doyle Morgan, Pro se, Defendant. Cecil L. Davis, Jr., Banker Lopez Gassler, P.A., Tallahassee, for Defendant RDA Service Company.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT FOR NEGLIGENT HIRING, TRAINING, SUPERVISION, AND ENTRUSTMENT

This cause came before the Court for hearing on February 5, 2021 on Defendant, RDA Service Company, Inc.'s, Motion to Dismiss, Answer to Auto Negligence Complaint and Affirmative Defenses, and the Court having reviewed the motion, response and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

The Allegations of the Complaint

In his complaint, the plaintiff alleges that he sustained severe and permanent injuries when, on November 22, 2015, he drove a Chevrolet Trailblazer utility vehicle from the Gadsden County rest area onto the eastbound Interstate 10 entrance ramp where he collided with a Mack Tractor driven by defendant Jesse Morgan and owned by defendant RDA Service Company. According to the plaintiff, the Mack Tractor was traveling in reverse at the time of the collision. Plaintiff further alleges that defendant Morgan was a leased professional truck driver under the operating authority of defendant RDA Service Company. Most importantly, plaintiff alleges that defendant Morgan was acting within the course and scope of his business relationship with defendant RDA Service Company at the time of the collision.

Count I of plaintiff's complaint is a claim for the negligence of the alleged at fault driver, defendant Morgan. Count II is a vicarious liability claim against defendant RDA Service Company for the negligent driving of defendant Morgan (master—servant / agency and dangerous instrumentality).[1] Count III is a direct claim against RDA Service Company for negligent hiring, training, supervision, and entrustment. Count IV is a vicarious liability claim against RDA Service Company based on respondeat superior (master—servant and agency).

RDA's Answer

In its answer, defendant RDA Service Company admitted paragraph 17 and 18 of the complaint, which state:

> 17. At the time of the subject collision and at all time relevant hereto, Defendant JESSE DOYLE MORGAN was employed by, and was an agent, servant, and/or employee of and under dispatch for Defendant RDA SERVICE COMPANY, INC.
>
> 18. At the time of the subject collision, Defendant JESSE DOYLE MORGAN was operating his vehicle within the scope of his employment, while on duty, in furtherance of and on behalf of Defendant RDA SERVICE COMPANY, INC.

Complaint at 5; Answer at 6.

RDA's Legal Argument for Dismissal

A close inspection of RDA's motion to dismiss reveals really three distinct bases for its argument. First, it points to what it describes as a hard and fast rule that negligent acts committed "within the course and scope" of employment preclude, as a matter of law, claims based on the employer's own negligence. That would include claims such as negligent hiring, supervision, and retention. Second, RDA argues that claims which are no more than "concurrent theories of liability" are improper and must be dismissed. Third, RDA argues that plaintiff simply has not alleged sufficient facts to sustain a cause of action for negligent hiring, training, supervision, and entrustment. The Court agrees with all three.

Florida state courts, and Florida federal courts applying Florida state law, over time have enunciated an almost black letter rule regarding "course and scope." "Under Florida law, a claim for negligent hiring, retention, or supervision requires that an employee's wrongful conduct be committed outside the scope of employment. *Buckler v. Israel*, 680 F. App'x 831, 834 (11th Cir. 2017). "By its very nature, an action for negligent retention involves acts which are not within the course and scope of employment. . . ." *City of Boynton Beach v. Weiss*, 120 So.3d 606, 610 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1742a] (internal quotation marks and citations omitted); see also *Mallory v. O'Neil*, 69 So.2d 313, 315 (Fla. 1954) and *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744, 758 (Fla. 1st DCA 1991).

"An employee's conduct is within the scope of his employment, for purposes of determining an employer's vicarious liability to third persons injured by the employee, if the conduct: (1) is of the kind the employee is hired to perform, (2) occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) is activated at least in part by a purpose to serve the master. *Desvarieux v. Bridgestone Retail Operations, LLC*, 300 So.3d 723, 728 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D188b]

Florida courts also have limited negligence causes of action that are considered additional "concurrent theories of recovery." Under Florida law, if a corporate entity defendant has admitted that it would be vicariously liable for the negligence of its driver, direct negligence claims are, ". . . improper where those claims impose no additional liability." *Dewit v. UPS Ground Freight, Inc.*, No. 1:16CV36-MW/CAS, 2017 WL 2903347, at *3 (N.D. Fla. June 16, 2017) (citations omitted). The classic examples of such duplicative claims are the direct negligence claims of negligent hiring, supervision, and retention. "Where these theories impose no additional liability in a motor vehicle accident case, a trial court should not allow them to be presented to the jury." *Trevino v. Mobley*, 63 So.3d 865, 866 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1245a], citing *Clooney v. Geeting*, 352 So.2d 1216, 1220 (Fla. 2d DCA 1977).[2]

Common law has long balanced the equities and responsibilities that underwrite negligence actions in this state.[3] It accommodates persons injured by employees who act willfully and "outside the course and scope" of their employment, where it can be shown that the employer's negligence was the proximate cause of the injury because it provided the opportunity for the harm to occur. "The concept of employer liability for negligent hiring or retention of an employee is not of recent vintage in the law of Florida, having found clear expression at least by 1954 in *Mallory v. O'Neil*, 69 So.2d 313 (Fla.1954)." *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744, 750 (Fla. 1st DCA 1991).

The balancing has included limitations on employer liability to prevent it from becoming a form of strict liability for anything any employee does to harm another. *Id*. at 750 ("Of particular concern in negligent hiring and retention cases is the basis for holding employers liable for employees' acts for which no liability would attach under the doctrine of respondeat superior.")

The safeguard installed by common law was specific criteria (elements) that must be plead and eventually proven for a plaintiff to succeed. The current criteria are:

"To state a claim for negligent selection or hiring under Florida law, Plaintiff must allege (1) that an employee . . . was incompetent or unfit to perform the work provided; (2) that Defendant knew [or] reasonably should have known of the particular incompetence or unfitness; and (3) that the competence or unfitness proximately caused the injuries." *Baldoza v. Royal Caribbean Cruises, Ltd.*, No. 20-22761-CIV, 2021 WL 243676, at *9 (S.D. Fla. Jan. 25, 2021).

To state a claim for negligent training, the complaint must contain allegations relating to the employer's negligence in the 'implementation or operation of [a] training program and [how] this negligence caused a plaintiff's injury." *Id*. at *8 (citations omitted).

"To state a claim for negligent supervision, a plaintiff must allege that (1) the employer received actual or constructive notice of an employee's unfitness, and (2) the employer did not investigate or take corrective action such as discharge or reassignment." *Id*. at *8 (citations omitted).

"Florida recognizes Section 390 of the Restatement (Second) of Torts as setting forth the law of negligent entrustment. Section 390 states: One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. *Kitchen v. K-Mart Corp.*, 697 So.2d 1200, 1202 (Fla. 1997)." *Stolinas v. Palmer*, No. 218CV702FTM38MRM, 2021 WL 82861, at *3 (M.D. Fla. Jan. 11, 2021).

One must wonder why a plaintiff would even want to scale these walls. Certainly, proving these direct negligence claims requires substantial investigation and discovery and, of course, the right facts. All this when, if proven, respondeat superior and dangerous instrumentality take him right to the prize. As Judge Walker pondered the defendant's vicarious liability admission in *Dewit*, "One would think that Plaintiffs would take that admission and run with it." *Dewit* at *2. This is not to say that a plaintiff should not consider all potential paths to a meaningful verdict or resolution. Certainly there are tactical implications that counsel must navigate and consider, such as insurance coverage issues and evidentiary limitations.

The Law Applied to the Complaint and Answer

Regarding the course and scope of employment, as stated above, both plaintiff and defendant RDA plead that the subject employee or agent conduct was *within* the course and scope of employment. The active tortfeasor, defendant Morgan, is alleged to have carelessly driven his vehicle while working. But there are no allegations that indicate he was not doing the kind of work he was hired to perform, or that it did not occur within the time and space limits authorized or required by the work, or that he was not motivated at least in part by a purpose to serve RDA.

Regarding concurrent theories of liability, none of the direct negligence claims in the present lawsuit would result in damages different in nature or amount from those that would result from the vicarious claims. The direct negligence claims, therefore, are all duplicative.

Regarding RDA's contention that the complaint does not state a cause of action for direct negligence, it is true the complaint is short on ultimate factual allegations. There are specific allegations regarding defendant Morgan's conduct. He negligently operated the Mack Tractor "by improperly backing down the eastbound Interstate 10 ramp, crashing into the front bumper of Plaintiffs vehicle, failing to realize the collision had occurred, and continuing to push the vehicle 5pprox. . seventy-five (75) feet down the eastbound Interstate 10 entrance ramp prior to noticing the collision and coming to a complete stop." Complaint at 2.

However, the only allegations regarding the conduct of RDA are conclusory. They include: "Failing to properly hire and train employees including Defendant Jesse Doyle Morgan; Negligently hiring, entrusting and associating incompetent employees including Defendant Jesse Doyle Morgan; Failing to exercise ordinary care in hiring, retention, training and supervision of employee Jesse Doyle Morgan; Failure to exercise prudence and caution so as to protect Plaintiff from injuries associated with allowing employee Jesse Doyle Morgan to operate its vehicle." Complaint at 4.

There is no discussion or reference to any lack of new hire vetting, ongoing disciplinary matters involving defendant Morgan, the absence of supervisors, specific training programs or initiatives that were inadequate, or any specific knowledge on the part of RDA that would support in any way any of the four direct negligence claims.

Bottom line, plaintiff simply has not included the allegations required to state a cause of action for any of the four direct negligence claims against RDA.

Pleading in the Alternative

In response to the motion to dismiss, the plaintiff noted that the direct negligence claims in his complaint were plead in the alternative.

"Pursuant to our rules of civil procedure, a party may assert inconsistent claims or defenses in a single pleading." *Innovative Material Sys., Inc. v. Santa Rosa Utilities, Inc.*, 721 So.2d 1233, 1233 (Fla. 1st DCA 1998) [24 Fla. L. Weekly D82f] (citations omitted). "Inconsistent statements in a pleading do not bind the party that submitted that pleadings. The Florida Rules of Civil Procedure permit inconsistency in pleadings as to either statements of facts or legal theories adopted." *Booker v. Sarasota, Inc.*, 707 So.2d 886, 888 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D642a].[4]

The present plaintiff absolutely had a right to plead in the alternative, even with inconsistent theories of liability, and even with inconsistent facts. However, the complaint does not state alternate claims of direct negligence. Nowhere in the complaint does plaintiff allege that defendant Morgan was acting outside the course and scope of his employment, much less set forth ultimate facts in support. This is a threshold requirement for stating a cause of action for an employer's direct negligence, see above.

Leave to Amend

Whether plaintiff is entitled to have Count III dismissed without prejudice to amend later is perhaps the most challenging issue to be addressed. As opposed to many of the issues discussed above, this issue has not been as fully shaped by case law or statutes.

On the one hand, Florida law allows, even encourages, liberal amendments to pleadings. *Morgan v. Bank of N.Y. Mellon*, 200 So.3d 792, 795 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2157a]. "Further, 'all doubts should be resolved in favor of allowing the amendment and refusal to do so generally constitutes an abuse of discretion unless it clearly appears that [1] allowing the amendment would prejudice the opposing party, [2] the privilege to amend has been abused, or [3] amendment would be futile.' " *Drish v. Bos*, 298 So.3d 722, 724 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1626a] (citations omitted).

Allowing the plaintiff to amend, should discovery reveal facts that would support the direct negligence claims against RDA, would not prejudice either defendant. The privilege to amend has not been abused. While it's possible that such an amendment could result in more robust summary judgment proceedings, and there is no reason to believe that it would be futile.

On the other hand, we have appellate decisions that suggest there are circumstances that preclude a party from changing course, regardless of additional information gleaned during discovery.

One line of cases that would seem to limit such a change in position is the doctrine of estoppel. That doctrine tells us a party should not be permitted to successfully assume a certain position, and later change

the position simply because its interests have changed. *Clemens v. Namnum*, 233 So.3d 1146, 1149 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2622a], citing *McPhee v. State*, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971). However, for this doctrine to apply, the party must have gained something from the original position. *Id*. The *Clemens* court concluded that a plaintiff whose position went from contending direct liability to contending vicarious liability, "did not succeed or gain anything" by asserting the first position. *Id*.

Other courts suggest estoppel would work to preclude an amendment to add a direct negligence count against RDA in the present case. In *Reyes v. Werner Enterprises, Inc.*, the court held:

> Moreover, Werner's motion is well taken because, under Florida law, when "a plaintiff alleges and a defendant admits that the alleged torts took place during the course and scope of employment, employer liability can only be pursued on the basis of respondeat superior and not on the basis that the employer was negligent." *Delaurentos v. Peguero*, 47 So. 3d 879, 882 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2320b] (citing *Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954)).

No. 16-21883-CIV, 2017 WL 3776826, at *1 (S.D. Fla. Aug. 30, 2017).

A ruling on this point is premature as plaintiff has not filed a motion to amend. However, because it was briefly discussed at the hearing, the Court will address the matter to clarify its dicta. It appears that our First District has not spoken on this precise issue. Assuming the Third District case cited in *Reyes* stands for the proposition that a plaintiff cannot amend in this situation, it would appear to conflict with the Fourth District in *Clemens*, allowing this Court some leeway in reaching its decision.

Practically speaking, even with intensive discovery, it is unlikely that plaintiff will uncover evidence that defendant Morgan's actions on the day in question were really outside the course and scope of his employment. Such behavior tends to be obvious from the onset and would require more than the alleged careless driving. But should that unlikely scenario unfold, the plaintiff will be entitled to amend his complaint and add or substitute in a count for direct negligence against RDA, assuming the other requirements for the causes of action are satisfied.

Finally, there clearly is no impediment to plaintiff amending to add a count for punitive damages if discovery reveals facts sufficient to support it. *Deaterly v. Jacobson*, No. 2D20-636, 2021 WL 45671, at *2 (Fla. 2d DCA January 6, 2021) [46 Fla. L. Weekly D89a]. Employees can engage in willful and wanton behavior that is still within the scope of employment, which opens up the possibility of employer liability for the same. *Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158, 1159 (Fla. 1995) [20 Fla. L. Weekly S128a]; see also Fla. Stat. 768.72 (2020). A claim for punitive damages would not constitute a concurrent theory of liability as the potential damages would not be duplicative to the other counts of the lawsuit. *R.J. Reynolds Tobacco Co. v. Coates*, No. 5D19-2549, 2020 WL 6219570, at *2 (Fla. 5th DCA October 23, 2020) [46 Fla. L. Weekly D126a]; and see Fla. Stat. 768.72(3)(a)-(c) (2020).

Accordingly, it is ORDERED and ADJUDGED that defendant's motion to dismiss Count III is GRANTED. Count III is DISMISSED WITHOUT PREJUDICE.

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[1]Although Count II refers to RDA Service Company's "operational control," it appears to be a claim based on Florida's dangerous instrumentality doctrine. For the dangerous instrumentality doctrine, it is the consent of the owner that is paramount, not operational control. See *Lambert v. Emerson*, 304 So.3d 364 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D760a], *Depriest v. Greeson*, 213 So.3d 1022, 1025 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D439c], and *Roman v. Bogle*, 113 So.3d 1101,1016 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D993a]. Moreover, plaintiff includes a separate claim for respondeat superior liability in Count IV, which is where the business relationship is properly addressed.

[2]Interestingly, in *Trevino*, the court did not hold that the plaintiff's claim for negligent entrustment was a "concurrent theory of liability." The court explained that, "*Clooney* was decided prior to the 1999 enactment of section 324.021(9)(b) 3., Florida Statutes, which limits the noneconomic damages awardable against a vehicle owner for damages caused by the negligence of a permissive user." *Trevino* at 867. That meant that the potential damages that could be recovered were not the same. The plaintiff could recover more with direct negligence than with vicarious liability. However, this is of no avail to the plaintiff. The statute only applies to "natural persons," and does "not apply to an owner of motor vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases motor vehicles."

[3]The genius of common law has guided the courts of this state since its beginning. While still a territory of the United States, Florida adopted the common law of England as its own, provided it "be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." Florida Statute 2.01, originally enacted in 1829. The Florida Supreme Court gave us an excellent discussion of the transition of common law from England to Florida in *Waller v. First Savings and Trust Company*, 103 Fla. 1025, 138 So. 780 (1931). Legal scholars have long discussed the importance of common law to the states. Justice Cardozo put it this way: "History or custom or social utility or some compelling sense of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge and tell him where to go." *Justice Cardozo's Enduring Legacy* by Andrew L. Kaufman, The New York Times, July 9, 1988.

[4]At the hearing, the Court incorrectly opined that alternate pleading likely would not be appropriate unless the primary and alternate claims relied on the same set of facts. The personal injury wrongful death action is an instructive example. There, ". . .it is permissible for a personal representative to pursue both a claim for survival damages and an alternative wrongful death claim where the cause of the decedent's death may be disputed by the parties. *Capone v. Philip Morris USA, Inc.*, 116 So.3d 363, 378 (Fla. 2013) [38 Fla. L. Weekly S402a]. The main facts driving the scenarios are diametrically inconsistent—the alleged negligence caused the death, the alleged negligence did not cause the death.

* * *

Guardianship—Undocumented immigrant minor—Appointment of guardian of person of undocumented immigrant minor and issuance of findings on minor's qualification for special immigrant juvenile status

IN THE MATTER OF THE GUARDIANSHIP OF: JVR, MINOR CHILD DOB [Redacted]. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-324-GA. December 10, 2020. David Frank, Judge. Counsel: Darby Kerrigan Scott, FSU College of Law, Tallahassee, for Guardian Jacqueline Amanda Ortiz. Lolia Y. Fernandez, for Minor Child.

ORDER APPOINTING GUARDIAN OF THE PERSON AND ISSUING SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS

This cause came before the Court on December 8, 2020 on a Petition for Appointment of Guardian of Minor (Guardianship of Person) pursuant to Chapter 744, Florida Statutes, and the Court having reviewed the record, heard the testimony of witnesses, considered all other evidence presented, and being otherwise fully advised in the premises, finds and concludes as follows.

The Pertinent Allegations of the Verified Petition

The Minor Child, JVR, ("Proposed Ward," "Ward," or "JVR"), is a 17-year-old national of El Salvador, who has suffered abandonment by his Mother, [REDACTED] ("Mother"). He currently lives in Quincy, Florida with his Father, [REDACTED] ("Father"). JVR attends Gadsden County High School. He is very active in school and in his church. He is currently in 9th Grade and is focusing on learning English and doing well in school. On weekends, he plays the piano at his church. The exact address of JVR'S Mother is currently unknown; however, she resides in San Salvador, El Salvador. The address of JVR's Father is [REDACTED].

JVR was born in El Salvador. When he was 3 years old, his Mother left him in the care of her brother-in-law for approximately six months. The Father would visit twice a week and give them money for JVR. The Father soon realized that the money that he was leaving was not being used for JVR, but for drugs and alcohol. The Father then took JVR to live with him and his stepmother, [REDACTED], also known as "Yeny."

In May 2008, the Father and Yeny left for the United States and left JVR and his half-sister with Yeny's parents. JVR lived with them until 2016. During this time, JVR encountered problems with gangs, who threatened to kill him if he did not join. In 7th grade, he was forced by gang members to ask for money from his other classmates under the threat of death.

On two occasions in 2013, the Mother attempted to gain custody of JVR in El Salvador but was unsuccessful. The first time, she showed up at Yeny's parent's house and asked for JVR to go with her. JVR did not wish to go with her because they were estranged. The second time, the Mother brought police to forcibly retain custody. JVR was scared and put a stopper on the door and hid.

During the custody proceeding that resulted, a Salvadoran court found that the Mother's behavior was neglectful, causing JVR to frequently become ill, and that he was sent to purchase alcohol and tobacco for his Mother. The Father was granted custody even though he was living in the U.S. at the time.

From January of 2017 until September 2019, when problems with gangs and bullying at school escalated, JVR was taken in by Yeny's sister. During this time, in addition to problems with local gangs, JVR suffered verbal and physical abuse at the hands of his step-cousin.

In September of 2019, the Father decided that JVR should come to live with him and Yeny in the United States. JVR crossed the border and was apprehended by immigration authorities. He was processed, sent to a refugee camp, and then released to live with the Father in Tallahassee.

The Father has no U.S. immigration status and does not speak English.

Petitioner, Jacqueline A. Ortiz ("Proposed Guardian" or "Ms. Ortiz"), seeks a court order appointing her JVR's guardian of the person. She lives at [REDACTED].

Because of JVR's living situation, Ms. Ortiz initially inquired into adopting JVR, but decided not to pursue the matter when she learned it would take too long to be effective. She is currently a customer service representative of Fringe Benefits Management Company and has been for the past 10 years. She is a citizen of the United States and qualified under the laws of Florida to act as guardian of JVR. She is not a professional guardian. She is a close, loving family friend. JVR, JVR's Father, JVR's stepmother, and half siblings all stay at Ms. Ortiz' home on weekends. She helps JVR with his schoolwork. Ms. Ortiz is ready, willing, and able to care for JVR. Both the Father and the Mother consent to the appointment of Ms. Ortiz as the guardian of JVR, as evidenced by their signed and notarized consent forms.

There is no property that would be subject to the guardianship.

JVR is seeking Special Immigrant Juvenile Status based on the Mother' s abandonment.

The Testimony and Evidence Presented

The Court heard sworn testimony from four witnesses using its Zoom remote hearing protocol and the services of a certified translator.

JVR testified first. He confirmed many of the allegations stated above and added context to the severity of his Mother's abandonment and the good experience and relationship he currently has with the Proposed Guardian, Ms. Ortiz.

JVR testified that he is 17 years old, not married, a citizen of El Salvador, who arrived in the United States on November 1, 2019. He lives with his Father in Quincy, Florida and is in the 9th grade at Gadsden County High School. He has a very apparent speech impediment and had to repeat a grade. Nonetheless, he is having a good experience at school and plays the piano at church. For a year he has spent weekends with Ms. Ortiz, who his Father met at church. He trusts Ms. Ortiz and wants her to be his guardian.

JVR has never had a meaningful relationship with his Mother. He lived at times with his grandparents on his Stepmother's side and his stepmother's sister but has no memory of his Mother. At one point, his Mother turned up with police and claimed JVR had been kidnapped. At the Salvadoran custody hearing, JVR told the judge he did not want to go with his Mother because he didn't know her or have any feelings for her. He wanted to go back to his grandparents.

Finally, JVR painted a bleak and dangerous life in El Salvador. His life and the lives of his family were threatened with harm at every turn. He lived in fear, never at peace, because of the ubiquitous and violent gangs who were constantly trying to recruit him. Nobody in his family was able to protect him. His family could not rely on the police to protect him because of corruption and because they were "working with the gangs." There was no place within El Salvador to which he could relocate to escape this danger. He only escaped this dire situation when his Father brought him to the United States.

JVR's Father testified that he has been living with JVR in Quincy for a year and that their relationship is "all good." He does not have an immigration status and does not speak English. He confirmed that JVR has no relationship with his Mother. He stated that JVR could not be reunified with his Mother because, in addition to her not knowing him, she is not concerned about him and never tries to call or communicate with him. He recounted that at one point after he had broken up with her and had left the house, JVR was with his Mother for six months. During that time, it was an in-law who actually cared for JVR. The Mother used the money he gave her to buy beer and cigarettes rather than for JVR.

JVR's Father also testified on the gang situation in El Salvador, a situation he knew firsthand because he also "lived through it." He described threats by gang members "to kill you and your family" if one does not do what they say. The threats are credible, they often deliver on their promises.

JVR's Father met the Proposed Guardian, Ms. Ortiz, at a Christian church in 2008. Ms. Ortiz gives JVR "lots of things," including support, help with homework, supervision and advice. He stated that she would make a good guardian. She is a good person.

Petitioner also called an expert witness, Florida State University Professor Robinson Herrera, Ph.D. Dr. Herrera teaches Latin American history and has studied and conducted field work on the various aspects of transnational gang violence in Central America, including violence related to the post-civil war turmoil in El Salvador. He described the voluntary and involuntary components of gang membership, violent acts for profit, ineffective security forces, and destabilization and fear.

Dr. Herrera described gang violence in "mega cities" such as San Salvador where JVR lived and presumably where he would be sent if returned to the country. He talked about the dominance of two gangs—MS-13 and 18th Street. He discussed the nature of the gangs, that they are more akin to organized insurgents rather than simple thugs. He described how they recruit with money and fear and that El Salvador is ripe for this because parents are often working outside the home and families struggle with poverty and hunger. Interestingly, and in this regard, Dr. Herrera opined that JVR's speech impediment would likely make him more susceptible to recruitment. He explained that gangs could entice JVR with assurances that gang membership would prevent fellow student bullying and harassment because of his stutter. Dr. Herrera also confirmed that it would not be possible for JVR to escape these dangers by relocating to a different part of the country.

To elucidate his testimony, Dr. Herrera referred to two papers published by Human Rights Watch. They are *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, Feb. 2020, https://www.hrw.org/sites/default/files/report pdf/elsalvador0220 web O.pdf visited Nov. 28, 2020), and *El*

Salvador, Events of 2019, Jan. 2020, https://www.hrw.org/world-report/2020/country-chapters/el-salvador (last visited Nov. 28, 2020). Petitioner's Exhibits 1 and 2.

The focus of the papers is national immigration policy and, therefore, are more appropriate for legislative discussions rather than state court proceedings. Nonetheless, they do document certain facts that are relevant to the present proceeding. They were admitted into evidence because of their factual content covering gang violence in El Salvador, not for policy advocacy. The following is an example of the information that correlated Dr. Herrera's testimony on gang recruitment techniques, level of violence, geographic prevalence, and the relationship with security forces:

> Gangs in El Salvador effectively exercise territorial control over specific neighborhoods and extort residents throughout the country. They forcibly recruit children. They sexually assault people targeted on the basis of their gender and/or real or perceived sexual orientation or gender identity. Gangs kill, abduct, rape, or displace those who resist. Many of those who are abducted are later found dead or never heard from again. According to unverified estimates cited by the UN special rapporteur on extrajudicial, summary or arbitrary executions, approximately 60,000 gang members reportedly operate in some 247 out of 262 municipalities in the country.63 Gangs enforce their territories' borders and extort and surveil residents and those transiting, particularly around public transport, schools, and markets. Allegations of security and elected officials collaborating with gangs in criminal operations have been reported by the press and all political parties have negotiated with gangs according to consistent allegations reported, but not substantiated by, the UN special rapporteur.

Exhibit 1 at 27.

The proposed guardian, Ms. Ortiz, also testified. She is a U.S. citizen, married with five children, works in retirement benefits administration with a salary of approximately $38,000 per year, and has lived in Tallahassee for 12 years. She has known JVR for a year, during which she has developed an "aunt like relationship" with him. Ms. Ortiz is with JVR on weekends and gives him a stable environment by supporting him financially, helping with his decision making, and helping him do homework and projects. She understands the responsibilities and duties of a guardian.

Ms. Ortiz covered her qualifications to be a guardian in Florida as follows:

> She is a resident of this state who is sui juris and is 18 years of age or older is qualified to act as guardian of a ward; has not been convicted of a felony; does not suffer any incapacity or illness, making her incapable of discharging the duties of a guardian; is suitable to perform the duties of a guardian; has not been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in s. 39.01 or s. 984.03(1), (2), and (37); has not been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.04 or similar statute of another jurisdiction; does not provide substantial services to the proposed ward in a professional or business capacity; is not a creditor of the proposed ward; is not employed by any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity; and has made a commitment to provide for the proposed ward until he reaches the age of majority.

The Guardianship Requested

Unlike dependency, the establishment of a guardianship of a minor typically is a compact and prompt process.

> . . . .[U]pon petition of a parent, brother, sister, next of kin, or other person interested in the welfare of a minor, a guardian for a minor may be appointed by the court without the necessity of adjudication pursuant to s. 744.331. A guardian appointed for a minor, whether of the person or property, has the authority of a plenary guardian

Fla. Stat. 744.3021(1) (2020).

Here, Petitioner presented a logical and compelling argument for the appointment of a guardian for JVR. Currently, the only natural guardian caring for or even available to JVR is his Father. JVR's Mother abandoned JVR when he was very young, has no relationship with him, and her exact location in El Salvador at any given time is unknown. She has no U.S. immigration status and is not expected to ever join JVR in the United States or reunite with him in El Salvador.

Unfortunately, JVR's Father also does not have any immigration status and does not speak English. Those two facts alone render him ineffective for a myriad of parental responsibilities—signing legal documents, authorizing medical care in certain situations, processing paperwork for school, and much more. Moreover, JVR's Father could be detained or deported at any time leaving JVR without any parent.

Finally, the one currently connected parent, his Father, understands his limitations and strongly consents to the guardianship as the best way to provide for JVR.[1] Under Florida law and strong public policy reflected in our state constitution, a natural parent whose parental rights have not been terminated is entitled to select the guardian for his or her child, unless there is a finding that the parent's choice would cause demonstrable harm. *D.R. v. Heidrich*, No. 5D19-2431, 2020 WL 3584188, at *5 (Fla. 5th DCA July 2, 2020) [45 Fla. L. Weekly D2585b].

The Court finds that Ms. Ortiz is well suited and qualified to be JVR's guardian of the person. She understands and is committed to the obligations she would assume as the person responsible for JVR.

Special Immigrant Juvenile Status ("SIJS") Findings

Petitioner also requests this Court to issue SIJS findings for JVR.

Section 101(a)(27)(J) of the Immigration and Nationality Act of 1952 (Act), as amended, 8 U.S.C. 1101(a)(27)(J),[2] permits the Secretary of Homeland Security to grant special immigrant juvenile classification to certain aliens whom a juvenile court has declared to be dependent on the court, or whom the juvenile court has committed to or placed under the custody of a State agency, department, individual, or entity. The juvenile court must determine that reunification of the alien with one or both parents is not viable due to abuse, neglect, abandonment, or similar basis under State law. In addition, it must be determined in administrative or judicial proceedings that the return of the alien to the alien's or the alien's parent's country of nationality or last habitual residence would not be in the alien's best interest.

The exact requirements for SIJS are slightly muddied because apparently the federal regulations have not kept up with the amendments to the authorizing statutes they are meant to implement. It appears that the following are the current requirements:

> The immigrant youth must be an unmarried noncitizen under age 21 who is under the jurisdiction of a state juvenile court, and for whom the court has made the following findings:
>
> The child has been declared dependent by a juvenile court or the court has placed the child in the custody of a state agency, individual, or entity appointed by a state or juvenile court;
>
> The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
>
> The child's best interest would not be served by being returned to his or her parents' country of nationality or last habitual residence.

See statutes listed in footnote 2 along with their implementing regulations.

Guardianship as the Path Toward SIJS

The vast majority of trial court rulings and appellate court opinions on SIJS in Florida arose in the context of a dependency action. What about guardianship cases? Do they satisfy the "declared dependent or placed in custody" requirement?

As historical context, prior versions of the federal statutes had SIJS

requirements that only could be met with state court dependency proceedings. For example, the child had to be eligible for long-term foster care and deemed dependent on in the custody of the state.

The Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") enacted two key changes relevant to guardianships. First, it replaced the requirement of eligibility for long-term foster care with a new requirement that a juvenile's reunification with one or both parents is not viable due to abuse, abandonment, neglect or a similar basis under state law. INA section 101(a)(27)(J)(i), 8 U.S.C. 1101(a)(27)(J)(i). Second, the TVPRA further expanded the group of eligible aliens to include those placed by a juvenile court with an individual or entity. INA section 101(a)(27)(J)(i), 8 U.S.C.

When a court appoints a guardian in Florida, it places the child under the custody of an individual. Fla. Stat. 744.3021(1) (2020) ("A guardian appointed for a minor, whether of the person or property, has the authority of a plenary guardian."). In Florida, a trial court is authorized to "enter any [ ] order necessary to protect the ward." Fla. Stat. 744.371(5) (2020).

Moreover, several Florida trial courts, including at least two in our Second Judicial Circuit, have recognized that guardian determinations satisfy SIJS requirements. Order on Special Immigrant Juvenile Status Findings, *In re Guardianship of Maldonado* (Fla. 2d Cir. Ct. 2019); Special Immigrant Juvenile Status Findings, *In re Guardianship of Martin* (Fla. 2d Cir. Ct. 2017); Order Regarding Eligibility for Special Immigrant Juvenile Status, *In re Guardianship of Touze*, No. 96-4717 (Fla. 11th Cir. Ct. 1998); see also *Mendez v. Mendez Lopez*, 271 So.3d 72, 74 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D387a].

Several other states have reached the same conclusion. *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 299 (N.Y. App. Div. 2010) (appointment of aunt as guardian satisfied the required declaration of dependency by a juvenile court for purposes of SIJS); *In re Guardianship of Guaman*, 879 N.W.2d 668, 672 (Minn. App. 2016) (a probate court's broad authority to act included the ability to make SIJS findings); see also *In the Matter of the Guardianship of Irma Elisabeth Avila*, Luis Ramiro Velasquez Avila, Appellant-Petitioner, Court of Appeals of Indiana, Case No. 18A-GU-1312, 2018 WL 5832141 (November 8, 2018).

It should now be clear that a Florida guardianship of a minor satisfies the procedural pathway for SIJS findings as set forth in federal and state laws and regulations.

A guardianship of a minor not only neatly accommodates "the court has placed the child in the custody of a . . . individual . . . appointed by a state or juvenile court" requirement, it also is well suited to address "the child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law" requirement.

Although dependency seems better equipped to address abuse and neglect, a guardianship often provides an effective remedy for abandonment, especially abandonment by one of two parents.

Section 39.01(1), Florida Statutes, defines abandonment as:

> a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child's care and maintenance or *has failed to establish or maintain a substantial and positive relationship with the child*, or both. For purposes of this subsection, "establish or maintain a substantial and positive relationship " includes, but is not limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child.

Fla. Stat. 39.01(1) (2020) (emphasis added).

Evidence Issues

Guidance regarding the evidentiary threshold for SIJS cases is sparse. We know that a hearing is required, at least when the avenue pursued is dependency. In *B.R.C.M.*, the Florida Supreme Court held, "We disapprove of the categorical summary denial of dependency petitions filed by immigrant juveniles, and find no authority in the statutory scheme that allows for dismissal or denial without factual findings by the circuit court." *B.R.C.M.* at 12. There is no reason to believe factual findings are not required if the path toward SIJS is a guardianship, even though a guardian for a minor can be appointed without an "adjudication." Fla. Stat. 744.3021(1) (2020).

What has caused this Court some pause is that evidence is typically less vigorous than evidence presented in standard litigation. Judge Jonathan Sjostrom framed the issue perfectly in a SIJS case proceeding in dependency:

> All of this evidence is unrebutted in a literal sense because there was no effective adversarial process. For obvious practical reasons, the basic evidentiary issues in the case cannot be tested. But there is no evidence or suggestion that the Department did or could conduct any effective investigation of events alleged to have occurred in Nigeria. It seems unlikely that the issues could have been effectively investigated by the Department in any case, but a meaningful investigation of events in Nigeria in the days available before the child turned 18 was not reasonably possible.

In the Interest of: ROE1, a child. Circuit Court, 2nd Judicial Circuit in and for Leon County, Case No. 2016 DP 0136, 26 Fla. L. Weekly Supp. 177a (April 26, 2017).

Judge Sjostrom acknowledged that many of the SIJS cases are brought with little time before the child reaches the age of majority, thus limiting the amount of time for investigation or discovery. He acknowledged the difficulty getting credible and competent information, much less evidence, from foreign countries, often their most rural and poorest areas. And he pointed out that often the only witnesses are those supporting the petition due to the complete lack of any adversarial process.

It is true that the information (evidence) that is acquired for SIJS hearings is often second hand and somewhat speculative or extrapolated from generalized hearsay research and publications. *See* Petitioner's Exhibits 1 and 2. But it is also true that, at least when the path is a guardianship, the SIJS process is not really meant to be rigidly adversarial and there are inherent and unavoidable evidentiary limitations. Limitations that were surely expected and acceptable to the drafters of the legislation. It is the nature of the proceeding that limits the robustness of the evidence.

Bottom line—state trial judges must follow the law and the law requires the processing of SIJS cases. Federal and state statutory schemes and, thus, public policy, provide ". . .a pathway for undocumented children who have been abused, abandoned, or neglected to obtain lawful permanent residency in the United States." *In the Interest of Y.V.*, 160 So.3d 576, 579 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D849a]; *B.R.C.M. v. Fla. Dep't of Children & Families*, 215 So.3d 1219 (Fla. 2017) [42 Fla. L. Weekly S472a]; Fla. Stat 39.5075 (2020). Although very limited and strictly defined, the state trial court's role is critical in this important process. Claire Chiamulera, *State Courts' Roles in Protecting Immigrant Children*, Center on Children and the Law, American Bar Association, February 1, 2016.

Judge Sjostrom ended his ruling with, "I conclude that I am bound to resolve the findings mandated by the Immigration and Nationality Act of 1990 and the Trafficking Victims Protection and Reauthorization Act of 2008." I conclude the same.

The Possibility of JVR's Reunification with His Mother

The Mother left JVR when he was three years old. He has not been in the Mother's care since that time. Not only has she not made

frequent and regular contact with JVR since then, she has had absolutely no contact with him since he was 11 years old. When she attempted to obtain custody of JVR in 2013, her attempt was rejected by a Salvadoran court. There is no substantial and positive relationship; she abandoned him by any definition of the word. Even if JVR's Mother could be located, there is almost no chance she would agree to care for JVR or be capable of caring for him safely.

The Prospect of Returning JVR to El Salvador

Considering his life and experiences in El Salvador, JVR has a legitimate and objectively reasonable fear of gang violence, from which his family in El Salvador was and is unable to protect him. Additionally, one of these family members was abusive to JVR. Returning JVR to El Salvador would throw him into the churning fire of ubiquitous gang violence and likely would at least result in his abuse and possibly even his death. Maintaining the life JVR and his Father have built in Quincy and Tallahassee, a life that will now include a caring guardian, will give JVR a safe and financially stable environment. El Salvador would not.

Accordingly, it is ORDERED and ADJUDGED that

1. Jacqueline A. Ortiz is qualified to serve as and is APPOINTED Guardian of the Person of the minor child JVR.

2. Upon taking the prescribed oath and filing designation of resident agent and acceptance, letters of guardianship shall be issued.

3. Unless the Guardian education requirement is waived by the Court, the Guardian shall file with the court within 4 months after the issuance of Letters of Guardianship, a notice of completion of Guardian educational requirements.

4. The Guardian must notify the court of any changes in her residence address, street address, or mailing address within 20 days of the change.

5. The Guardian is authorized to make all reasonable and necessary decisions for, and sign documents on behalf of, the Ward, including but not limited to matters involving the Ward's health, education, housing, and travel.

6. There are no assets or property of the guardianship and the Guardian will not be required to open a guardianship account.

7. This guardianship order shall remain in effect until the minor child reaches the age of majority.

8. Regarding Special Immigrant Juvenile Status, the Court finds

a. JVR is the biological son of [REDACTED] (Father) and [REDACTED] (Mother). He was born on December 29, 2002 in El Salvador and is a citizen of El Salvador. He is unmarried and under the age of 18. He currently resides with his Father at [REDACTED]. His Mother lives in El Salvador.

b. At a guardianship proceeding held by this Court on December 8, 2020, a Guardian was appointed guardian of the person of JVR. Thus, the Court has placed the Ward under the legal custody of the Guardian. The Mother and Father consented to the appointment of the Guardian.

c. The Ward's reunification with his Mother is not viable because the Mother abandoned the Ward within the meaning of Florida law outlined above.

d. Returning the Ward to his home country, El Salvador, would not serve the best interest of the Ward for the reasons discussed above.

IT IS FURTHER ORDERED that the names and addresses of the minor Ward and other participants in this case will be REDACTED in compliance with the Florida Rules of Judicial Administration and applicable statutes before any publication or dissemination of this Order.

[1]Petitioner filed the written, sworn consents to the guardianship by both the Father and the Mother, although the Mother's consent was not discussed at the hearing.

[2]Laws that modified the original Act include: The Immigration Act of 1990 (Pub.L. 101-649, 104 Stat. 4978, enacted November 29, 1990); The Immigration and Nationality Technical Corrections Act of 1994, Public Law 103-416, 108 Stat. 4319 (Jan. 25, 1994); The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (CJS 1998 Appropriations Act), Public Law 105-119, 111 Stat. 2440 (Nov. 26, 1997); The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Public Law 109-162, 119 Stat. 2960 (Jan. 5, 2006); and The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Public Law 110-457, 122 Stat. 5044 (Dec. 23, 2008).

* * *

Torts—Medical malpractice—Presuit requirements—Motion to dismiss claims related to medical negligence of clinic's plastic surgery team and strike related expert witness, on grounds that plaintiff failed to include plastic surgery team in presuit disclosures, is denied—Although plaintiff's pre-suit filings gave notice and provided corroborating expert affidavits only with respect to treatment by clinic's orthopedic team, nothing prohibits plaintiff from discovering and alleging other acts of professional negligence committed by clinic resulting in same injury identified in pre-suit filings

BASSEM M. GIRGIS, Plaintiff, v. MAYO CLINIC JACKSONVILLE, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CA-004425-XXXX-MA, Division CV-A. December 15, 2020. Waddell A. Wallace III, Judge. Counsel: David D. Dickey and Bryan S. Gowdy, for Plaintiff. Christopher Hazelip, Cheryl Worman, and Sally Anne Brown, for Defendant.

ORDER DENYING MOTION TO DISMISS AND MOTION TO STRIKE REGARDING PLASTIC SURGERY ISSUES

This case is before the Court on the Motion to Dismiss Claims Related to Plastic Surgery and Strike Expert Witness, filed October 27, 2020, by defendant, Mayo Clinic Jacksonville (a Nonprofit Corporation) ("Mayo Clinic"). In its motion, Mayo Clinic asks that the Court strike from the complaint all allegations of medical negligence on the part of Dr. Antonio Forte and the Mayo Clinic "plastic surgery team" and prohibit plaintiff from calling as a witness the plastic surgeon expert, Dr. Jesse O. Basadre, disclosed by plaintiff, Bassem M. Girgis, as Administrator of the Estate of Nahed Girgis, deceased.

In his pre-suit filings, plaintiff gave notice and provided a corroborating expert affidavit only with respect to treatment by Dr. Peter Murray and the Mayo Clinic "orthopedic surgical team." In his complaint, however, plaintiff alleges not only professional negligence by the orthopedic team, but also negligence on the part of Dr. Forte and the Mayo Clinic plastic surgery team. Mayo Clinic argues that plaintiff should not be allowed to include allegations of plastic surgery professional negligence in the complaint when there was no notice or corroborating affidavit alleging such negligence provided in the pre-suit process.

In response, plaintiff argues that Chapter 766, Florida Statutes, does not require a plaintiff to identify and provide a corroborating affidavit for every act of negligence committed by a defendant, particularly an institutional defendant such as Mayo Clinic. In making this argument, plaintiff relies heavily on *Davis v. Orlando Regional Medical Center,* 654 So.2d 664 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1177a], and *Columbia/JFK Medical Center Limited Partnership v. Brown,* 805 So.2d 28 (Fla. 4th DCA 2002) [26 Fla. L. Weekly D2696a]. In *Davis,* the pre-suit disclosures only spoke to professional negligence during a surgical procedure. However, the court allowed the plaintiff to present expert testimony of independent acts of professional negligence allegedly occurring following the surgery. In *Columbia/JFK,* the pre-suit compliance alleged only that the hospital was vicariously liable because of negligence of its emergency room physicians and nursing staff. Nevertheless, the court allowed plaintiff to add to her complaint allegations that the hospital was negligent in allowing a certain gynecologist to operate on her one day prior to the emergency room admission. In *Davis,* the Fifth District explained that the purpose of the pre-suit notice and corrobo-

rating expert affidavit "is not to notify the defendants as to how they were negligent, but rather is to demonstrate that the claim is legitimate." *Davis,* 654 So.2d at 665-66.

Mayo Clinic argues that the amendments to Chapter 766 in 2003, and most significantly 2013, changed the pre-suit requirements in such a manner that *Davis* and *Columbia/JFK* no longer represent Florida law. These amendments narrowed the requirements of the corroborating affidavits. Such pre-suit affidavits now must be provided from a professional practicing in the same specialty as the defendant who is charged with professional negligence. Because plaintiff did not provide such a corroborating affidavit from a plastic surgeon in the pre-suit process, Mayo Clinic argues that plaintiff may not assert claims alleging malpractice by its plastic surgeons. However, both *Davis* and *Columbia/JFK* hold that, as long as the pre-suit filing identifies and corroborates an act of professional negligence, the purpose of the pre-suit notice is met and nothing prohibits a plaintiff from discovering and alleging other acts of professional negligence by the same defendant resulting in the same injury as identified pre-suit. If acts of professional negligence not disclosed in the pre-suit notice can be added to a complaint, as in *Davis* and *Columbia/JFK,* the amendments to Chapter 766 tightening the qualifications required for pre-suit corroborating affiants would not impact or change the rationale of this controlling judicial precedent. If there is no requirement that such acts be disclosed, the specific requirements for disclosure are not material.

For these reasons and those more fully explained in Plaintiff's memorandum in opposition to Mayo Clinic's motion, it is

ORDERED:

Mayo Clinic's Motion to Dismiss Claims Related to Plastic Surgery and Strike Expert Witness is DENIED.

* * *

Criminal law—Unlawful sexual activity by person 24 years of age or older with person 16 or 17 years of age—Evidence—Mental health records of victim—Psychotherapist-patient privilege—Motion for production of victim's psychotherapy records is denied except for records of her Baker Act hospitalizations—Relevance of psychotherapy records is far outweighed by victim's interest in privacy of records where defendant has admitted to having sexual contact with victim, and any evidence that victim has propensity to imagine or exaggerate events or suffers from psychotic delusions would not exculpate defendant from strict liability crime to which consent is no defense—Unopposed motion for in camera review of records of victim's Baker Act hospitalizations is granted

THE STATE OF FLORIDA, Plaintiff, v. IFEANYI KING IBENNAH, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F17-17780, Section 5. December 30, 2020. Miguel M. de la O, Judge. Counsel: Adianez Jimenez, for Plaintiff. David Rothman, for Defendant.

ORDER GRANTING IN PART, DENYING IN PART, MOTION FOR PRODUCTION, AND *IN CAMERA* REVIEW, OF MENTAL HEALTH RECORDS

THIS CAUSE came before the Court on Defendant, Ifeanyi King Ibennah's ("Ibennah"), Motion for Production and *In Camera* Review of Mental Health Records of Alleged Victim ("Motion"). The Motion was served on October 26, 2020. The State of Florida ("State") served its Response to the Motion on November 9, 2020, and Ibennah filed a Reply November 23, 2020. The Court has reviewed the various filings, heard argument of Counsel, reviewed documentary and audio evidence, and is fully advised in the premises. The Motion is **GRANTED in part, DENIED in part**.

The State has charged Ibennah with violating Florida Statutes section 794.05, which makes it unlawful for a person over the age of 24 to engage in sexual activity with a person 16 or 17 years of age (colloquially referred to as "statutory rape").

Ibennah seeks mental health records of the alleged victim in this case ("T.P."). Ibennah asks that the records be produced *in camera* so that this Court can review them for information relevant to his defense. The State has conceded that the Court may review records related to T.P.'s involuntary hospitalizations pursuant to the Baker Act. However, the State objects to the production of non-Baker Act records, even for *in camera* inspection, on the authority of Florida Statutes section 90.503 ("Psychotherapist-patient privilege") and *State v. Famiglietti*, 817 So. 2d 901 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1056a].

The Court starts with what should be an uncontroversial observation, *Famiglietti* is a mess. Not the legal analysis, of course. The plurality, concurrences, and dissent are written by brilliant jurists, and their combined acumen shines through. What remains a mess nearly two decades later is the guidance which trial courts should decipher from the various opinions. Sitting *en banc*, five judges (out of eleven which comprised the Third District Court of Appeal at the time) issued the plurality opinion. A sixth judge (Judge Ramirez) agreed with the result while disagreeing that the psychotherapist privilege is absolute, but also rejecting application of the balancing test employed by the Fourth DCA in *State v. Pinder*, 678 So. 2d 410 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1680a]. A seventh judge (Judge Schwartz) also agreed with the result, but declined to address the scope of the privilege or the *Pinder* balancing test.

Consequently, a six-judge majority of the Third DCA disapproved of *Pinder*, but there was no majority support for finding that the privilege is absolute. So, what test should trial courts of the Eleventh Judicial Circuit apply? Apparently, one that is stricter than *Pinder's* but short of absolute. *See Famiglietti*, at 908 ("In my view, [the *Pinder*] test is too permissive. However, I cannot agree with [the majority] that the privilege is absolute; simply that under the facts of this case, I cannot conceive of anything that Famiglietti could possibly allege upon remand that would be sufficient to overcome the privilege.") (Ramirez, J., concurring).

In 2018, the Third DCA again addressed the psychotherapist privilege in *J.B. v. State*, 250 So. 3d 829 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1530a]. *J.B.* left the issue unresolved. In J.B., a panel of the Third DCA acknowledged that a plurality of the court found that the privilege was absolute, but hedged its ruling by concluding that based on the specific facts of that case there was an insufficient basis for invading the privilege, even if the *Pinder* test were applied. Nevertheless, *J.B.*, a death penalty case, gives this Court the guidance it needs because Ibennah has failed to allege more than speculation that the records he seeks will contain relevant, admissible evidence.

> We additionally conclude that, even if the more permissive or qualified test relied upon by the Fourth District [in *Pinder*] was applied to the instant case, the trial court's order would still constitute a clear departure from established law, as Barahona's request for disclosure of J.B.'s confidential and privileged psychotherapist-patient records is exactly the type of fishing expedition that this Court, the United States Supreme Court, and our sister courts have strongly cautioned against.
>
> * * *
>
> Here, defense counsel merely argued that the privileged records might potentially be relevant. This argument falls short of establishing, within a reasonable probability, that the records actually contain information necessary to Barahona's defense.

Id. at 833-34.[1]

For what little it's worth, this Court would—if writing on a clean slate—join Judge Sorondo's dissent. *See Famiglietti*, at 910 ("If the attorney-client privilege is qualified, it follows that the

psychotherapist-patient privilege is as well.") (Sorondo, J., dissenting). However, the Court would still deny the Motion with regards to the non-Baker Act records because, even applying the more permissive *Pinder* test, the relevance of the records Ibennah seeks are far outweighed by the alleged victim's interest in the privacy of her psychotherapy records. Ibennah's best case scenario is that the alleged victim's records would show she is prone to imagine or exaggerate events, or perhaps suffers from psychotic delusions. Such evidence in the medical records of an alleged victim would ordinarily be a fruitful area for a defense lawyer to pursue. Here, however, it is decidedly unfruitful because Ibennah himself admitted sexual contact with 16 year-old T.P., and his DNA was found in swabs of her vagina. Although Ibennah correctly notes that 1 in 1335 persons in the population at large share the same profile as the DNA found in T.P.'s vagina, it is Ibennah who admits being in a car alone with her, admits the union of her mouth with his penis, and admits his fingers touched her vagina. It is not difficult, therefore, to believe the events occurred as T.P. alleges. However, it is unnecessary for this Court to believe all parts of T.P.'s story for the purposes of ruling on the Motion.

Ibennah himself has admitted to the elements of the charged crime, and T.P.'s mental health history cannot exculpate him or mitigate his actions because Florida Statute 794.05 is a strict liability crime.

> A strict liability statute imposes criminal liability regardless of fault. For example, statutory rape is a strict liability crime. *See* §§ 794.05, .021, Florida Statutes (2012) . . . . Under section 794.05, "[a] person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree." These statutes do not require the State to prove the defendant's knowledge of the minor's age, and ignorance or belief as to the minor's age is no defense.

State v. Washington, 114 So. 3d 182, 187 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1535a]. Likewise, consent is not a defense.

> It should by now be clear through experience, as recognized in *Jones*, that there is no constitutionally protected right to the defense of consent when any person commits a lewd act on a minor. The difficulty of defining exactly what "consent" consists of when the "consenting" party is a child, what might be deemed the communication of "consent" by a minor, how a minor would be expected (or required) to communicate lack of consent and determining the earliest age at which "consent" would be valid are just some of the obvious reasons why the legislature has determined this defense cannot apply in such cases.

State v. Raleigh, 686 So. 2d 621, 623 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2458a], *cause dismissed*, 694 So. 2d 739 (Fla. 1997). *See Schmitt v. State*, 590 So. 2d 404, 410-11 (Fla. 1991) ("By the same token, it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents"); *Feliciano v. State*, 937 So. 2d 818, 820 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2395b] ("unemancipated minors are under a statutory disability that precludes consent to sexual activity with adults.").

These facts distinguish Ibennah's case from *Traffanstead v. State*, 290 So. 3d 985 (Fla. 1st DCA 2019) [45 Fla. L. Weekly D32a].[2] In *Traffanstead*, the defendant did not admit to sexual activity with the victim, and the DNA evidence was found on two items which may have been contaminated—not in the victim's sexual organ. As noted earlier, this Court agrees a balancing test should be applied, as *Traffanstead* notes. However, in light of *Famiglietti's* rejection of *Pinder's* balancing test, this Court would be hard-pressed to follow *Traffanstead*.

In light of Ibennah's admissions, and the corroboration of both his admissions and T.P.'s allegations with DNA evidence, there is no reasonable or plausible evidence that could be contained in T.P.'s non-Baker Act records.[3] Consequently, the Court grants, without objection, *in camera* production of the alleged victim's Baker Act records, but denies his request for production of all other psychotherapist records.

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[1]Judge Schwartz made the same point in *Famiglietti*.

> The sole basis for the defendant's attempt to invade the secrecy of the victim's communications with her psychotherapist is the entirely fanciful suggestion that, because, for a good reason she fully explained, the victim had attempted to protect the defendant by claiming that someone else had committed an earlier assault upon her, she "might" have also made a similar admission about the present crime. Since there is nothing whatever to this line of reasoning, as to which speculative is too worthy a description, it is obvious that production may not be required even under the most permissive standard of invading the privilege imaginable, let alone the very restrictive one adopted in *Pinder*.

Id. at 908-09 (Schwartz, J., concurring in part, dissenting in part).

[2]*Reh'g denied* (Feb. 7, 2020), *review denied*, SC20-319, 2020 WL 3041609 (Fla. June 8, 2020), and *review denied*, SC20-320, 2020 WL 3042038 (Fla. June 8, 2020).

[3]Any issue regarding T.P.'s competence to testify will be resolved at the time of trial, which is the relevant time period. *See Coney v. State*, 643 So. 2d 654, 655 (Fla. 3d DCA 1994) (trial court must access "the victim's competency *at the time of trial*") (emphasis in original).

* * *

Attorney's fees—Sanction—Failure to appear at duly noticed deposition or schedule hearing for motion for protective order prior to failure to appear

FRANK MINUTO, Plaintiff, v. AUTO CLUB SOUTH INSURANCE COMPANY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CA-008615. February 17, 2021. Anne-Leigh Moe, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND DENYING DEFENDANT'S MOTION TO DISMISS: MOOTNESS

THIS MATTER having come before the court on February 15, 2021 on Plaintiff's Motion for Sanctions, Defendant's Response to Motion for Sanctions and Defendant's Motion to Dismiss: Mootness. Timothy A. Patrick appeared for Plaintiff. Douglas Fraley appeared for Defendant. The court having reviewed the file, considered the Motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, makes the following findings,

1. Plaintiff's Motion for Sanctions alleges that Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition and that Defendant failed to schedule its Motion for Protective Order for hearing prior to failing to appear for said deposition.

2. Plaintiff's Motion for Sanctions is **HEREBY GRANTED.** The Court placed Timothy Patrick under oath to testify to his Court awarded rate in Hillsborough County, along with the total amount of time he had expended spent in addressing the missed deposition, filing of Motion for Sanctions and hearings on same. The Court awards three (3) hours of attorney's fees at Mr. Patrick's Court awarded rate of $500.00 per hour, along with the court reporting costs of $80.00 for a total of $1,580.00.

3. The deposition of Defendant's Corporate Representative must occur within thirty (30) days from the date of this Order.

4. Defendant's Motion to Dismiss: Mootness is **HEREBY DENIED**.

* * *

Mortgages—Foreclosure—Sale—Deficiency judgment— Calculation—Fair market value determined, after consideration of testimony regarding condition of home, unique nature of community and impact the community's membership rules have on values of properties located within the community, and fact that home was encumbered by various liens—Addition of amount of liens which were paid by plaintiff and which were not part of original foreclosure judgment is appropriate—Motion for deficiency judgment granted

BOYAR REALTY, LLC, a Florida Limited Liability Company, Plaintiff, v. FLORIDA REAL ESTATE INVESTMENT AND LAND DEVELOPMENT GROUP, INC., a Dissolved Florida Corporation, ANTHONY V. CAVALLO, individually and YULIA ALEX TIMPY, individually, Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2020 CA 000667XXXXMB, Division AN. January 6, 2021. Howard K. Coates, Jr., Judge. Counsel: Cris Boyar, Coral Springs, for Plaintiff. Jordan Wagner, Fort Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF DEFICIENCY JUDGMENT AND FINAL DEFICIENCY JUDGMENT

THIS CAUSE came before the Court on November 30, 2020, for evidentiary hearing on the Plaintiff's Motion for Entry of Deficiency Judgment. The Plaintiff was present through its representative and attorney, Cris Boyar, Esq. The Defendant Alex Timpy was present and represented by Jordan Wagner, Esq. Defendants Anthony Cavallo and Florida Real Estate Investment and Land Development Group, Inc., who were properly noticed, did not participate in this hearing.

In making the findings of fact and conclusions in this case, the Court has carefully considered, compared, and weighed all of the evidence provided including the exhibits accepted into evidence. The Court has observed the candor and demeanor of the witnesses and determined their credibility. The Court has resolved all of the conflicts in the evidence.

In making the determinations set forth below, the Court has attempted to distill the testimony and salient facts together with the findings and conclusions necessary to a resolution of this case. In summarizing the substance of the witnesses' testimony, the Court has not included every detail of their testimony, nor attempted to state non-essential facts; however, because the Court has not done so, does not mean that it has failed to consider all of the evidence.

In addition to all of the exhibits offered into evidence, the Court has considered all argument of counsel, the court file, the testimony of the parties and their witnesses. Based on the foregoing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JURISDICTION AND NOTICE

1. The Court has jurisdiction over the parties and the subject matter.

BACKGROUND AND PROCEDURAL HISTORY

2. The Plaintiff filed a Verified Complaint for Foreclosure on January 21, 2020. The Plaintiff obtained a Final Judgment as to the Count for Foreclosure on May 7, 2020 in the amount of $194,538.26. The property was sold at a foreclosure auction on June 11, 2020 for $70,100.00, but that buyer did not fund and the property was properly noticed for a second auction date. The property was then sold at the foreclosure auction on August 25, 2020 to the Plaintiff in the amount of $30,200.00. A certificate of title was issued to the Plaintiff on September 11, 2020.

3. On September 14, 2020, the Plaintiff filed a Motion for Summary Judgment on a Motion for Entry of a Deficiency Judgment against the Defendants Florida Real Estate Investment and Land Development Group, Inc., Anthony V. Cavallo, individually and Yulia Alex Timpy, individually. Attached to the motion was the promissory note, mortgage, modification agreement, unconditional guarantee, final judgment of foreclosure, certificate of title, sales agreement from Plaintiff to Gerard Haryman, and the affidavit of Cris Boyar. On November 30, 2020, this court held a one day evidentiary hearing.

WITNESS TESTIMONY AND EVIDENCE PRESENTED

4. The Court heard from the following witnesses from Plaintiff: 1) Cris Boyar; 2) Mark McCalister, a licensed roofer, 3) Antonio Prieto, a property inspector, 4) Rise Seigrest, a licensed real estate broker 5) Mark Plaxen, realtor; and, 6) Gerard Haryman.

PLAINTIFF'S WITNESSES

Cris Boyar

5. Cris Boyar testified in behalf of the Plaintiff and that, when he inspected the property on August 25, 2020, the property was in terrible condition, there were holes in the roof, there were weeds that were waist high in the backyard, there were visible leaks, visible mold, and the property was in complete disrepair overall. He further testified he paid the liens for homeowners association, taxes and water bills that were not discharged by the court after taking title to the property. The liens totaled $18,323.16. Mr. Boyar testified that he consulted with realtors and investors before selling to Haryman in order to sell the property for a fair price.

Mark McCalister

6. Mark McCalister testified that he is a licensed roofer and has been for 16 years. The Court found Mr. McCalister competent and credible. He generated an estimate for the subject property with respect to the Roof which was admitted into evidence. Mr. McCalister testified that he personally inspected the roof and that it was in very bad condition, no way it could be warrantied, and that the tiles were no longer available. He also testified that there were loose and broken tiles and that it would cost $25,000 to replace the roof. Despite some history between Mr. McCalister and Ms. Timpy that might create a basis for some bias, the Court found his testimony credible.

Antonio Prieto

7. Antonio Prieto testified that he is a licensed home inspector and that he performed a full inspection of the home, took photographs and prepared a report which was admitted and received into evidence. Mr. Prieto further testified that he was hired for Mark Plaxen and not for litigation purposes. He opined the home was in overall poor condition, there were active leaks, mold, rot, and other damages that are more fully described in his report.

Rise Seigrest

8. Rise Seigrest testified that she is a Florida Licensed Real Estate Broker and provided her opinion to the Court as to the fair market value of the subject property. Ms. Seigrest testified that the subject property, as it sat in early September 2020, would be worth between $50,000 and $55,000 based on the poor condition of the home, the liens and the expensive costs to move into Wycliffe. She further testified that she lives in Wycliffe and that over the past few years she was the Realtor that sold a large portion of the homes in Wycliffe and is very familiar with all of the homes that were either listed or sold in Wycliffe, including this subject property, which she sold to Timpy. Ms. Seigrest testified she showed the subject property in excess of 20 times and received only one offer of $50,000 and she was aware of other homes in better condition that sold between $74,400 and $150,000. The homes in Wycliffe that were renovated with new kitchens, bathrooms and roofs sold at the higher end. Homes that were bigger and included a pool, new roof, recently renovated and were lakefront sold for the most. She stated the property in question did not have a pool, lake view, and was in poor condition.

Mark Plaxen

9. Mark Plaxen testified that he is a realtor/investor and lives in Wycliffe. He stated that he showed the home to clients many times

and received only one offer of $50,000. He considered buying the home as an investment for himself, but ultimately did not make an offer based on his inspection of the property, the poor condition of the home, the expensive needed repairs, and the inspection conducted by licensed inspector Antonio Prieto.

Gerard Haryman

10. The Court also heard testimony from Gerard Haryman, who is under contract to purchase the subject property. Mr. Haryman testified his home, located directly next to the subject property, was for sale for almost two years and he never received any valid offers near $140,000. He has been in the subject home many times and stated his home is similar to the subject home, but is larger with an additional bathroom, was in good condition, remodeled, and did not need a roof. Mr. Haryman further testified he is under contract to buy the subject property from the Plaintiff for $75,000. He did not know the Plaintiff's representative prior to meeting him when he inquired about buying the property in question.

DEFENDANT'S WITNESSES

11. Defendant, Yulia Timpy presented as witnesses herself, property inspector Eric Womer, and expert appraiser Michael Cibene.

Yulia Timpy

12. Defendant, Yulia Timpy, testified as to the condition of the property based on her observation and knowledge. She stated the home was in beautiful condition. However, she admitted she did not see the property for months and was aware the electricity/water was turned off for months and the renters removed the refrigerator, washer, and dryer. Timpy admitted the property was not maintained for months. She and Anthony Cavallo are both licensed Realtors and the property was not sold after trying for more than one year. She did not present or provide any testimony or evidence of a buyer for the property, at any sales price.

Eric Womer

13. Mr. Womer testified as to the condition of the property at the time he inspected the property on October 26, 2020. Mr. Womer testified that he is a licensed property inspector hired by his client, Alex Timpy, to do a home inspection on the subject property. He further testified that he took the pictures in the report at time he was at the property and that he stands by his report. Mr. Womer described the subject property condition as really nice, close to 30 years old, inside well maintained and stated that he found nothing wrong with the subject property beyond cosmetic issues.

14. On cross-examination, it was revealed that Mr. Womer's inspection was weeks after repairs to the home had begun and that Mr. Womer did not go on the roof. He further testified that he was not aware that the home was being painted, did not notice fresh paint, and that at the time of his testimony was the first he was hearing about painting. He also stated stated that he was not aware that it was marble on top of tile. Finally, Mr. Womer testified that he is not in construction, has no personal knowledge as to how the home looked when Plaintiff took possession or what repairs were done by Plaintiff, and does not know if the spa was maintained by someone before he got there. With respect to the roof, he stated that he expected the roof to last less than 5 years and that he personally will not walk on a 30 year roof.

Michael Cibene

15. Michael Cibene testified that he is a licensed appraiser, hired by Defendant to provide an opinion as to the fair market value of the subject property. Mr. Cibene testified that the property had a fair market value of $170,000 based on what other homes were selling for within the Wycliffe Country Club. Mr. Cibene did not consider the home that was for sale next to the property in question which was similar in size. This particular home is owned by Gerard Haryman, who testified as described above. Mr. Cibene also stated he has not been inside Wycliffe Country Club for many years and he did not inspect the subject property himself. Notably, on cross-examination, Mr. Cibene testified that he is appraising the home, not considering the membership, and that he does not know the impact of the type of membership on the subject property.

LEGAL ANALYSIS

GOVERNING LEGAL STANDARD

16. A deficiency is the difference between the fair market value of the property at the time of sale and the amount of the debt. Fla. Stat. § 702.06; *See, Grace v. Hendricks*, 140 So. 790, 794 (Fla. 1932) ("A deficiency decree has been defined by this court as one for the balance of the indebtedness after applying the proceeds of the sale of the mortgaged property to such indebtedness."). The proper formula in calculating a deficiency judgment is the final judgment of foreclosure total debt, minus the fair market value for the property, as determined by the court. *Morgan v. Kelly*, 642 So. 2d 1117 (Fla. 3d DCA 1994). As explained in *Morgan*:

> A trial court's discretion with regard to deficiency judgments is not absolute. "[W]hen a deficiency decree is entered for less than the amount due and owing, the judgment must be supported by established equitable principles." When a court does not state any legal or equitable principles justifying an award for less than the full amount of the deficiency, the award is an abuse of discretion.

Id. (citations omitted).

17. "While ordinarily the granting of a deficiency decree is discretionary with the court, this is not an absolute and unbridled discretion, but a 'sound judicial discretion,' which must be supported by established equitable principles as applied to the facts of the case, and the exercise of which is subject to review on appeal." *Vantium Capital v. Hobson*, 137 So.3d 497, 499 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D628a]. Nonetheless, "[w]here it is clear that the total debt secured by a lien on property is more than the fair market value of that property at the date of the foreclosure sale, the granting of a deficiency decree is the rule rather than the exception. *Id*., *citing Ahmad v. Cobb Corner, Inc*., 762 So.2d 944, 946 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1193a]. A deficiency judgment should be granted "unless there are facts and circumstances creating equitable considerations upon which a court should deny the deficiency decree in the exercise of its discretion." *Id.*

18. As provided in *Vantium Capital*:

> "The secured party has the initial burden of proving that the fair market value of the property was less than the total debt determined by the final judgment." *Chidnese v. McCollem*, 695 So.2d 936, 938 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1628b]. However, "[a] legal presumption exists that the foreclosure sale price equals the fair market value of the property." *Thunderbird, Ltd. v. Great Am. Ins. Co*., 566 So.2d 1296, 1299 (Fla. 1st DCA 1990). "Therefore, once the party seeking a deficiency judgment introduces evidence of the foreclosure sale price, the burden shifts to the judgment debtor to present evidence concerning the property's fair market value." *Liberty Bus. Credit Corp. v. Schaffer/Dunadry,* 589 So.2d 451, 452 (Fla. 2d DCA 1991). "In the absence of such evidence, the trial court has the power to act upon the assumption that the sale price reflects the fair market value." *Fara Mfg. Co., Inc. v. First Fed. Sav. & Loan Ass'n of Miami*, 366 So.2d 164, 165 (Fla. 3d DCA 1979).

Vantium Capital v. Hobson, 137 So.3d at 499; see also,

19. Finally, although there is a legal presumption that "the foreclosure sale price equals the fair market value of the property," *Thunderbird, Ltd. v. Great Am. Insurance. Co.*, 566 So.2d 1296, 1299 (Fla. 1st DCA 1990), the foreclosure sale price itself is not conclusive. *Barnard v. First Nat'l Bank of Okaloosa Cnty*., 482 So.2d 534, 535

(Fla. 1st DCA 1986). "The trial court has the duty and discretion to inquire into the fair market value of the property, the adequacy or inadequacy of the sale price, and the relationship, if any, between the foreclosing mortgagee and the purchaser at the foreclosure sale." *Id.*

FAIR MARKET VALUE OF SUBJECT PROPERTY

20. The property is located at 4465 Barclay Fair Way, Lake Worth, Florida 33449 within the Wycliffe Golf and Country Club and was not owner occupied. The Court was faced with at times diametrically opposed testimony and evidence in this matter. Of course, faced with conflicting expert opinions and testimony of the witnesses, the trial court, as the finder of fact in this case, is free to determine the reliability and credibility of the competing testimony and to weigh them as the court sees fit. *Dep't of Agric. & Consumer Servs. v. Bogorff*, 35 So.3d 84, 88 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1062a] (*citing Easkold v. Rhodes*, 614 So.2d 495, 498 (Fla. 1993) (additional citation omitted)). Further, the Court is not obliged to accept one expert or the other; the Court can make its valuation based on all of the evidence. *Ramphal v. TD Bank Nat'l Ass'n*, 206 So. 3d 172, 174 (Fla. 5th DCA 2016) [42 Fla. L. Weekly D57c]. Nonetheless, the Court is also not inclined or arguably even permitted to simply "split the difference" between the two evaluations of the experts. *Blossman v. Blossman*, 92 So.3d 878, 878-79 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1645b] (cit*ing Spillert v. Spillert*, 564 So.2d 1146 (Fla. 1st DCA 1990)). However, the Court does have discretion to find a different value other than that provided by either expert, if the Court provides an articulable, factual basis for doing so that is supported by competent substantial evidence contained in the record. *Ramphal v. TD Bank Nat'l Ass'n,* 206 So. 3d 172, (Fla. 5th DCA 2016) [42 Fla. L. Weekly D57c].

21. The court having viewed photographs and hearing the testimony of the witnesses with knowledge of the property closest to the date of the foreclosure sale at which Plaintiff was the successful purchaser, the Court finds the property was in poor condition and was in need of a roof that would cost at least $25,000. Further, it was undisputed when the Plaintiff took title to the property it was not free and clear as there were liens that were required to be paid by the buyer. It is axiomatic that a property that is sold free and clear is worth more than a property with an encumbrance. *Edwards v. F.D.I.C.,* 746 So. 2d 1157, 1157-58 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2660c].

22. Based on the above testimony, the Court finds and concludes that the fair market value of the subject property is $75,000.00, which takes into account the poor condition of the subject property at the time Plaintiff took possession, as well as the unique nature of the Wycliffe community and the impact the community's membership rules have of the values of the properties located within the community. In this regard, the Court found Ms. Seigrest's testimony to be persuasive and compelling. The Court has determined to accord much less weight to Mr. Cibene's opinion since he did not in the Court's view appropriately account for the Wycliffe membership requirements on the fair market value of the subject property. Similarly, the Court accorded more weight to Mr. McCalister's and Mr. Prieto's testimony regarding the condition of the property and the roof than to Mr. Womer's inspection which was conducted after much of the cleanup and repair of the property had already begun.

23. In addition, the Court finds and concludes that at the time of Plaintiff's purchase of the subject property through foreclosure, the property was subject to the following additional liens, all of which were in addition to and not included as part of the final judgment entered in this matter: Homeowner Association lien-$3,300.00; Tax lien-$14,354.26; and Water Bill lien-$668.90, for a total additional amount of $18,323.16.

24. The Court's treatment of these additional amounts is governed by *Martinec v. Early Bird Int'l, Inc.*, 262 So. 3d 205, 206 (Fla. 4th DCA 2018) [44 Fla. L. Weekly D42a], which "adopted the view of the Goodwin Beach Partnership majority, requiring the consideration of unpaid taxes when entering a deficiency judgment," "to ensure the mortgagee is fully compensated," but to do so in a manner that does not allow "a mortgagee to recover the unpaid [liens] twice." *Id.* Here, the Court has confirmed that the liens Plaintiff seeks to have added to the final judgment were not part of the original judgment of foreclosure and thus adding such figures at this time in consideration of a deficiency judgment would not result in a double recovery to Plaintiff.

25. As such, the Court finds and concludes that the deficiency judgment to which Plaintiff is entitled, based on the evidence presented and considered by the Court, is $137,861.42, which amount is properly calculated and derived as follows:

Original Foreclosure Judgment Amount	$194,538.26
Homeowner Association Lien	$3,300.00
Tax Lien	$14,354.26
Water Bill Lien	$668.90
Total Judgment Amount with additional liens	$212,861.42
Less Fair Market Value of Property	$75,000.00
Total Remaining Final Deficiency Judgment	$137,861.42

Based on the foregoing, it is thereby

ORDERED and ADJUDGED as follows:

A. Plaintiff's Motion for Deficiency Judgment is GRANTED as herein provided.

B. As such, the Plaintiff, Boyar Realty, LLC located at [Editor's Note: street address redacted], Coral Springs, Florida 33067 shall recover from the Defendant YULIA ALEX TIMPY, who resides at [Editor's Note: street address redacted], Lake Worth, Florida 33449 and ANTHONY V. CAVALLO who resides at [Editor's Note: street address redacted], West Palm Beach, Florida 33413 and FLORIDA REAL ESTATE INVESTMENT AND LAND DEVELOPMENT GROUP, INC., a Dissolved Florida Corporation in the amount of $137,861.42 which shall bear interest at the statutory rate and for which let execution issue forthwith.

C. It is further ordered and adjudged the Defendants Timpy and Cavallo SHALL complete, under oath, Florida Rules of Civil Procedure Form 1.977 (Fact Information Sheet) attached hereto for both judgment debtors, include all required attachments, and serve it on Plaintiff's attorney within 45 days from the date of this Final Deficiency Judgment, unless the Final Deficiency Judgment is satisfied or post judgment discovery is stayed.

D. Jurisdiction is retained to enter such further orders as may be just and proper to compel Defendants' compliance with this judgment and to compel the Defendants to complete Form 1.977, including all required attachments, and serve it on the attorney for the Plaintiff.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Officer's directive that defendant turn off engine of parked vehicle so that officer could hear him better, coupled with use of spotlight focused on defendant, placement of patrol vehicle so as to block defendant's vehicle, and arrival of other law enforcement vehicles, elevated consensual encounter to investigatory stop—Even if officer requested that defendant turn off engine, defendant's compliance was acquiescence to officer's authority, not voluntary—Detention—Tip—Where officer encountered defendant in response to 911 call from security guard about unconscious male in vehicle, but no details were provided to show that male referenced in call was defendant, facts of 911 call cannot be considered in determining whether officer had reasonable suspicion to detain defendant—Further, court cannot consider whether detention of defendant for traffic infraction of parking diagonally was warranted in absence of any evidence regarding applicability of traffic laws to parking lot—Mere observation of alert defendant seated in parked vehicle with engine running at late hour does not establish reasonable suspicion for detention—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ROBERT EDGAR CLARK, II, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2020-CT-000498. November 24, 2020. Jason J. Nimeth, Judge. Counsel: Demi Fabelo, Office of the State Attorney, Tavares, for Plaintiff. Joel Leppard and Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE, came before the Court on Defendant's Motion to Suppress, and the Court having held a hearing on October 28, 2020, where Robert Edgar Clark, II, (hereinafter "Defendant") was present with counsel, and the Court having heard the arguments of the parties, considered the testimony, reviewed the applicable case law, and otherwise being fully advised in the premises, it is hereby ordered and adjudged as follows.

FACTS

On January 18, 2020, Officer Brown of the Clermont Police Department was working in the area of the Legends. While on patrol, Officer Clerk received a dispatch regarding an unresponsive male located in the driver's seat of a vehicle at the Legends. A security guard with the Legends was responsible for contacting law enforcement. Officer Brown responded to the scene to investigate.

When Officer Brown arrived at the dispatched location, she observed a vehicle with the motor on. The male was identified as Defendant. The vehicle was located diagonally across a parking line, and when Officer Brown arrived, she parked directly behind Defendant's vehicle. Approximately one car length separated the two vehicles. Officer Brown described the parking lot as having only one way in and one way out which was blocked by her vehicle. Officer Brown arrived with no emergency equipment activated; however, her spotlight was activated and shining into the vehicle. When shining the spotlight into the vehicle, she observed a male later identified as Defendant in the driver's seat and alert. Two other law enforcement vehicles arrived on scene.

When Officer Brown approached the vehicle, the driver's window was cracked. Defendant lowered the window, so Officer Brown could speak with him. Officer Brown asked for Defendant's driver's license and was trying to hear him. The vehicle's engine was loud, so she directed him to turn the vehicle off. Defendant complied. At some point during the encounter, Defendant provided a credit card instead of his driver's license. Officer Brown developed no concerns for Defendant's welfare while interacting with Defendant. At some point during Officer Brown's interactions with Defendant, she detected the odor of an alcoholic beverage, so she asked him to step out to determine whether the odor was from Defendant or the vehicle. When Defendant was asked how much he had to drink, he responded three beers. Defendant further indicated that he had been at a bar.

Officer Brown requested Defendant to exit the vehicle because she could not distinguish whether the odor of alcoholic beverages was coming from Defendant or the vehicle. After Defendant exited the vehicle, Officer Brown observed urine on Defendant's pants, staggering, and beer cans in the vehicle; and she heard slurred speech. Officer Brown asked Defendant to perform field sobriety exercises. Defendant performed the walk and turn exercise, the horizontal gaze nystagmus exercise, and the one-leg stand. Defendant was subsequently arrested because Officer Brown believed he was unsafe to drive.

ANALYSIS

When a defendant is detained or searched outside the issuance of a search warrant, the State has the burden to establish that the evidence was legally obtained. *State v. Setzler,* 667 So. 2d 343, 345 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2418b]. "As a practical matter, absence of a search warrant in the court file [suffices] to shift the burden of going forward to the prosecution." *Id.* (citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. Jeffers,* 342 U.S. 48 (1951); *Jones v. State,* 648 So. 2d 669, 674 (Fla. 1994)). The trial court's findings of fact relating to a motion to suppress must be "supported by competent, substantial evidence. . . ." *State v. Nowak,* 1 So. 3d 215, 217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2788c] (citing *Weiss v. State,* 965 So. 2d 842, 843 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2334c]).

I. WHETHER DEFENDANT WAS SEIZED WHEN TURNING HIS ENGINE OFF

"The United States Supreme Court has determined that the Fourth Amendment requires legal 'seizures' of a person to be based upon reasonable, objective justification, usually expressed in Fourth Amendment jurisprudence as a reasonable articulable suspicion that the individual seized is engaged in criminal activity." *G.M. v. State,* 19 So. 3d 973, 977 (Fla. 2009) [34 Fla. L. Weekly S568a] (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). "However, every encounter between law enforcement and a citizen does not automatically constitute a seizure in the constitutional context." *Id.* Whether a legal seizure has occurred is to be determined based upon "the totality of the circumstances surrounding the specific encounter," and the person must either "be physically subdued by a police officer or the person must submit to the officer's show of authority." *G.M. v. State,* 19 So. 3d at 978 (citing *United States v. Mendenhall,* 446 U.S. 544, 554 (1980); *United States v. Drayton,* 536 U.S. 194, 201 (2002) [15 Fla. L. Weekly Fed. S367a]; *Ohio v. Robinette,* 519 U.S. 33, 39 (1996); *Florida v. Bostick,* 501 U.S. 429, 439 (1991)); *California v. Hodari D.,* 499 U.S. 621, 626 (1991)). This determination is based upon an objective analysis of the circumstances. *G. M. v. State,* 19 So. 3d at 977 (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975)).

Officer Brown directed Defendant to turn his vehicle off. While describing her interaction with Defendant, Officer Brown specifically stated that she was trying to talk with Defendant; however, the engine was too loud, so she had him turn it off. During the State's re-direct examination, Officer Brown was asked whether she had told Defendant to turn the vehicle off or requested the action, and Officer Brown indicated that she had asked. However, in the Court's consideration of the testimony, it is more credible that she directed Defendant to turn

off the vehicle as she had first testified given it was volunteered during an open-ended question. This testimony is the most credible in that it was not in response to the leading question previously posed from the defense or the direct question subsequently posed from the State. Officer Brown's direction to act coupled with the activated spotlight focused on Defendant, the placement of Officer Brown's vehicle as to block Defendant's exit, and the arrival of other law enforcement vehicles would lead a reasonable person to "conclude that he or she is not free to end the encounter and depart." *See Gentles v. State,* 50 So. 3d 1192, 1197 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2900a] (holding that "[a]n order to shut off one's car is as much a restraining on movement as an order to step out of the car"); *see also Stennes v. State,* 939 So. 2d 1148, 1149 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2605b] ("positioning a patrol car to obstruct the path of a vehicle once it is stopped elevates the encounter to an investigatory stop") (quoting *Young v. State,* 803 So. 2d 880, 882 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2239a]; *Leroy v. State,* 982 So. 2d 1250, 1252 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1434a] ("[u]se of a police spotlight or flashlight is one factor to consider in evaluating whether the person would reasonably believe he was free to leave") (citing *Blake v. State*, 939, So. 2d 192, 196 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1256c]).

Even if the Court were to find that Officer Brown merely asked Defendant to turn his vehicle off, the State is still required to prove that Defendant's submission was consensual. "Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances." *Tyson v. State,* 922 So. 2d 338, 339 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D621a] (citing *Jorgenson v. State,* 714 So. 2d 423, 426 (Fla. 1998) [23 Fla. L. Weekly S339a]). "The failure to object to a search does not equal consent to a search." *Tyson,* 922 So. 2d at 339. "While consent need not be expressed in a particular form, it is not established by a showing of acquiescence to a police officer's authority." *Tyson,* 922 So. 2d at 339 (citing *Phuagnong v. State,* 714 So. 2d 527 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D1483a]). "The only relevant time period to determine if an individual has given voluntary consent is at the time of the search." *Johnson v. State,* 995 So. 2d 1011, 1014 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D2515a]. Based on the facts available to the Court—the location of Officer Brown's vehicle and the activated spotlight being shined on Defendant's vehicle—Defendant merely acquiesced to law enforcement's request.

II. WHETHER OFFICER BROWN HAD A REASONABLE SUSPICION TO SEIZE DEFENDANT

Analysis under the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution is all about timing. *See State v. Dixon,* 976 So. 2d 1206, 1209 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D865a]. "[L]aw enforcement. . .may stop and temporarily detain an individual, if the officer has a founded or reasonable suspicion that the person has committed or is about to commit a crime." *Bailey v. State,* 717 So. 2d 1096, 1097 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2154a] (citing *Hunter v. State*, 660 So. 2d 244 (Fla. 1995) [20 Fla. L. Weekly S251a]). Additionally, when law enforcement is engaging in community caretaking functions, seizures of individuals are allowable "in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity." *Castella v. State,* 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a] (citing *Samuelson v. City of New Ulm,* 455 F. 3d 871, 877 (8th Cir. 2006)); *see also Ortiz v. State,* 24 So. 3d 596, 600 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2311a] ("[s]earches undertaken by a law enforcement officer in fulfilling his or her community caretaking functions focus on 'concern for the safety of the general public") (quoting *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973)). "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]). "In determining whether a [seizure] is constitutional, an objective test is used, asking only whether probable cause for the stop existed and ignoring the officer's subjective motivation or intention." *State v. Wilson,* 268 So. 3d 927, 928 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1007a].

Officer Brown had received information prior to her arrival indicating that a male was unconscious in a vehicle at the Legends. When an officer is acting on knowledge outside his or her personal observations, the Court must determine the reliability of that information because "[n]ot all tips are of equal value in establishing reasonable suspicion; they 'may vary greatly in their value and reliability.' " *State v. Maynard,* 783 So. 2d 226, 229 (Fla. 2001) [26 Fla. L. Weekly S182b] (citing *Adams v. Williams,* 407 U.S. 143, 147 (1971)). "Because an anonymous caller's basis of knowledge and veracity are typically unknown, these tips justify a stop only once they are 'sufficiently corroborated' by police." *Maynard,* 783 So. 2d at 229 (citing *Alabama v. White,* 496 U.S. 325, 329 (1990); *Pinkney v. State,* 666 So. 2d 590 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D244a]). On the other side of the spectrum of reliability is a citizen informant "who is 'motivated not by pecuniary gain, but the desire to further justice.' " *Maynard,* 783 So. 2d at 230 (citing *State v. Talbott,* 425 So. 2d 600, 602 n. 1 (Fla. 4th DCA 1982)). A citizen informant is generally one who provides identification, provides detailed information, and provides their motives for calling law enforcement. *See State v. Rewis,* 722 So. 2d 863, 864-65 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2548b]. No details were provided about the 911 call in this case other than it was placed by a security guard at the Legends. There was no testimony as to when the call was placed, the description of the unresponsive male, or the description of the vehicle. The Court is unable to determine whether the male referenced in the 911 call is Defendant or another male altogether. Therefore, the Court cannot consider the facts of the 911 call as reliable in its review of Defendant's detention.

Additionally, the Court is unable to consider whether Defendant had committed a traffic infraction when the vehicle was parked diagonally. The testimony fails to establish whether there is a traffic requirement applicable to this scenario or whether traffic statutes would be applicable to this parking lot. *See Mattingly v. State,* 41 So. 3d 1020, 1021-22 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1774b] ("the definition of a street or highway. . .includes traffic ways and parking areas that are open to public use. . . [and whether a street is considered to be open to public use is usually a question of fact") (citing *State v. Lopez,* 633 So. 2d 1150, 1151 (Fla. 5th DCA 1994); *State v. Tucker,* 761 So. 2d 1248 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1678a]). Officer Brown's observations of Defendant in a running vehicle at the late hour does not establish a reasonable suspicion to seize Defendant. *See Miranda v. State,* 816 So. 2d 132 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D709a] (holding that reasonable suspicion was not established through law enforcement's observation of a vehicle parked with the window cracked at 5:00 am in a high crime area).

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion to Suppress is GRANTED.

* * *

Landlord-tenant—Eviction—Landlord waived right to seek eviction by accepting payment of rent from tenant—Because acceptance of rent fully cured default, court cannot impose posting requirement for rent, and claim for damages is moot—Complaint dismissed without prejudice

MARY VINSON, Plaintiff, v. ALPHONSO WILLIAMS, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2020-CC-003262, County Civil Division V. January 5, 2021. Kristine Van Vorst, Judge. Counsel: Mary Vinson, Pro se, Plaintiff. Kevin Skyler Rabin, Senior Staff Attorney, Three Rivers Legal Services, Inc., Gainesville, for Defendant.

FINAL ORDER DISMISSING PLAINTIFF'S COMPLAINT FOR EVICTION AND DAMAGE WITHOUT PREJUDICE

THIS MATTER came before the Court for a duly-noticed hearing on Defendant's Motion to Determine Rent / Waive Posting of Rent and Plaintiff's Complaint for Eviction and Damages. Present before the Court via Zoom were Plaintiff, Defendant, Defendant's attorney, Kevin S. Rabin, and two witnesses—Deanerkay Vinson and Tawanka Williams. The Court, having reviewed the motion and pleadings, having heard testimony and received evidence, and being otherwise fully advised in the premises, **FINDS AS FOLLOWS:**

A. On November 15, 2020, Plaintiff served Defendant with a pre-suit termination of tenancy notice that offered a 12-day cure period in which to pay rent for October and November 2020 and late fees.

B. On November 17, 2020, within the cure period and per the parties' customary method of mailed rent payments, Tawanka Williams, on behalf of Defendant, mailed to Plaintiff payment for the total balance demanded—$1,152.00—and an additional $51.00, for a total of $1,203.00.

C. On November 18, 2020, prior to the expiration of the cure period provided, Plaintiff instituted this action, seeking eviction for nonpayment of rent in October and November 2020 and damages tied precisely to that nonpayment.

D. On November 30, 2020, Plaintiff received the funds from Defendant's ex-wife and credited the funds towards the rent balance owed by Defendant, resulting in a $51.00 credit.

E. On November 25, 2020, Defendant filed a timely *pro se* Answer to Plaintiff's Complaint for Eviction and Damages, raising payment as his defense to eviction. On December 4, 2020, Defendant retained counsel and filed an Amended Answer and Affirmative Defenses, which further clarified the payment defense, and a Motion to Determine Rent / Waive Posting of Rent.

F. Plaintiff failed to file any document acknowledging receipt of the rent or otherwise issue any notice to Defendant regarding the receipt of payment.

G. Section 83.60(2), Florida Statutes provides that "in an action by the landlord for possession of a dwelling unit, *if the tenant interposes any defense other than payment*, including, but not limited to, the defense of a defective 3-day notice, the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent that accrues during the pendency of the proceeding, when due." (emphasis added).

H. Section 83.56(5)(a), Florida Statutes provides, in pertinent part:

> *If the landlord accepts rent with actual knowledge of a noncompliance by the tenant* or accepts performance by the tenant of any other provision of the rental agreement that is at variance with its provisions, or if the tenant pays rent with actual knowledge of a noncompliance by the landlord or accepts performance by the landlord of any other provision of the rental agreement that is at variance with its provisions, *the landlord* or tenant *waives his or her right to terminate the rental agreement or to bring a civil action for that noncompliance*, but not for any subsequent or continuing noncompliance. (emphasis added).

I. If a landlord accepts rent in full after issuing a notice threatening to terminate a tenancy for nonpayment of rent, then a landlord may not terminate the tenancy or evict for that incident of nonpayment of rent. *Id.*; *see also* § 83.56(3), Fla. Stat. (2020) (providing a 3-day notice as the form for a termination of tenancy for nonpayment of rent and mandating it offer the choice between "payment of the rent or possession of the premises").

J. Due to Defendant's payment and Plaintiff's acceptance of funds which fully cured the default, the court cannot impose a posting requirement for rent that becomes due during the pendency of the proceeding in order for Defendant to maintain his defense. § 83.60(2), Fla. Stat. (2020); *see Stanley v. Quest Int'l Inv., Inc.,* 50 So. 3d 672, 673 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2636a] ("The statute plainly requires the payment of rent if tenant choose to assert any defense *other than payment* . . . .") (emphasis added).

K. Moreover, as Plaintiff accepted the payment tendered by Defendant, Plaintiff has waived any right to seek the remedy of eviction in this action pursuant to section 83.56(5)(a), Florida Statutes.

L. Finally, Plaintiff has received compensation for Plaintiff's alleged damages of unpaid rent and late fees in October and November 2020 in full, and Plaintiff's damages claim, as presented, is moot.

THEREFORE, it is **ORDERED AND ADJUDGED:**

1. Defendant's Motion to Determine Rent / Waive Posting of Rent is **GRANTED** and Defendant is not required to post any rent to the court registry to maintain his defense by operation section 83.60(2), Florida Statutes**.**

2. Plaintiff's Complaint for Eviction and Damages and all claims therein are **DISMISSED WITHOUT PREJUDICE**, and Plaintiff shall take nothing from this action.

3. By Defendant's consent, each party shall bear their own attorney's fees and costs.

4. This Order fully and finally disposes of all parties and all claims in this action. The Clerk of Court shall close the court file accordingly.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Exhaustion of policy limits—Insurer that has exhausted policy limits in payment of valid claims is entitled to judgment in its favor—Medical provider cannot challenge exhaustion of benefits where there is no allegation of bad faith or that insurer paid untimely bills, merely that insurer paid more than was required on claim to another provider

RAEMISCH CHIROPRACTIC, a/a/o Orlando Alvarez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-SC-013156-O. December 21, 2020. Tina L. Caraballo, Judge. Counsel: Evan S. Brown, Reifkind, Thompson & Rudzinski, LLP, Fort Lauderdale, for Plaintiff. Gregory J. Willis, Zea R. McDonnough, and Timothy R. Weaver, Cole, Scott & Kissane, P.A., Orlando, for Defendant.

FINAL JUDGMENT FOR DEFENDANT, AND ORDER ON DEFENDANT'S AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON EXHAUSTION OF PIP BENEFITS

THIS CAUSE having come before the Court on December 10, 2020 on Defendant's Motion for Summary Judgment and Memorandum of Law in Support Thereof With Regard to Exhaustion of PIP Benefits and Plaintiff's Motion for Summary Judgment and Response in Opposition to Defendant's Motion for Final Summary Judgment Based on Alleged Exhaustion, and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that:

1. Defendant issued a policy of insurance that provided $10,000.00

in PIP benefits to Claimant, Orlando Alvarez.

2. On or about March 25, 2014, Defendant tendered a sum of $10,000.00 in PIP benefits to various medical providers for treatment rendered to Orlando Alvarez.

3. On May 18, 2018, Plaintiff filed a complaint for breach of contract against Defendant.

4. Defendant has plead exhaustion of benefits as an affirmative defense, and Plaintiff has not filed an avoidance of Defendant's Affirmative Defense of Exhaustion.

5. *Northwoods Sports Medicine & Physical Rehab, Inc. v. State Farm Mutual Auto. Ins. Co.,* 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a], binding precedent on this Court, finds that once an insurer has paid out $10,000 in PIP benefits for valid claims, it could not be liable for additional PIP benefits, absent bad faith. See also, *Simon v. Progressive Express Ins. Co.,* 904 So.2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b] and *Progressive American Ins. Co. v. Stand-Up MRI of Orlando,* 990 So.2d 3, (Fla. 5th DCA 2008.) [33 Fla. L. Weekly D1746a]

6. "[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it." *Nader v. Fla. Dept. of Highway Safety and Motor Vehicles,* 87 So. 3d 712,725 (Fla. 2012) [37 Fla. L. Weekly S130a] (quoting *Pardo v. State,* 596 So. 2d 665, 666-67 (Fla. 1992)).

7. *Coral Imaging Services v. Geico Indemnity Insurance Co.,* 955 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a], carves out a narrowly tailored exception to the normal rules relating to exhaustion, holding that untimely submitted claims are not valid, but rather are gratuitous and do not count towards the $10,000.00 limit. Timely submission of claims is not at issue here.

8. Plaintiff has argued that payment to another provider for MRI services, Palm Harbour MRI, at the 2007 Limiting Charge was improper, was more than Defendant was required to pay, and therefore a gratuitous payment based upon *Coral Imaging.*

9. In *Geico Indemnity Co. v. Gables Ins. Recovery, Inc., a/a/o Rita M. Lauzan,* 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a], the Third District Court of Appeals adopted the position of the Fourth and Fifth District Courts of Appeal as set forth in *Northwoods, Simon* and *Progressive American* wherein it was held that "in the absence of a showing of bad faith, a PIP insurer is not liable for benefits once benefits have been exhausted." The Third District Court then concluded that "*Coral Imaging* only applies where the PIP insurer exhausts benefits by improperly paying untimely bills."

10. Accordingly, *Coral Imaging* doesn't apply here and Plaintiff's argument that Defendant's payment at the 2007 Limiting Charge was a "gratuitous payment" that should not be counted toward the policy limit fails as a matter of law.

11. Since this case does not present a circumstance where State Farm made any payments towards untimely submitted bills, the binding precedent detailed in *Coral Imaging* and *Northwood*s, requires this Court to find that the exhaustion of benefits cannot be challenged. Plaintiff did not plead any allegation of "bad faith" and State Farm did not benefit from exhausting the policy: State Farm merely paid the claims in a reasonable manner in the order they were submitted.

12. Defendant therefore properly exhausted the available $10,000.00 in PIP benefits through the payment of valid claims and is entitle to judgment in its favor.

Accordingly, it is hereby ORDERED and ADJUDGED that:

Defendant's Motion for Summary Judgment and Memorandum of Law in Support Thereof with Regard to Exhaustion of PIP Benefits is **GRANTED** and Plaintiff's Motion for Summary Judgment and Response in Opposition to Defendant's Motion for Final Summary Judgment Based on Alleged Exhaustion is hereby **DENIED**. Final Judgment is hereby entered in favor of STATE FARM MUTUAL AUTOMOBNILE INSURANCE COMPANY. It is adjudged that Plaintiff shall take nothing by this action and Defendant shall go hence without day.

This court retains jurisdiction as to Defendant's entitlement to costs.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic stop for failing to maintain single lane was lawful—Absent other indicia of impairment, odor of alcohol alone did not create reasonable suspicion to justify request that defendant perform field sobriety exercises—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. REGINALD JAMAR MARTIN, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CT-000976-A-W, Division 85. November 23, 2020. Faye L. Allen, Judge. Counsel: Gilbert Arroyo, Office of the State Attorney, Orlando, for Plaintiff. Joel Leppard and Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court on the Defendant's Motion to Suppress, a hearing was held on October 06, 2020, and the Court having heard argument from Counsel and having reviewed the Court file and being otherwise duly advised, it is hereby

ORDERED and ADJUDGED as follows:

The dual issues raised in the Motion to Suppress were whether the stop was legal pursuant to 316.089 Florida Statutes, and whether the officer had reasonable suspicion to conduct a DUI investigation.

"A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Section 316.089 (1), Florida Statutes. Defense argues that when no other vehicles are around or affected by failure to maintain the lane, a stop is invalid. The state alleges that excessive swerving from the lane negates this argument and both sides cite to case law in support of their respective positions regarding the failure to maintain a single lane. The officer admitted that she never asked the Defendant why he swerved from his lane of travel and that the Defendant was able to pull over at a reasonable location. The court however does finds that the Defendant did fail to maintain his lane and the stop was valid.

Although the initial stop was valid the officer's actions afterward were not supported by the limited observations. The officer testified that she asked the Defendant to step out of the vehicle after asking the Defendant to participate in Field Sobriety Exercises. The Court is concerned that the only indicator of impairment at that time was a strong odor of alcohol from Defendant's breath when he spoke with the officer. In fact, the odor of alcohol, absent other indicators of impairment is not enough to support reasonable suspicion to justify the request for Field Sobriety Exercises. *State v. Kliphouse,* 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. The officer never asked the Defendant why he swerved from his lane of travel and there were any number of reasons why the Defendant may have left his lane of travel.

To request that a driver submit to **field sobriety** tests, a police officer must have reasonable suspicion that the individual is driving under the influence. *State v. Ameqrane,* 39 So.3d 339 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D1148b], citing *State v. Taylor,* 648 So.2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b], the supreme court 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 was entitled under section 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The officer's] request that [the defendant] perform **field sobriety** tests was reasonable under the circumstances and did not violate any Fourth Amendment rights.

Id. at 341.

It is important to note that the officer denied observing any indication of slurred speech, or bloodshot or red eyes. The officer observed no difficulty when the Defendant provided his license and registration to the officer. Even with limited observations, most of which was inconsistent with driving under the influence, the officer requested the Defendant to participate in Field Sobriety Exercises prior to Defendant exiting his vehicle. The officer did hear someone on the Defendant's Stereo Bluetooth ask "do you have anything open and visible?" The court is not persuaded to consider this detail in support of the decision to request Field Sobriety Exercises. It is unclear whether the officer based her decision partly on what she heard. Ultimately, upon exiting the vehicle the Defendant had no difficulty getting out of the vehicle.

The Defendant's Motion to Suppress is **GRANTED**.

* * *

Criminal law—Driving under influence—Search and seizure—Investigatory detention—Where deputy responding to report of armed disturbance was given description of alleged suspect and his vehicle, deputy observed vehicle matching that description in parking lot with motor running, and deputy parked behind vehicle to block it from leaving, deputy conducted investigatory detention based on reasonable suspicion that defendant in vehicle was committing, had committed or was about to commit crime—Where deputy at scene and deputy at corrections facility observed that defendant had odor of alcohol and red/glassy/watery eyes but did not observe indicia that defendant was actually impaired, deputies did not have probable cause for DUI arrest—While a defendant's refusal to perform field sobriety exercises may be used in court as evidence of consciousness of guilt, refusal is not basis to find probable cause for DUI arrest—Witnesses are prohibited from referring to defendant as drunk or impaired

STATE OF FLORIDA, Plaintiff, v. ROBERT JOHN NIEVES-TORRES, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2020CT1312. November 20, 2020. Christine E. Arendas, Judge. Counsel: Adam Duh, Office of the State Attorney, Kissimmee, for Plaintiff. Joel Leppard and Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS/ MOTION IN LIMINE

THIS MATTER having come before this court upon the Defendant's Motion to Suppress/ Motion in Limine, this court having heard testimony of the witnesses and argument of counsel, and being otherwise duly advised in the premises, finds as follows:

FACTUAL FINDINGS

A. On or about May 23, 2020 at approximately 10:05 pm. Osceola County Deputies were dispatched to a possible armed disturbance call.

B. Upon arrival to the apartment complex, Deputy Koffinas was provided a description of the suspect and information that the suspect was seen getting into a White Nissan Rogue.

C. Deputy Koffinas observed a White Nissan Rogue parked in a parking spot of the apartment complex with its lights on. The automobile was running. Deputy Koffinas parked behind the automobile so as to block it from fleeing.

D. Deputy Koffinas made contact with the driver who he later identified as the suspect, Robert Nieves-Torres. Deputy Koffinas knocked on the window but it appeared that the suspect was not able to roll the window down. As a result, Deputy Koffinas asked the suspect to step out of the vehicle.

E. Deputy Koffinas testified that during his encounter with the suspect he observed the suspect to have slurred speech and glassy eyes. Deputy Koffinas believed the suspect may have been impaired. Deputy Koffinas testified that although he believes it to be an important element, he did not indicate in his written report that the suspect had slurred speech.

F. The suspect was arrested following an investigation into the armed disturbance call and transported to the Osceola County Corrections Facility.

G. Deputy Whobrey was dispatched to the County Corrections Facility to conduct a DUI investigation.

H. Deputy Whobrey testified that he was informed by Deputy Koffinas that the suspect was behind the wheel of the running vehicle, that he had observed the suspect to have red/glassy watery eyes and that he smelled the odor of alcohol impurities. Deputy Whobrey testified that he was not informed that the suspect was observed to have slurred speech.

I. After speaking with Deputies Koffinas and Tamayo, Deputy Whobrey made contact with the suspect, informed the suspect that he was conducting a DUI investigation and read the suspect his Miranda rights.

J. Deputy Whobrey testified that he observed an odor of alcohol impurities coming from the suspect's person and also as the suspect walked by him. He observed the suspect to have red/glassy/watery eyes. Deputy Whobrey testified that he did not notice the suspect to have slurred speech and that he did not know how the suspect spoke because he had not met him previously. Deputy Whobrey testified that he believed the suspect was impaired and requested the suspect to perform the field sobriety exercises. The suspect refused. Deputy Whobrey testified that he informed the suspect that if he did not perform the exercises he would be arrested and it could be used against him in court. The suspect again refused. Deputy Whobrey placed the· suspect under arrest for DUI. Deputy Whobrey then read implied consent to the suspect and requested a breath sample. The suspect refused to provide a breath sample.

K. Defense filed their Motion to Suppress/Motion in Limine alleging that the Traffic Stop was Illegal, Defendant's Statements Must Be Excluded Under Miranda, There was No Reasonable Suspicion for a DUI Investigation, There was No Probable Cause of DUI and No Authority to Arrest. Defense withdrew their claim that Defendant's Statements Must Be Excluded Under Miranda.

L. Defense's Motion in Limine seeks to limit the Defendant's Refusal to Perform FSE's is not Probative of Consciousness of Guilt, Penalties for Refusing a Breath Test are Inadmissible, State Cannot Argue an Innocent Person Would have taken the Breath Test, State and Its Witnesses Cannot refer to the Defendant as "Drunk, Impaired, or the Like. Defense withdrew their claim that the Defendant's Refusal to Perform FSE's is not Probative of Consciousness of Guilt.

LEGAL ANALYSIS

TRAFFIC STOP

In Florida, there are three levels of encounters between citizens and law enforcement: (1) a consensual encounter, (2) an investigatory stop/detention based on reasonable suspicion, and (3) an arrest supported by probable cause. *McMaster v. State*, 780 So. 2d 1026 (5th DCA 2001) [26 Fla. L. Weekly D881b]. Based upon the evidence received in this matter, Deputy Koffinas conducted an investigatory detention based upon reasonable suspicion. Upon

arrival to the scene of the alleged armed disturbance, Deputy Koffinas was provided a description of the suspect and of the automobile the suspect was believed to have left in. Deputy Koffinas observed a vehicle matching the description upon his arrival and parked behind the vehicle thereby detaining the suspect based on reasonable suspicion that the suspect was committing, had committed, or was about to commit a crime.

DUI INVESTIGATION AND ARREST

Florida law prohibits driving under the influence when the driver's "normal faculties are impaired". F.S. §316.193. Law enforcement must have reasonable suspicion of impairment to conduct a DUI investigation. *State of Florida v. Ronald Littlefield*, 13 Fla. L. Weekly Supp. 1000a (Osceola 2006). Impairment is based on a totality of the circumstances. The "mere odor of alcohol only shows that alcohol was relatively recently imbibed by the defendant" and does not show impairment. *State v. Kliphouse*, 771 So. 2d 16 (4th DCA 2000) [25 Fla. L. Weekly D2309f]. Deputy Koffinas and Deputy Whobrey both testified that the suspect had an odor of alcohol and red/glassy/watery eyes. There was conflicting testimony as to slurred speech. "To request field sobriety exercises, an officer must have a reasonable suspicion that the driver is impaired." *State v. Ameqrane*, 3 So. 3d 339 (2nd DCA 2010) [35 Fla. L. Weekly D1148b] Reasonable suspicion must be more than a mere hunch and is to be judged on the totality of the circumstances." *Wallace v. State*, 8 So. 3d 492 (5th DCA 2009) [34 Fla. L. Weekly D925b] The only evidence presented was that the suspect had an odor of alcohol and his eyes were red/glassy/watery. There wasn't any evidence presented that the suspect was actually impaired or exhibited signs of impairment.

Absent a warrant, the State must show that there was probable cause to arrest the suspect for driving under the influence. Deputy Whobrey testified that he smelled an odor of alcohol and observed the suspect to have red/glassy/watery eyes. He testified that based on his observations and a "totality of the circumstances", he requested the suspect to perform the field sobriety exercises. When the suspect refused, Deputy Whobrey advised him that if he did not perform the exercises he would be arrested and it could be used against him in court. FSE's are voluntary. While a refusal to perform the exercises can be used in court as evidence, refusal itself is not a probable cause basis for a DUI arrest. Probable Cause is defined to mean "a fair probability", "less than prima facie but more than mere suspicion". *State of Florida v. Cooper.* 25 Fla. L. Weekly Supp. 1019a (Volusia County November 2017). The facts in this case do not give rise to a showing of probable cause for a DUI arrest.

MOTION IN LIMINE

Refusal to Perform FSE's

Defense withdrew this section.

Penalties for Refusing Breath Test

Florida Statute §316.1932(1)(a)(l) requires that breathe samples must be incident to a lawful arrest.

State Cannot Argue that an Innocent Person Would Have Taken the Breath Test

Florida Statute §316.1932(1)(a)(1) requires that breathe samples must be incident to a lawful arrest.

State and Witnesses Cannot Refer to Defendant as "Drunk", "Impaired" or the Like

A lay witness may offer opinion testimony regarding impairment. "Police officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct, and appearance, and also to give an opinion on the defendant's impairment based on those observations." *Williams v. State*, 710 So.2d 24, 28 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D752a]. *See also, Thomas v. State*, 15 Fla. L. Weekly Supp. 334b (Fla. 17th Cir. Ct. 2008); *Phillips v. State*, 15 Fla. L. Weekly Supp. 36b (Fla. 17th Cir. Ct. 2007). A witness's opinion as to the guilt or innocence of the accused is not admissible. *Thomas v. State*, 837 So.2d 443 (4th DCA 2002) [27 Fla. L. Weekly D2516a]

IT IS THERFORE ORDERED and ADJUDGED:

1. Defendant's Motion to Suppress/Motion in Limine is hereby GRANTED as set forth above.

* * *

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Where officer observed defendant engaging in argument with another driver while standing in roadway with other vehicles present, officer had reasonable suspicion to detain defendant—Continued detention was lawful based on indicia of impairment observed during investigation of argument—Motion to suppress is denied

STATE OF FLORIDA, v. MATTHEW FRYMIER, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2019-CT-000362AX. January 13, 2021. Jacqueline B. Steele, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard on December 4, 2020 upon Defendant's Motion to Suppress, and the Court having heard testimony of witnesses, and having heard argument of counsel, and being otherwise fully advised in the premises, the Court makes the following findings of Facts and Conclusion of Law:

FACTS

1. On January 27, 2019, at approximately 1:45 p.m., Officer Christopher Davidson of the Florida Fish and Wildlife Commission, while on duty in a marked patrol vehicle, was traveling westbound on S.R. 70 (53rd Avenue East), in Bradenton, Manatee County, Florida, when he observed an orange sedan facing the wrong direction on the shoulder of S.R. 70 (53rd Avenue East) at the intersection of Caruso Road.

2. Officer Davidson, who was driving his patrol car, positioned his vehicle in front of the orange sedan on the shoulder and activated his overhead lights.

3. Officer Davidson then observed the driver of the orange sedan exit his vehicle, run into Caruso Road and confront the driver of a red pickup truck. Officer Davidson further observed the two drivers arguing in the road at the light at the intersection of S.R. 70 (53rd Avenue East) and Caruso Road. Officer Davidson suspected possible road rage/battery/aggravated assault.

4. This incident took place at approximately 1:45 p.m. in the afternoon with other vehicles at the light/intersection. Officer Davidson requested identification from the two drivers and asked that they pull over into a nearby parking lot so that they would not impede the regular flow of traffic.

5. After obtaining identification, it was determined that Jeremy Frymier was the driver of the orange sedan and that Matthew Frymier was the driver of the red pickup truck.

6. The investigation conducted by Officer Davidson into the argument that he observed in the roadway resulted in an allegation by Jeremy Frymier that his brother, Matthew Frymier, had been doing "burnouts" at Jeremy Frymier's home and he requested that a trespass warning be issued.

7. Officer Davidson during the course of his investigation of the suspected road rage/battery/aggravated assault and alleged trespass noticed indicators of impairment of the Defendant, Matthew Frymier, and asked that he exit his vehicle for the purpose of conducting field sobriety exercises.

OPINION

In his Motion to Suppress, the Defendant challenges the constitutionality of his initial detention.

Whether an officer has a reasonable suspicion for a stop depends upon the totality of the circumstances, in light of the officer's knowledge and experience. *Belsky v. State,* 831 So. 2d 803, 804 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2630b] (citing *Ippolito v. State,* 789 So. 2d 423, 425 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1883d]. A hunch or mere suspicion is not enough. *Ippolito,* at 425.

In *Popple v. State,* 626 So.2d 185 (Fla.1963), the Florida Supreme Court recognized three levels of police-citizen encounters. *Popple,* at 186. According to the Court:

> "The first level is that of consensual encounter and involves minimal contact with the police. *Id.* The second level is that of an investigatory stop, which allows a police officer to "reasonably detain a citizen temporarily if the officer has a reasonable suspicion of that a person has committed, is committing, or is about to commit a crime." *Id.* The third level of encounter involves an arrest for which the arresting officer must have probable cause that a crime has been or is being committed." *Id.*

This case involves a second level encounter. In order to stop and detain a person for investigation, a police officer must have a reasonable suspicion, based upon objective, articulable facts, that the person to be detained has committed, is committing, or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Walker v. State,* 846 So. 2d 643 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1304b]; *Belsky v. State,* 831 So. 2d 803 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2630b]. *See also, Maldonado v. State,* 992 So.2d 839, 843 (Fla. 2nd DCA 2008) [33 Fla. L. Weekly D2303a].

Further, §901.151(2), *Florida Statutes,* the "Florida Stop and Frisk law" provides:

> "Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or if the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense."

Based upon the totality of the circumstances, in light of Officer Davidson's training, experience, and his observations of the incident as testified to during the hearing, the Court finds that Officer Davidson had a reasonable suspicion that the Defendant was involved and engaged in an argument that was the potential result of a road rage incident and/or was about to lead to a battery/aggravated assault.

In the present case, the Defendant's engaging in an argument while in the roadway in the middle of the afternoon with other vehicles present is sufficient, as a matter of law, to establish that Officer Davidson had reasonable suspicion to detain the Defendant. This falls within the standards for the community caretaking doctrine and to insure the safety of the motoring public. *See Majors v. State,* 70 So.3d 655, 661 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a] and *Ellis v. State,* 755 So.2d 767, 768 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D848b].

Thereafter, the continued detention of the Defendant after the traffic stop was concluded was also lawful based upon reasonable suspicion of impairment observed during the course of the road rage/battery/aggravated assault/trespass investigation. The Defendant does not challenge the stop once Officer Davidson developed reasonable suspicion of impairment.

Therefore, it is

ORDERED AND ADJUDGED that Defendant's Motion to Suppress is **DENIED**.

* * *

Insurance—Personal injury protection—Attorney's fees—Prevailing insurer

VIDA CHIROPRACTIC, INC., a/a/o William Haynes, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY; USAA GENERAL INDEMNITY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 18-CC-024807, Division K. September 3, 2020. Jessica G. Costello, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Christopher Scott Dutton, Dutton Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO TAX ATTORNEY'S FEES AND COSTS AGAINST THE PLAINTIFF ENTITLEMENT ONLY

This cause having come before this Court on July 14, 2020 on Defendant's Motion to Tax Attorney's Fees and Costs (Entitlement), and having hear argument of counsel and the Court being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** that:

Defendant's Motion to Tax Attorney's Fees and Costs is **GRANTED**, based on Defendant's Motion for Sanctions Pursuant to section 57.105, Florida Statutes (Payment in Full / Fee Schedule Limitations to Exhaustion / Exhaustion of Benefits).

It is hereby ORDERED that Defendant is entitled to recover from Plaintiff, attorneys fees and costs pursuant to Florida Statutes section 57.105 and Florida Rule of Civil Procedure 1.420. This Court reserves jurisdiction to determine the amount and allocation of the attorney's fees and costs award pending the parties' compliance with the Court's Order on Requirements and an evidentiary hearing on same.

* * *

Insurance—Personal injury protection—Coverage—Insurer was in breach of contract and 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)—Summary judgment entered in favor of medical provider

ORLANDO THERAPY CENTER, INC., (a/a/o Jasmin Basulto), Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-016425 (consolidated into). ORLANDO THERAPY CENTER, INC., (a/a/o Ariel E. Basulto), Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. Case No. 18-CC-016426. January 7, 2021. Daryl M. Manning, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the court on October 8, 2019 on Plaintiff's Motion for Summary Judgment. The court having considered the Motion, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. Plaintiff's Motion for Summary Judgment contends that Defendant violated the statutory 30 day investigative time requirement in denying coverage to Plaintiff and did not invoke the additional time limitation under *F.S.* 627.736(4)(i). As such, Defendant was in breach of its insurance contract pursuant to *F.S.* 627.736(4)(i).

2. The Court follows the recent orders granting summary judgment on this issue. Summary judgment granted where insurer violated the statutory 30 day investigative time requirement. As such, Defendant was in breach of its insurance contract. *Hillsborough Therapy Center, Inc. (a/a/o Rolando Perez) v. Progressive American Ins. Co.* (Fla. 13th Jud. Cir. Ct., Hillsborough Cty., Case No. 17-CC-45153, January 6, 2020, Cynthia S. Oster, Judge) [27 Fla. L. Weekly Supp. 980a].

3. Summary judgment granted where insurer violated the statutory

30 day investigative time requirement and did not invoke the additional time limitation under F.S. 627.736(4)(i), as such, it is in breach of contract. *AJ Therapy Center, Inc. (a/a/o Pedro Enrique Chavez) v. Century National Ins. Co.* (Fla. 13th Jud. Cir. Ct., Hillsborough Cty., Case No. 17-CC-51131, December 31, 2019, Cynthia S. Oster, Judge) [27 Fla. L. Weekly Supp. 906b].

4. Summary judgment granted where insurer violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under F.S. 627.736(4)(i), they waived their ability to investigate or deny the claim for material misrepresentation. *Orlando Medical & Wellness (a/a/o Moises Montoya) v. Century National Ins. Co.* (Fla. 13th Jud. Cir. Ct., Hillsborough Cty., Case No. 18-CC-040604, January 9, 2020, Daryl M. Manning, Judge) [27 Fla. L. Weekly Supp. 979a].

5. Plaintiff's Motion for Summary Judgment is **HEREBY GRANTED**.

* * *

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 David Hoegler, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-033024. December 22, 2020. Frances M. Perrone, Judge. Counsel: Emilio R. Stillo, Kevin W. Richardson, and Andrew B. Davis-Henrichs, Stillo & Richardson, P.A., Davie; and Anthony T. Prieto, Morgan & Morgan, P.A., for Plaintiff. Crystal Urquiza, Law Offices of Robert J. Smith, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S CHOSEN APPRAISER AUTO GLASS INSPECTION SERVICES AND FOR ATTORNEYS FEES AND COSTS

THIS CAUSE having come before the Court on December 15, 2020 concerning Plaintiff's 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 ("Allstate") compelled appraisal pursuant to the terms and conditions of the applicable Policy, and selected Auto Glass Inspection Services ("AGIS") as its chosen appraiser in this claim. In relevant part, the Allstate insurance policy states:

> **Right to Appraisal**
> Both **you** and **we** have a right to demand an appraisal of the loss. Each will appoint and pay a competent and ***disinterested*** appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.
> (emphasis added).

Plaintiff, Auto Glass America, LLC ("AGA"), contends that AGIS is not disinterested 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 Allstate'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 Allstate'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, September 20, 2018, and October 3, 2018 wherein AGA, through counsel, objected to Allstate's use of AGIS as its appointed appraiser for *all* claims. AGA argues that despite making a good faith effort to request that Allstate remove AGIS and to obtain another appraiser (i.e., one that is disinterested), Allstate's position remains unwavering that it does not have to do so. Although Allstate 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]. Allstate maintained at the hearing that AGIS was "disinterested".

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 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, Allstate'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 a disinterested appraiser. Based on the record evidence, AGA has made a sufficient showing that AGIS is not disinterested, and Allstate failed to present anything to suggest otherwise. . This Court therefore finds AGIS does not appear to be free from bias, prejudice, or partiality. *See, Auto Glass America LLC (a/a/o Tiara McFadden) v. Esurance Prop. & Cas. Ins. Co.*, Case No.: COCE19-24303 Div. 51 (Broward Cnty. Ct., Dec. 2, 2020)(McCarthy, J.) [28 Fla. L. Weekly Supp. 960a]; *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. The Plaintiff is not seeking a determination

as to entitlement to attorney's fees and costs at this time.

[1]Allstate 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 Allstate's use of AGIS by the letter dated September 20, 2020 and October 3, 2018 referenced above.

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Failure to disclose actual garaging address—Insurer violated PIP statute by failing to pay or deny claim within 30 days and failed to invoke additional time limitation under section 627.736(4)(i)—Rescission of policy was improper

AJ THERAPY CENTER, INC., (a/a/o Coralis Ruiz Pena a/k/a Zoraliz Pena), Plaintiff, v. AVENTUS INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-046778. January 7, 2021. Daryl M. Manning, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on March 3, 2020, June 22, 2020 and December 15, 2020 on Plaintiff's Motion for Final Summary Judgment, Plaintiff's Motion for Reconsideration/Rehearing and a Case Management Conference. The court having considered the Motions, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. This is a Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's rescission of the subject policy. Defendant's rescission was based upon an alleged material misrepresentation for an alleged failure to disclose the actual garaging address of the insured vehicle on the insurance application by the named insured.

2. On March 3, 2020, a hearing was held on Plaintiff's Motion for Final Summary Judgment.

3. On March 18, 2020, the Court issued an Order Denying Plaintiff's Motion for Final Summary Judgment.

4. On June 22, 2020, a hearing was held on Plaintiff's Motion for Reconsideration/Rehearing. Plaintiff's Motion for Reconsideration/Rehearing is **HEREBY GRANTED** whereby the previous Order Denying Plaintiff's Motion for Final Summary Judgment dated March 18, 2020 is vacated and reversed.

5. Plaintiff's Motion for Final Summary Judgment seeks entry of summary judgment arguing that Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract and Defendant's rescission of the policy was improper. Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Criminal law—Driving under influence—Evidence—Hospital records—Officer's inquiry of emergency room doctor as to whether blood had been drawn from defendant for purposes of blood alcohol test and doctor's unsolicited statement regarding test result were in accordance with section 316.1932(1)(f)2.b, which authorizes doctor to disclose to law enforcement blood alcohol test results on patient whose results exceed lawful level—Even if officer was required to obtain warrant or subpoena before asking doctor if blood test had been performed, officer's request is not misconduct that warrants exclusion of medical records—Further, where there was no bad faith on part of officer, inevitable discovery exception to exclusionary rule applies—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. HEIDY ANDREA BRITO, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Misdemeanor Division E. Case No. 50-2019-CT-009443-AXXX-NB. December 21, 2020. Robert Panse, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter came before the Court on December 17, 2020 on an evidentiary hearing on "Defendant's Motion to Suppress Evidence." At the hearing, Palm Beach Gardens Police Officer Timothy Lawrence testified under oath and the Court admitted into evidence (stipulated to by the State and Defense), State's exhibit number 1, a DVD containing body worn camera video and audio footage. Upon consideration of the testimony, evidence, argument of counsel, and being fully advised in the premises the Court finds:

The Defendant, Heidy Andrea Brito, while operating a motor vehicle, was involved in a motor vehicle crash resulting in the Defendant and elderly people in another motor vehicle being taken to local hospitals. Information provided to or observed by Officer Timothy Lawrence included evidence that the Defendant had an odor of an alcoholic beverage on her breath, slurred speech, glassy bloodshot eyes and swaying when standing. Additionally, a container of sangria was found in the console of her car and the Defendant stated she had a few drinks after work.

While at the hospital, Officer Lawrence learned that the Defendant would be in the hospital for an extended period of time-at least two more hours. He also determined that with the additional time necessary to transport the Defendant to the breathalyzer facility, obtaining a breath sample was impractical. Officer Lawrence asked the emergency room doctor whether blood had been drawn for determining alcohol content and the doctor answered in the affirmative. The officer told the doctor that he did not want to know the lab results. Without prompting by the officer, the doctor told the officer the alcohol test result. Officer Lawrence was not provided with any medical records whatsoever and did not look at any medical records. Officer Lawrence testified that his inquiry (as to whether blood had been drawn to determine alcohol content), was in furtherance of the officer establishing probable cause for a DUI and to further his DUI investigation. It appears that up to this point, the officer had only requested from the Defendant that she voluntarily agree to a consensual blood draw. Officer Lawrence had not yet informed the Defendant of implied consent and the legal consequences of refusal, including suspension of the Defendant's driver's license.

The Court notes that section 316.1932(f)2.b.,c., Fla. Stat. provides as paraphrased below the following:

> that notwithstanding any provision of law pertaining to the confidentiality of hospital records or other medical records, a health care provider who is providing medical care to a person injured in a motor vehicle crash who becomes aware as a result of any blood test performed in the course of that medical treatment that the person's blood alcohol level meets or exceeds the blood alcohol level specified in section 316.193(1)(b), Fla. Stat., the health care provider may notify a law enforcement officer and provide a law enforcement officer with the name of the person being treated, the name of the person who drew the blood, the blood alcohol level indicated by the test, and the date and time of the administration of the test.

After Officer Lawrence was verbally told about the blood test result with respect to alcohol content, the officer then asked the Defendant for consent to a blood draw pursuant to the implied consent statute, read to her the implied consent statutory require-

ments/consequences and upon her refusal to give the consent, left the hospital. The information provided by the doctor (the performance of a blood alcohol test and the result) is consistent with subsec. 316.1932(f)2.b., Fla. Stat. that provides for disclosure of this information which provides reasonable cause to the officer to request the withdrawal of a blood sample. The officer's request for a blood sample after receiving this information is consistent with the above statute.

Subsequently, after the above styled DUI criminal case was filed by the State Attorney's Office against the Defendant, the State requested that the Court authorize the issuance of an investigative subpoena to obtain the medical records of the Defendant that included the lab report for the blood alcohol content. The Court granted the State's motion and the State subpoenaed and is in possession of the lab report that is the subject of the Defendant's Motion to Suppress.

The Court finds, that the officer's inquiry as to whether a blood test was performed and the unsolicited test result (not asked for but given to the officer verbally) was in accordance with that as authorized under section 316.1932, Fla. Stat. referenced above. The Court notes that the cases cited by the Defendant do not reference or analyze the above statute. Further, even if arguendo, Officer Lawrence was required to obtain either a warrant or have issued a subpoena with notice to the Defendant first (before asking the doctor if a blood draw had been done to test for alcohol), the Court finds, that the officer's verbal request does not constitute the type of governmental misconduct that would warrant exclusion of the medical records subsequently obtained through the State's subpoena issued after proper notice to the Defendant. See *Thomas v. State,* 820 So.2d 382 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D1251a]. The Court also finds that Officer Lawrence was acting in good faith.

Defendant seeks from this Court the application of the exclusionary rule preventing the State from utilizing the above referenced medical records of the Defendant. However, the application of the exclusionary rule should typically be only as a last resort, such that the deterrence of suppression must outweigh the heavy cost that society sustains in many cases where a Defendant is ultimately turned loose without punishment. See *Dinkins v. State,* 278 So.3d 828, 836-837 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2150a]. As referenced above, the Court finds that this is not such a last resort type of case or circumstances that would require suppression of the Defendant's medical records. In support of this finding, the Court, in part, notes the Defendant: allegedly violating Florida traffic laws (turning against a red left turn arrow) causing a crash; having a high blood alcohol level, purportedly in excess of three times the legal limit; injuring elderly people; and Defendant's hospital records generated in the hospital during the course of Defendant's medical care that were reasonably obtainable by the State and are routinely obtained by the State in cases where the Defendant is brought to the hospital. See *Dinkins* at 837.

Alternatively, the Court finds as well that the inevitable discovery exception to the exclusionary rule would apply in this case. The State has established that there was no bad faith on the part of Officer Timothy Lawrence. The establishment of the inevitable discovery is by a preponderance of the evidence and there only needs to be a reasonable probability of the discovery. See *Nix v. Williams,* 467 U.S. 431 (1984). It is not reasonable to assume that, under the facts of this case, the State would not have pursued and obtained the Defendant's hospital records from the same day of the accident, regardless of whether the officer was, prior to the issuance of the State subpoena, aware of a blood draw and/or test results. See *Dinkins* at 837. It is therefore,

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Evidence is DENIED.

* * *

B3 MEDICAL, a/a/o Gary Gross, Plaintiff, v. HARTFORD UNDERWRITERS INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. Cowe19019509, Division 82. August 3, 2020. Natasha DePrimo, Judge. Counsel: John C. Daly, Daly & Barber, P.A., for Plaintiff. Lillian J. Sanchez, Law Offices of Jason L. Weissman, Hollywood, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE having come before the Court on July 30, 2020 on Defendant's Motion to Dismiss Plaintiff's Amended Complaint with Prejudice for Failure to Establish Jurisdiction, State a Cause of Action Upon Which Relief Could be Granted, and for Non-Compliance of Court Order, and the Court being fully advised in the premises it is:

ORDERED AND ADJUDGED

Defendant's Motion is hereby GRANTED in part as to dismissal, denied as to being with prejudice. The Court dismisses Plaintiff's Amended Complaint without prejudice due to Plaintiff's failure to establish a jurisdictional basis under Florida law. This court reserves jurisdiction over Defendant's Motion for Attorney's Fees and Costs as to entitlement and amounts.

* * *

Insurance—Personal injury protection—Statement of claim—Amendment—Medical provider is granted leave to amend statement of claim to correct clerical error in pleading jurisdictional limit—No merit to insurer's argument that tender of $100 pled in original statement of claim prohibits further litigation where there is no indication that benefits were exhausted by that tender

TOTAL HEALTH CHIROPRACTIC, LLC., Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20005974, Division 62. December 18, 2020. Terri-Ann Miller, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Michelle Mejia, for Defendant.

ORDER

This cause having come before the Court on (1) Plaintiff's Motion to Amend Statement of Claim; (2) Plaintiff's Motion for Summary Judgment to Determine if the Defendant Confessed Judgement; and (3) Defendant's Motion to Enforce Confession of Judgment.

The Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED**, as follows:

That Plaintiff's Motion to Amend Statement of Claim is hereby Granted. "[E]xceeds the sum of FIVE HUNDRED ($500.00) DOLLARS but does not exceed the sum of TWO THOUSAND FIVE HUNDRED ($2,500.00) DOLLARS" shall be substituted for "does not exceed the sum of ONE HUNDRED ($100.00) DOLLARS" via interlineation in paragraph one of Plaintiff's Statement of Claim.

The Plaintiff, in this case, alleged a clerical error in pleading the original jurisdictional limit. This is Plaintiff's first request to amend the pleadings and this case is only seven months old. Based on the asserted clerical error, Florida Rule of Civil Procedure 1.190(e) and the liberality for amending pleadings under Florida Law the Court grants Plaintiff's Motion to Amend Statement of Claim.

In addition, and notwithstanding the foregoing, the Defendant's reliance on the cases and holdings of *Safeco Insurance v. Fridman,* 117 So.3d 16 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1159c] and *Geico v. Barber,* 147 So.3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] is misplaced. The holdings of these cases were overturned by *Fridman v. Safeco Insurance,* 185 So.3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a]. The Florida Supreme Court in *Fridman* holds that even the tendering of policy limits (which did not occur in this case) does not prohibit further litigation or render further

action moot unless "the controversy has been so fully resolved that judicial determination can have no actual effect." *Id.* Because nothing has been presented to indicate that benefits were exhausted with the $100.00 benefit tender the underlying controversy in this case has not been so fully resolved that further judicial determination will have no effect.

Regarding Plaintiff's Motion for Summary Judgment to Determine if the Defendant Confessed Judgment and Defendant's Motion to Enforce Confession of Judgment the Court reserves ruling.

* * *

Small claims—Damages—Evidence—Failure to provide witnesses or affidavit

BANK OF AMERICA, N.A., Plaintiff, v. MILLIRET MONCADA RESENDIZ, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19021611, Division 53. January 21, 2019. Robert Lee, Judge.

[AFFIRMED. FLWSUPP 2811MRES; 28 Fla. L. Weekly Supp. 1006a.]

FINAL JUDGMENT IN FAVOR OF DEFENDANT

This case came before the Court on November 20, 2019 for small claims trial on damages pursuant to Rule 7.170(b), which requires the Plaintiff to provide "evidence establishing the damages." Plaintiff's counsel appeared without a witness or affidavit of damages. Although clearly not required, the Court gave the Plaintiff until November 21, 2019 at 9:00 a.m. to deliver any supporting affidavit or settlement paperwork to chambers. Plaintiff failed to do so. As a result, the only judgment the Court can enter "in accordance with the evidence" is in favor of the Defendant as Plaintiff has presented no evidence to sustain its position. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Plaintiff shall take nothing in this action, and the Defendant shall go hence without day.

* * *

STATE FARM BANK, Plaintiff, v. MARIE RENE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 15-22013 COCE 53. January 21, 2021. Robert W. Lee, Judge. Counsel: Rausch Sturm, St. Petersburg, for Plaintiff. Marie Rene, pro se, Defendant.

ORDER DENYING MOTION TO AMEND JUDGMENT

This cause came before the Court for consideration of the Motion to Amend Judgment filed by the Judgment Assignee Galaxy International Purchasing, LLC, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; and been sufficiently advised in the premises, the Court rules as follows:

It is hereby ORDERED AND ADJUDGED that the Motion is DENIED. This case has proceeded to judgment. *See* D. Salisbury, Trawick's Fla. Prac. & Proc. §26:2 (2020) (Judgment assignees "sometimes ask for an amended judgment that changes the caption to substitute the purchaser of the judgment for the original plaintiff. That is improper [. . .]. They should obtain an assignment of judgment and record it.")

* * *

Contracts—Retail installment contract—Complaint—Motion for more definite statement requiring plaintiff to file copy of "window form" is granted where form is identified in contract as collateral document that overrides contract terms

PERSOLVE RECOVERIES, LLC, Plaintiff v. JASMINE BURNS, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20009917, Division 61. January 8, 2021. Jackie Powell, Judge. Counsel: Shera Erskine Anderson and Ofer Shmucher, Miami, for Defendant.

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

THIS CASE having come before the Court on January 8, 2021, at approximately 10:00am, 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 the Court and hearing argument from each party, the Court finds as follows:

Relevant Procedural History

1. The Plaintiff initiated the above captioned cause of action seeking to recover a deficiency judgment based upon a repossessed vehicle.

2. In support of its claims, the Plaintiff attached to its Complaint a retail installment contract which in turn references a "window form," and specifically states that "information on the window form overrides any contrary provisions in the contract of sale."

3. The Plaintiff did not attach the referenced "window form" to its Complaint or otherwise file a copy of same with the Court.

4. The Defendant filed a Motion for a More Definite Statement based upon the Plaintiff's failure to attach the "window form" described above.

Applicable Legal Authority

5. A motion for a more definite statement is appropriate where there is a vagueness or ambiguity associated with a complaint, which renders it difficult for a defendant to accurately respond. *Foerman v. Seaboard Coast Line Railroad Co.,* 279 So.2d 825, 826-27 (Fla. 1973).

6. Where the vagueness or ambiguity relates to the absence of a collateral document, a Court must determine whether the collateral document is sufficiently described in the referencing document. *Kantner v. Boutin,* 624 So. 2d 779, 781 (Fla. 4th DCA 1993).

7. In determining whether the collateral document was sufficiently referenced, a Court should consider the following: 1) Whether the collateral document was specifically described in the referencing document; and 2) Whether the intent to incorporate the collateral document was sufficiently expressed in the referencing document. *Kantner, supra* at 781.

Conclusions of Law

8. In the present matter, the retail installment contract attached to the Plaintiff's Complaint specifically identifies the "window form" as a collateral document.

9. Further, the retail installment contract specifically explains that the "window form" *overrides* any contrary provisions in the retail installment contract. (Emphasis added).

10. Thus, the "window form" was sufficiently identified and referenced in the retail installment contract as a collateral document and thus is required to determine the full scope of the contract upon which the Plaintiff's claim is based.

11. Without the "window form," the retail installment contract attached to the Plaintiff's Complaint is incomplete and thus cannot constitute the complete document upon which the Plaintiff's claim is based.

12. Further, without the ability to review the "window form," the Defendant and the Court are unable to determine which provisions—if any—the "window form" overrides, thereby creating an ambiguity and rendering the Defendant's Motion for a More Definite Statement proper.

IT IS THEREFORE ORDERED AND ADJUDGED

13. The Defendant's Motion for a More Definite Statement is GRANTED solely as to the "window form" referenced in the retail installment contract attached to the Plaintiff's Complaint.

14. The Defendant's Motion for a More Definite Statement is denied as moot as to the arbitration agreement insofar as Plaintiff has already filed a copy of same with the Court.

15. The Plaintiff shall file with the Court and serve upon counsel for the Defendant a copy of the "window form" referenced in the retail installment contract attached to the Plaintiff's Complaint within fifteen (15) days from the date of this Order.

16. The Defendant shall file and serve a response to the Plaintiff's Complaint within fifteen (15) days from the date on which the Plaintiff files the "window form" as detailed 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)—Demand letter is not deficient for failing to indicate exact amount owed—Even if demand letter did not substantially comply with PIP statute, there was no prejudice to insurer from any claimed deficiency in letter that would preclude enforcement of PIP policy

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. January 10, 2021. Terri-Ann Miller, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. David Cruz, for Defendant.

ORDER

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgment as to Defendant's First Affirmative Defense and Defendant's Motion for Final Summary Judgment (only the portion as to the Demand Letter), 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 First 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. Defendant's Motion for Final Summary Judgment (only the portion as to the Demand Letter) and request for abatement is denied.

Regarding Defendant's contention that the Demand Letter:

> failed to comply with the pre-suit requirements of section 627.736(10) of the Florida Statutes, as Plaintiff's purported pre-suit demand letter failed to properly provide notice of the exact amount of benefits owing to avoid suit. Specifically, the demand improperly sought recovery at 100% for all charges, the incorporated billing ledger created ambiguity as to the total amount at issue, and the demand failed to correctly identify an exact amount owed to avoid suit. Furthermore, the demand failed to properly provide an itemized statement identifying those charges for which the Plaintiff alleges an amount was owed in excess of 80%. Therefore, the Plaintiff failed to meet a condition precedent to bringing and/or maintaining the present cause of action under section 627.736(10). After being placed on notice of the defects in its demand, Plaintiff knowingly waived any right to resubmit a compliant pre-suit demand letter.

the Court finds that the Demand Letter included a copy of the original HICF that was submitted to the insurance carrier and that this satisfies 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." In addition, the Court otherwise finds that the at-issue Demand Letter complied with the requirements of Florida Statute 627.736. The Court adopts the reasoning set forth by Judge Guzman in *Saavedra v. State Farm,* 26 Fla. L. Weekly Supp. 664a (Dade Cty. Ct. 2018) where he held:

> this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount owed. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible.1 The Court is not free to edit statutes of add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So.2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly 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 Defendant 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).

The Court finds that the billing ledger attached to the Demand Letter did not create any ambiguity as to the total amount at issue and even if it had would still find that that the Plaintiff substantially complied with Florida Statute 627.736(10).

> "a plaintiff need only substantially comply with conditions precedent." *Id*. at 61 (citing *Fed. Nat'l Mortg. Ass'n v. Hawthorne*, 197 So.3d 1237, 1240 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1800a]). "Substantial compliance or performance is 'performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez v. JPMorgan Chase Bank*, 187 So.3d 343, 345 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D595b] (quoting *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc*., 247 So.2d 72, 75 (Fla. 4th DCA 1971)). "Moreover, a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice. . . . Even if we concluded that the required notice was mailed to an incorrect address, the Bank correctly points out that the defective notice did not prejudice the Borrowers, as they did not attempt to cure the default.

Citigroup Mortg. Loan Tr. Inc. v. Scialabba, 238 So. 3d 317, 319-20 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a].

> Additionally, section 627.736(5)(b)1.d., Florida Statutes (2004), states that an insurer is not required to pay a claim or charges "[w]ith respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d)." Accordingly, based upon

the statute's plain language, a bill or statement need only be "substantially complete" and "substantially accurate" as to relevant information and material provisions in order to provide notice to an insurer.

United Auto. Ins. Co. v. Prof'l Med. Grp., Inc., 26 So. 3d 21, 24 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a].

Lastly, and even if Plaintiff's Demand Letter had not substantially complied with Florida Statute 627.736 the Court finds that the Defendant did not sustain any prejudice related to what they claim was deficient with Plaintiff's Demand Letter. Defendant's response to the Demand Letter not only included an extra payment but alleged that payment had now been made in accordance with Florida Statute 627.736 and the subject policy. Given that there was no prejudice this Court would not preclude the enforcement of an otherwise valid contract. *See Scialabba, supra.*

* * *

Criminal law—Driving under influence—Evidence—Refusal to perform field sobriety exercises—Where officer advised defendant that he would be forced to make decision on whether to arrest defendant based on observations to that point if he did not participate in field sobriety exercises, defendant was warned of adverse consequences of refusal, and refusal is relevant to consciousness of guilt—Motion in limine is denied

STATE OF FLORIDA, Plaintiff, v. VIVEKANAND DAONARINE, Defendant County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-MM-044231-AXXX-XX. December 11, 2020. Katie Jacobus, Judge. Counsel: Michael Garcia, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE WITH REGARD TO REFUSAL TO SUBMIT TO FIELD SOBRIETY TEST

This cause came to be heard before the Court on November 5, 2020 on the Defendant's *Motion in Limine with Regard to Refusal to Submit to Field Sobriety Test.* Michael L. Garcia, Esq. appeared on behalf of the State of Florida and Stuart Hyman, Esq. on behalf of the Defendant. The Court having heard and evaluated the testimony of State's witnesses, video evidence, and arguments of counsel, and being otherwise advised on the premises, finds as follows:

The Defendant's *Motion in Limine with Regard to Refusal to Submit to Field Sobriety Test* is **Denied** based upon the Court's evaluation of the State's witnesses, video evidence, and argument.

The facts established at the suppression hearing are as follows:

On September 1, 2019 at approximately 11 p.m., Sgt. Kevin Roberts of the Brevard County Sheriff's Office was on duty and patrolling the area of State Road AlA in Satellite Beach when he observed the Defendant's vehicle exit a sports bar some distance ahead of Sgt. Roberts. The Defendant's vehicle was travelling in the opposite direction of Sgt. Roberts and as the vehicle got closer, it drifted into opposing traffic, specifically the lane Sgt. Roberts was driving. Sgt. Roberts had to swerve into the right lane in order to avoid a head on collision with the Defendant who drifted into his lane. Sgt. Roberts executed a U-turn and began following the Defendant's vehicle, which was now driving in a left turn only lane for approximately one mile before switching back into the left travel lane. The Defendant came to a stop at a red light at an intersection and remained stopped for several seconds after the light turned green, requiring Sgt. Roberts to utilize his horn to bring the green light to the Defendant's attention.[1] Once back into the left travel lane, Sgt. Roberts observed the Defendant's vehicle drift into the right lane eight times by at least one half the width of the vehicle for a period of several seconds each time.

Sgt. Roberts operates as a supervisor for a large section of Brevard County while on his shift. While observing the Defendant's driving pattern, Sgt. Roberts alerted a Satellite Beach Police Officer, Officer McCrann, of his observations and asked if the Officer wanted to do a DUI investigation. Officer McCrann agreed and while following Sgt. Roberts and the Defendant vehicle, Officer McCrann could see the Defendant's vehicle drift several times into the right lane. Sgt. Roberts initiated the traffic stop by activating his emergency lights. The Defendant passed several entrances to businesses which were closed at the time and did not immediately pull over for the traffic stop.

Sgt. Roberts' vehicle and Officer McCrann's vehicle were both present behind the Defendant's vehicle at the time the Defendant came to a stop. Sgt. Roberts made the initial contact with the Defendant and requested his license, registration and proof of insurance. Sgt. Roberts testified that at that time he made contact with the Defendant he observed the Defendant's eyes to be bloodshot and glassy and also observed that the Defendant had a distinct odor of alcohol emitting from his breath that grew stronger as he spoke.[2]

At the same time Sgt. Roberts was obtaining the Defendant's documents, Officer McCrann observed a firearm in the Defendant's vehicle. The Defendant produced his license, registration, and insurance without difficulty. With Defendant's consent, Officer McCrann removed the firearm from the vehicle and secured it while the traffic stop took place. It was later determined that the Defendant was in lawful possession of the firearm and no charges related to the firearm were pursued in this case either by law enforcement or the State Attorney's Office.

Once the firearm was secured, Officer McCrann took over the DUI investigation because, as Sgt. Roberts indicated, Sgt. Roberts was on duty in a supervisory capacity for a large area of Brevard County and could not be tied up with the often lengthy and involved process of investigating a DUI. Sgt. Roberts testified that he did remain on scene during the entire incident which consisted of the traffic stop, initial contact with the Defendant, the Defendant's refusal to participate in field sobriety exercises and the Defendant's arrest which lasted approximately sixteen minutes according to the video entered into evidence by the State.

Officer McCrann testified next and stated that he was advised by Sgt. Roberts that he was entering Satellite Beach city limits while following a possibly impaired driver. Officer McCrann testified that as he was being called, he observed the Defendant's vehicle pass where he was positioned at the time and began following behind Sgt. Roberts. Officer McCrann testified that he observed the Defendant's vehicle swerve into the right lane of travel several times before Sgt. Roberts initiated the traffic stop and arrived on scene contemporaneously with Sgt. Roberts.

While speaking with the Defendant, Officer McCrann made the same observations Sgt. Roberts observed about the Defendant's bloodshot, glassy eyes, slurred speech,[3] and distinct odor of alcohol that became stronger as he spoke. Officer McCrann at that point requested that the Defendant perform field sobriety exercises to determine if he was safe to operate a vehicle. The Defendant refused. Officer McCrann requested the Defendant exit his vehicle which, after some back and forth between the Defendant and the Officer, the Defendant complied. While exiting the vehicle the Defendant was observed to stumble after exiting the vehicle and used the vehicle for balance while exiting.[4] Over the course of their conversation, the Defendant was asked several times if he would submit to field sobriety exercises based on what Sgt. Roberts told Officer McCrann and based on Officer McCrann's observations of the Defendant and his driving pattern. Each time the Defendant was asked to submit to field sobriety exercises, the Defendant responded in an evasive manner, stating several times that he had a gunshot in his leg and that no one can say their ABCs backwards. The Defendant eventually made it clear that he was refusing to participate in field sobriety exercises. At that time,

Officer McCrann alerted the Defendant that if he did not perform field sobriety exercises that he would be forced to make his decision whether to arrest Defendant for DUI based on his observations up to that point. No other adverse consequences were provided. The Defendant responded by telling the officer to go ahead and take him to jail. At that point, the Defendant was placed under arrest and secured in the back of Officer McCrann's vehicle.

Field Sobriety Exercises May Be Compelled

The Defendant's Motion contends that field sobriety exercises are not compulsory and therefore a refusal to submit to such exercises has no probative value. Based on the applicable case law, the Court agrees with the State that field sobriety exercises can be compelled by law enforcement officers—if they have reasonable suspicion of impairment. In *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b], the Florida Supreme Court specifically found that an officer needs only *reasonable suspicion* to believe a DUI suspect is impaired in order for the officer "to conduct a reasonable inquiry to confirm or deny that *probable cause* exists to make an *arrest*" for DUI. *Id.* at 703-4 (emphasis added). *See also, State v. Liefert,* 247 So.2d 18, 19 (Fla. 2d DCA 1971) (finding "the question of consent concerning such physical tests has been held to be immaterial" and stating: "we hold that the police officer, after having observed appellee drive in a weaving fashion and then noticed the smell of alcohol on his breath, had sufficient cause to believe that appellee had committed a crime in the operation of a motor vehicle and could require him to take part in such physical sobriety tests."); *State, Dept. of Highway Safety and Motor Vehicles v. Guthrie,* 662 So. 2d 404, 405 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2480b] (Based on the *Taylor* case, the Court held that "the standard for compelling road sobriety tests is 'reasonable suspicion' ") *Cf. Jones v. State,* 459 So.2d 1068 (stating in dicta that probable cause for driving under the influence is needed before an officer can conduct a more extensive investigation, such as asking the person to exit the car for a roadside sobriety test).

There is no true "right to refuse" field sobriety exercises; there are only consequences of refusing to perform field sobriety exercises (i.e., possibility of arrest based on officer's observations without the benefit of field sobriety exercise performance; and use in trial as consciousness of guilt). *See, e.g., State v. Young,* 483 So.2d 31, 33 (Fla. 5th DCA 1983) (there is no "legal right to refuse" a breath test; only an "option to refuse" which "involves a penalty and can also be used as inculpatory evidence in the driver's criminal trial").

Field Sobriety Exercises Are Not Scientific Tests

In his motion, the Defendant characterized field sobriety exercises are "scientific tests." But the Court agrees with the State that the field sobriety exercises are not scientific in nature pursuant to case law supplied by the State in their written response to the Defendant's motion. The State relied on *State v. Meador,* 674 So.2d 826 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a]. After considering conflicting expert testimony on the scientific reliability issue, the Court in *Meador* ultimately agreed with the defendants that field sobriety tests do not "have any enhanced scientific reliability not readily observable by the average lay person." 674 So.2d at 832. However, the Court also agreed with the State that scientific reliability is not required, stating:

> The mere fact that the NHTSA studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful BAC's does not convert all of the observations of a person's performance into scientific evidence. The police officer's observations of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns.

Id. at 831-32.

Relevancy of Refusal to Submit to Field Sobriety Exercises

The Court finds that the Defendant's refusal to submit to field sobriety exercises is relevant to the State's prosecution of this case based upon the relevant case law. The State relied upon *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b], and the Court agrees that *Taylor* is binding on this issue. The Court in *Taylor* explained:

> Taylor had ample incentive to take the tests: He was aware of the circumstances surrounding the officer's request; he knew the purpose of the tests; and he had ample warning of possible adverse consequences attendant to refusal. . . . Given the strong incentives to take the tests, Taylor's claim that his refusal was an innocent act loses plausibility. In short, he knew that refusal was not a "safe harbor" free of adverse consequences and acted in spite of that knowledge. His refusal thus is relevant to show consciousness of guilt. If he has an innocent explanation for not taking the tests, he is free to offer that explanation in court.

Id. at 704.

In the instant case, as in *Taylor,* Officer McCrann alerted the Defendant that if he did not participate in the field sobriety exercises that he would be forced to make his arrest decision based on what he had observed up to that point. Even though the officer did not provide any additional consequences of refusal, this warning that was provided constituted a proper warning of adverse consequences in accordance with *Taylor.* This case is thus unlike the case of *Howitt v. State,* 266 So.3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b], where "the officers did not advise Howitt of *any* adverse consequences of refusing to perform the field sobriety tests." 266 So.3d at 223. (Emphasis added). In this regard, *see Grzelka v. State,* 881 So.2d 633, 634-35 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a] ("Here, because Appellant was advised of at least one adverse consequence that would result from her refusal, her decision to refuse was relevant and the trial court did not abuse its discretion in admitting the evidence.").[5]

Thus, the Defendant's refusal to submit to field sobriety exercises is relevant to the State's prosecution and the Court DENIES the Defendant's motion in limine.

For these reasons, it is **ORDERED AND ADJUDGED** that the Defendant's *Motion in Limine with Regard to Refusal to Submit to Field Sobriety Test* is **DENIED**.

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[1]During the Defense's cross examination of Sgt. Roberts, he was asked if he could tell if the Defendant's head was down while at the red light or subsequently while driving. Sgt. Roberts state he could not tell, but there was also nothing introduced into evidence to indicate that the Defendant's head was down at either point.

[2]On cross examination, the defense asked if either officer knew of any normal faculty that is impaired by exhibiting an odor of alcohol or bloodshot glassy eyes to which Sgt. Roberts and Ofc. McCrann indicated they did not.

[3]On cross examination, the Defense asked both Officer McCrann and Sgt. Roberts if they could recall which words specifically were slurred by the defendant which neither could recall which specific words were slurred.

[4]On cross examination, the Defense asked Sgt. Roberts if his "take down" lights were illuminated at the time the Defendant exited his vehicle. Sgt. Roberts stated that his red and blue lights were on during the stop but once the vehicle pulled over he turned off the front facing red and blue lights and kept only the rear facing red and blue lights on. Sgt. Roberts went on to say that the only front facing lights that were on were the white spotlight which was facing down at the ground and his headlamps which were on low beam setting so "[they] wouldn't be blinded by the lights."

[5]As to the issue of the sufficiency of the warning of adverse consequences, the Defense cited to *Menna v. State,* 846 So.2d 502 (Fla. 2003) [28 Fla. L. Weekly S340a], *Herring v. State,* 501 So.2d 19 (Fla. 3d DCA 1986), and *State v. Esperti,* 220 So.2d 416 (Fla. 2d DCA 1969). However, these cases do not support Defendant's contention. In *Menna,* the Florida Supreme Court explained that "although Menna was informed that the test would be brief and was noninvasive, she was not told of any adverse consequences of her refusal to take the test and was given the impression that the test was optional." 846 So.2d at 507. In *Herring,* the Court explained: "In the present case, because Herring was not told that his refusal to submit to the hand swab test would have

consequences adverse to him (or even given the less specific, but certainly intimidating, warning that he had no right to refuse), he had no motivation to submit and his refusal, unlike Neville's and much like Hale's, was indeed a safe harbor." 501 So.2d at 21. *Esperti* held that under the circumstances in that case, evidence of the actions of the defendant of resisting a chemical test for the presence of nitrates was admissible as evidence of consciousness of guilt, even though police were subsequently able to overpower the defendant and the test was forcibly administered; the Court also held that such evidence was not a testimonial or communicative by-product of the test and was not protected by the privilege against self-incrimination. 220 So.2d at 417-18, 419.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer had reasonable suspicion for traffic stop where he observed defendant drive into oncoming traffic, remain stopped at traffic light that had turned green, and drift from lane to lane—Detention—Traffic stop was not unnecessarily prolonged by wait for fellow officer who was immediately behind stopping officer or by securing of firearm observed in defendant's vehicle—Officer had reasonable suspicion to require performance of field sobriety exercises where defendant displayed glassy bloodshot eyes, slurred speech, odor of alcohol, unsteady stance and increasing aggressiveness—Arrest—Defendant's reckless driving pattern and indicia of impairment provided probable cause for arrest

STATE OF FLORIDA, Plaintiff, v. VIVEKANAND DAONARINE, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-MM-044231-AXXX-XX. December 11, 2020. Katie Jacobus, Judge. Counsel: Michael Garcia, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO SUPPRESS

This cause came to be heard before the Court on November 5, 2020 on the Defendant's *Amended Motion to Suppress.* Michael L. Garcia, Esq. appeared on behalf of the State of Florida and Stuart Hyman, Esq. on behalf of the Defendant. The Court having heard and evaluated the testimony of State's witnesses, video evidence, and arguments of counsel, and being otherwise advised on the premises, finds as follows:

The Defendant's *Amended Motion to Suppress* is **Denied** based upon the Court's evaluation of the State's witnesses, video evidence, and argument.

The facts established at the suppression hearing are as follows:

On September 1, 2019 at approximately 11 p.m., Sgt. Kevin Roberts of the Brevard County Sheriff's Office was on duty and patrolling the area of State Road A1A in Satellite Beach when he observed the Defendant's vehicle exit a sports bar some distance ahead of Sgt. Roberts. The Defendant's vehicle was travelling in the opposite direction of Sgt. Roberts and as the vehicle got closer, it drifted into opposing traffic, specifically the lane Sgt. Roberts was driving. Sgt. Roberts had to swerve into the right lane in order to avoid a head on collision with the Defendant who drifted into his lane. Sgt. Roberts executed a U-turn and began following the Defendant's vehicle, which was now driving in a left turn only lane for approximately one mile before switching back into the left travel lane. The Defendant came to a stop at a red light at an intersection and remained stopped for several seconds after the light turned green, requiring Sgt. Roberts to utilize his horn to bring the green light to the Defendant's attention.[1] Once back into the left travel lane, Sgt. Roberts observed the Defendant's vehicle drift into the right lane numerous times by at least one half the width of the vehicle for a period of several seconds each time. The video introduced into evidence confirmed this observation. In fact, the Court observed the vehicle drift a total of eight times on the video.

Sgt. Roberts operates as a supervisor for a large section of Brevard County while on his shift. While observing the Defendant's driving pattern, Sgt. Roberts alerted a Satellite Beach Police Officer, Officer McCrann, of his observations and asked if the Officer wanted to do a DUI investigation. Officer McCrann agreed and while following Sgt. Roberts and the Defendant's vehicle, Officer McCrann could see the Defendant's vehicle drift several times into the right lane. Sgt. Roberts initiated the traffic stop by activating his emergency lights. The Defendant passed several entrances to businesses which were closed at the time and did not immediately pull over for the traffic stop.

Sgt. Roberts' vehicle and Officer McCrann's vehicle were both present behind the Defendant's vehicle at the time the Defendant came to a stop. Sgt. Roberts made the initial contact with the Defendant and requested his license, registration and proof of insurance. Sgt. Roberts testified that at the time he made contact with the Defendant, he observed the Defendant's eyes to be bloodshot and glassy, and also observed that the Defendant had slurred speech and a distinct odor of alcohol emitting from his breath that grew stronger as he spoke.[2]

At the same time Sgt. Roberts was obtaining the Defendant's documents, Officer McCrann observed a firearm in the Defendant's vehicle. The Defendant produced his license, registration, and insurance without difficulty. With Defendant's consent, Officer McCrann removed the firearm from the vehicle and secured it while the traffic stop took place. It was later determined that the Defendant was in lawful possession of the firearm and no charges related to the firearm were pursued in this case either by law enforcement or the State Attorney's Office.

Once the firearm was secured, Officer McCrann took over the DUI investigation because, as Sgt. Roberts indicated, Sgt. Roberts was on duty in a supervisory capacity for a large area of Brevard County and could not be tied up with the often lengthy and involved process of investigating a DUI. Sgt. Roberts testified that he did remain on scene during the entire incident which consisted of the traffic stop, initial contact with the Defendant, the Defendant's refusal to participate in field sobriety exercises and the Defendant's arrest, all of which lasted approximately sixteen minutes according to the video entered into evidence.

Officer McCrann testified next and stated that he was advised by Sgt. Roberts that he was entering Satellite Beach city limits while following a possibly impaired driver. Officer McCrann testified that as he was being called, he observed the Defendant's vehicle pass where he was positioned at the time and began following behind Sgt. Roberts. Officer McCrann testified that he observed the Defendant's vehicle swerve into the right lane of travel several times before Sgt. Roberts initiated the traffic stop and arrived on scene contemporaneously with Sgt. Roberts.

While speaking with the Defendant, Officer McCrann made the same observations Sgt. Roberts observed about the Defendant's bloodshot, glassy eyes, slurred speech,[3] and distinct odor of alcohol that became stronger as he spoke. Officer McCrann at that point requested that the Defendant perform field sobriety exercises to determine if he was safe to operate a vehicle. The Defendant refused. Officer McCrann requested that the Defendant exit his vehicle. After some back and forth between the Defendant and the Officer, the Defendant complied. While exiting the vehicle, the Defendant was observed to stumble after exiting the vehicle and used the vehicle for balance while exiting.[4] Over the course of their conversation, the Defendant was asked several times if he would submit to field sobriety exercises based on what Sgt. Roberts told Officer McCrann and based on Officer McCrann's observations of the Defendant and his driving pattern. Each time the Defendant was asked to submit to field sobriety exercises, the Defendant responded in an evasive manner, stating several times that he had a gunshot in his leg and that no one can say their ABCs backwards. The Defendant eventually made it clear that he was refusing to participate in field sobriety exercises. At that time,

Officer McCrann alerted the Defendant that if he did not perform field sobriety exercises, the officer would be forced to make his decision whether to arrest Defendant for DUI based on his observations up to that point. No other adverse consequences were provided. The Defendant responded by telling the officer to go ahead and take him to jail. At that point, the Defendant was placed under arrest and secured in the back of Officer McCrann's vehicle.

Reasonable Suspicion is the Proper Standard for Law Enforcement to Conduct a Traffic Stop and that Reasonable Suspicion was Shown in This Case

The Court agrees with the State that the proper standard to conduct a traffic stop is reasonable suspicion, not probable cause as the Defendant contends. *See, Heien v. North Carolina,* 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014) [25 Fla. L. Weekly Fed. S20a] (in a case involving a traffic stop for an allegedly defective brake light, the Supreme Court stated: "All parties agree that to justify this type of seizure, officers need only reasonable suspicion—that is, a particularized and objective basis for suspecting the particular person stopped of breaking the law.") (internal quotations omitted). *See also, Hilton v. State,* 961 So.2d 284 (Fla. 2007) [32 Fla. L. Weekly S401a] ("stopping a vehicle is permissible under the Fourth Amendment only where there is a reasonable suspicion that either the vehicle or an occupant is subject to seizure for a violation of law."). *Davis v. State,* 788 So.2d 308 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1215a] ("All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute.") (*citing State v. Ramos,* 755 So.2d 836 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1108a]).

Additionally, the Court finds that there was clearly sufficient reasonable suspicion for Sgt. Roberts to conduct a traffic stop of the Defendant in the instance case based on the substantial and competent evidence provided by the State's witnesses and video evidence. The Defendant was one to two feet into oncoming traffic which caused Sgt. Roberts to swerve in order to avoid a head on collision with the Defendant. The Defendant was observed by Sgt. Roberts stopped at a red light which then turned green and the Defendant failed to proceed thru the intersection for an extended period of time, causing Sgt. Roberts to utilize his vehicle's horn to bring the Defendant's attention to the green light. While the Defendant's vehicle was in motion again, the Sergeant observed the Defendant drift from the left travel lane into the right lane eight times by at least one half the width of the vehicle for several seconds each time. Sgt. Roberts then activated his emergency lights to conduct the traffic stop and the Defendant missed several opportunities to turn into a vacant parking lot but rather kept driving for a period of time and eventually stopped on the side of the road. The Court finds that based upon the totality of the circumstances and observations of the Sergeant, Sgt. Roberts had more than enough reasonable suspicion to conduct a lawful traffic stop.

The Traffic Stop Was Not Unnecessarily Prolonged to Conduct a DUI Investigation

The Court rejects the Defendant's argument that the traffic stop was unnecessarily prolonged. The Defendant argued that Sgt. Roberts unnecessarily prolonged the investigation in order to allow for Officer McCrann to arrive on scene to conduct the DUI investigation. However, the Court agrees with the State that Officer McCrann was behind Sgt. Roberts at the time of the traffic stop and in fact also observed some of the driving pattern that led to Sgt. Roberts' reasonable suspicion to conduct the traffic stop.

The Court also disagrees with the Defendant's argument that the stop was unnecessarily prolonged by the securing of the firearm that was observed in the Defendant's vehicle. In addition to the fact that that the officers already had reasonable suspicion at that point, the Court finds that Officer McCann's actions in securing the weapon for officer safety (with Defendant's consent) and to determine whether it was safe to continue the interaction with the Defendant were reasonable and did not impose on any Fourth Amendment rights of the Defendant.

Reasonable Suspicion is Proper Standard for Law Enforcement to Require a Suspect to Submit to Field Sobriety Exercises and Reasonable Suspicion was Shown in This Case

This Court follows the well-established line of cases that stand for the proposition that officers are only required to have reasonable suspicion, as opposed to probable cause, that a suspect is driving under the influence in order for officers to require the suspect to submit to field sobriety exercises. *See, State v. Taylor,* 648 So.2d 701, 704 (Fla. 1995) [20 Fla. L. Weekly S6b] (Florida Supreme Court specifically found that an officer needs only *reasonable suspicion* to believe a DUI suspect is impaired in order for the officer "to conduct a reasonable inquiry to confirm or deny that *probable cause* exists to make an *arrest*" for DUI). (Emphasis added). *See also, State, Dept. of Highway Safety and Motor Vehicles v. Guthrie,* 662 So. 2d 404, 405 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2480b] (Court held that based on the holding in *Taylor,* "the standard for compelling road sobriety tests is 'reasonable suspicion' ").[5] *Cf. Jones v. State,* 459 So.2d 1068 (stating in dicta that probable cause for driving under the influence is needed before an officer can conduct a more extensive investigation, such as asking the person to exit the car for a roadside sobriety test).

In the case at bar, the Court finds that there was competent and substantial evidence, through testimony and video footage from the officer's dashboard camera, that the Defendant displayed bloodshot and glassy eyes, slurred speech, distinct odor of alcohol as well as the above described driving pattern.

This Court, relying on testimony from the officer on scene, also finds that the Defendant was unsteady on his feet even though it is not visible from the video. The Court finds that the Defendant became increasingly aggressive and aggravated when asked to perform field sobriety exercises and was not cooperative with law enforcement on scene.

These factors together established more than enough reasonable suspicion to allow the officer on scene to require the Defendant to submit to field sobriety exercises.

Probable Cause to Arrest for DUI

The Court finds that the above factors that led to officers on scene to have reasonable suspicion to require the Defendant submit to field sobriety exercises also meet the elevated requirement of probable cause to arrest the Defendant for Driving Under the Influence. Moreover, in addition to the above indicators of impairment that led officers to request field sobriety exercises, the Defendant was given five different opportunities while speaking with law enforcement to submit to field sobriety exercises and on the last request unequivocally refused to participate. At that time, the officer notified the Defendant that if he did not submit to field sobriety exercises, the officer would have to make his decision whether to arrest the Defendant or not based on what he observed up to that point. The Defendant again, unequivocally refused to submit to field sobriety exercises and the officer was given no choice but to arrest the Defendant for DUI based on his observations of the Defendant up to that point. Those observations plus the refusal to submit to the field sobriety exercises were clearly sufficient to constitute probable cause to arrest for DUI.

The Defense pointed out in their argument that Officer McCrann conceded that bloodshot, glassy eyes or odor of alcohol does not alone indicate impairment by alcohol. The State in their argument re-

sponded by citing to *State v. Willis,* 276 So.3d 448 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1806a], where the Court stated:

> Like the instant case, officers sometimes stop people based on reports of essentially innocent behavior. Innocent behavior will frequently provide the basis for reasonable suspicion. *See United States v. Sokolow,* 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *see also Illinois v. Wardlow,* 528 U.S. 119, 125-26, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (acknowledging this fact and recognizing that officer can detain individual to resolve ambiguity regarding suspicious yet lawful or innocent conduct). "[T]he relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." *Sokolow,* 490 U.S. at 10, 109 S.Ct. 1581 (internal quotation marks omitted). Here, the State concedes that wearing body armor is not a violation of a Florida law.

276 So.2d at 453.

The Court is in agreement with this analysis,[6] and finds that it applies equally to the determination of probable cause. In fact, the *Sokolow* case that was cited in *Willis,* itself quoted the following passage from *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): "[I]nnocent behavior will frequently provide the basis for a showing of probable cause." *Sokolow,* at 490 U.S. 10, citing *Gates,* at 462 U.S. 243-44, n. 13.

Moreover, Officer McCrann also stated that the Defendant's bloodshot glassy eyes and slurred speech were only two of the factors that he considered when looking at the totality of the circumstances in making his decision to arrest the Defendant for DUI. The officer also considered the Defendant's reckless driving pattern, the Defendant's argumentative and aggressive behavior, the odor of alcohol, the fact that the Defendant stumbled when exiting his vehicle, and finally his refusal to participate in field sobriety exercises. These factors were clearly more than enough to demonstrate probable cause to arrest for DUI.

For these reasons, it is **ORDERED AND ADJUDGED** that the Defendant's *Amended Motion to Suppress* is **DENIED**.

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[1]During cross examination, Sgt. Roberts was asked if he could tell if the Defendant's head was down while at the red light or subsequently while driving. Sgt. Roberts stated he could not tell, but there was also nothing introduced into evidence to indicate that the Defendant's head was down at either point.

[2]On cross examination, the Defense asked if either officer knew of any normal faculty that is impaired by exhibiting an odor of alcohol or bloodshot glassy eyes to which both Sgt. Roberts and Ofc. McCrann indicated they did not.

[3]On cross examination, the Defense asked both Officer McCrann and Sgt. Roberts if they could recall which words specifically were slurred by the Defendant and neither could recall which specific words were slurred.

[4] On cross examination, the Defense asked Sgt. Roberts if his "take down" lights were illuminated at the time the Defendant exited his vehicle. Sgt. Roberts stated that his red and blue lights were on during the stop but once the vehicle pulled over he turned off the front facing red and blue lights and kept only the rear facing red and blue lights on. Sgt. Roberts went on to say that the only front facing lights that were on were the white spotlight which was facing down at the ground and his headlamps which were on low beam setting so the Defendant "wouldn't be blinded by the lights."

[5]The Defense argued that *Taylor* provides dicta rather than a holding. Regardless of this argument, the Supreme Court in *Taylor* did announce that reasonable suspicion is the proper determination to require a defendant to perform field sobriety exercises and the Court in *Guthrie* treated this announcement as the "holding" in *Taylor.* In any event, the ruling in *Guthrie* itself is unquestionably a "holding" because the Court in *Guthrie* quashed the order of the circuit court explicitly because the circuit court had applied a probable cause standard rather than a reasonable suspicion standard.

[6]The Defense has pointed out that the Second District Court of Appeal has indicated in two recent cases that "where a person's conduct is consistent with both criminal and noncriminal activity, such facts do not give rise to a reasonable suspicion of a crime." *Fields v. State,* 292 So.3d 889, 893 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D706a] (quoting *Peterson v. State,* 264 So. 3d 1182, 1189 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]). However, these cases fail to acknowledge the rulings by the United States Supreme Court in *Sokolow* and *Wardlow,* which were relied on in *Willis.* Moreover, *Willis* is a Fifth District case and so to the extent that *Willis* is in conflict with these Second District cases, *Willis* controls in this Court because this Court is within the Fifth District. *See, Pardo v. State,* 596 So.2d 665, 667 (Fla. 1992) ("if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it."). The Defense also cites to *Reid v. Georgia,* 448 U.S. 438, 441, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980) and *A.N.H. v. State,* 832 So.2d 170, 172 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2433a], but this Court does not find those cases on point for this issue. Those cases merely held that a seizure is not justified when factual circumstances can describe a large category of presumably innocent people under circumstances that could not lead police to reasonably suspect wrongdoing. In fact, *Reid* specifically acknowledged that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot," but found that "this is not such a case." 448 U.S. at 441.

* * *

Civil procedure—Discovery—Failure to comply—Sanctions

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. KAHN CARLEY, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-1012. August 10, 2020. James J. DeKleva, Judge. Counsel: Joseph Rosen, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE AND FOR SANCTIONS

THIS CAUSE came before the Court on August 10, 2020, upon Defendant's Motion to Enforce and for Sanctions. The Court has reviewed the Motion together with the court file and is otherwise fully advised in the premises. Accordingly, it is hereby

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

On May 4, 2020, this Court entered an Order Granting Plaintiff's Motion for Extension of Time to respond to Defendant's pending discovery requests ("Order"). Pursuant to the Order, Plaintiff was required to furnish responses and responsive documents to Defendant's pending discovery on or before June 3, 2020. Plaintiff received a copy of the Order and possessed the ability to comply. Plaintiff failed to furnish responses on or before the deadline imposed by the Order and said responses had not been furnished as of the date of the hearing on this matter, in knowing and willful derogation of the Order. Moreover, Plaintiff did not file for or otherwise request an extension to comply with the Agreed Order.

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

Accordingly, Plaintiff is ordered to furnish responses and responsive documents to Defendant's pending discovery requests, without asserting objections, within ten (10) days from date of this Order.

It is **FURTHER ORDERED** that Defendant's request for sanctions because of Plaintiff's failure to comply with the Order is **GRANTED**. After having considered the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, this Court awards Defendant $1,400.00 in sanctions, which must be tendered by Plaintiff to counsel for Defendant within ten (10) days from date of this Order. *See Portfolio Recovery Associates, LLC v. Ricelle Felix,* 27 Fla. L. Weekly Supp. 1052a (Fla. 18th Cir. 2020, Hon. James DeKleva) (awarding Defendant sanctions based upon affidavit reflecting attorney time billed at $350.00 per hour.)

* * *

Civil procedure—Discovery—Failure to comply—Sanctions

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. KAHN CARLEY, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-1012. October 22, 2020. James J. DeKleva, Judge. Counsel: Joseph Rosen, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

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

THIS CAUSE came before the Court on October 19, 2020, upon Defendant's Motion to Enforce and for Sanctions. The Court has reviewed the Motion together with the court file, heard argument from counsel, and is otherwise fully advised in the premises. Accordingly, it is hereby

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

On August 10, 2020, this Court entered an Order Granting Defendant's Motion to Enforce and for Sanctions ("Enforcement Order"), requiring the Plaintiff to furnish responses and responsive documents to Defendant's pending discovery requests, without asserting objections, within ten (10) days from date of the Enforcement Order, or August 20, 2020. The Enforcement Order also awarded Defendant sanctions in the amount of $1,400.00 for Plaintiff's failure to comply with this Court's prior Agreed Order and required Plaintiff to tender payment to Defendant's counsel on or before August 20, 2020. Plaintiff received a copy of the Enforcement Order, knew it was required to comply, and possessed the ability to comply. Moreover, these matters have been explicitly admitted to and established as fact by virtue of Plaintiff's responses to Defendant's First Request for Admissions that were filed on September 25, 2020. Nevertheless, Plaintiff failed to tender payment to Defendant's counsel within the deadline required and failed to furnish all responsive documents to Defendant's outstanding discovery requests, in knowing and willful derogation of the Enforcement Order.

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

Accordingly, Plaintiff shall not be afforded any further extensions to furnish its discovery responses and must provide all responsive documents to all of Defendant's discovery requests within ten (10) days from date of this Order.

It is **FURTHER ORDERED** that Plaintiff must remit and deliver payment of the previously ordered sanctions in the amount of $1,400.00 to Defendant's counsel within ten (10) days from date of this Order.

It is **FURTHER ORDERED** that Defendant's request for sanctions because of Plaintiff's willful failure to comply with the Enforcement Order is **GRANTED**. After having considered the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, along with the history of Plaintiff's conduct in this case, this Court awards Defendant $1,715.00 in sanctions. Plaintiff is required to remit and deliver payment of these sanctions within ten (10) days from date of this Order and must furnish tracking information for said payment to Defendant's counsel on the same date that the payment is sent.

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Civil procedure—Discovery—Failure to comply—Sanctions—Dismissal of action

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. KAHN CARLEY, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-1012. January 11, 2021. James J. DeKleva, Judge. Counsel: Joseph Rosen, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE PLEADINGS AND DISMISSING CASE WITH PREJUDICE

THIS CAUSE came before the Court on January 11, 2020, upon Defendant's Motion to Strike Pleadings against the Plaintiff. The Court has reviewed the Motion together with the court file, heard argument from counsel, and is otherwise fully advised in the premises. Accordingly, it is hereby **ORDERED** that Defendant's Motion to Strike Pleadings is **GRANTED**, for the following reasons:

In this case, Plaintiff has been ordered by this Court on three (3) separate occasions to provide responses and responsive documents to Defendant's outstanding discovery requests, and as of the date of the hearing on this matter, has failed to do so. In the early 1980's, the Florida Supreme Court stated that in the instance of discovery violations, a party's pleadings should only be stricken if and when the discovery violation is "willful and deliberate", or where it is found that the disobedient party is operating with "bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences deliberate callousness". *Mercer v. Raine,* 443 So.2d 944, 946 (Fla. 1983) (upholding striking a defendant's pleadings where court expressly found the defendant "knew what was going on" and had a "total disregard for the consequences", finding such facts supporting the interpretation that noncompliance was "willful").

Ten years later, the Florida Supreme Court in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993), adopted six (6) factors, known as the "Kozel factors", that Courts use to evaluate whether striking a party's pleadings and entering judgment or dismissing the action with prejudice is warranted. Those factors are as follows: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6)whether the delay created significant problems of judicial administration.

It is without question that over the past seven (7) months, Plaintiff's continuous conduct has risen well beyond the levels required by the Florida Supreme Court to grant the relief requested by Defendant. On August 10, 2020, the Court granted Defendant's motion to enforce after Plaintiff failed to provide discovery responses pursuant to an Agreed Order of Extension that was entered the month prior. The Court also awarded monetary sanctions because of the undue expense squandered by Defendant in enforcing Plaintiff's obligations. On October 22, 2020, the Court granted the Defendant's second motion to enforce and for subsequent monetary sanctions after Plaintiff failed to provide discovery responses pursuant to the prior Order entered on August 10, 2020. Importantly, in each one of these Orders, the Court expressly found that the Plaintiff both knew it was required to comply and possessed the ability to comply, and that Plaintiff's decision not to do so was deliberately willful.

A cursory review of the record clearly illustrates that Plaintiff has offered no reasonable justification for its continued noncompliance. Despite the numerous enforcement motions filed by Defendant, Plaintiff chose not to submit responses of any kind. In fact, Plaintiff failed to appear at the hearing on Defendant's first motion to enforce held on August 10, 2020. Moreover, during the hearing on Defendant's second motion to enforce held on October 19, 2020, counsel for Plaintiff admitted that responsive documents, including notices sent by Plaintiff to Defendant prior to this action being commenced, had not been furnished and provided no justification for it. The Court, in pronouncing its ruling at the hearing on October 19, 2020, advised Plaintiff that future noncompliance with its orders may result in further sanctions including striking its pleadings and dismissing the action.

Plaintiff's conduct has caused unnecessary problems for judicial administration because valuable court hearing time has been utilized

for unnecessary discovery disputes coupled with refusals to comply with this Courts orders. Previous sanctions have had little to no effect on Plaintiff's behavior, there has been no discernible improvement in the manner this case has been handled by the Plaintiff, and the challenges to the authority of this Court have continued unabated.

The Florida Supreme Court recently addressed this type of evasive discovery gamesmanship in *Bainter v. League of Women Voters of Fla., Inc.,* 150 So. 2d 1115, 1118 (Fla. 2014) [39 Fla. L. Weekly S689a], where Justice Pariente wrote:

> We simply do not countenance and will not tolerate actions during litigation that are not forthright that are designed to delay and obfuscate the discovery process. As this Court has long stated, full and fair discovery is essential to the truth-finding function of our justice system, and parties and non-parties alike must comply not only with the 'technical provisions of the discovery rules,' but also with 'the purpose and spirit of those rules in both the criminal and civil context.

Plaintiff has established a clear and unacceptable pattern of violating numerous Court Orders, and has otherwise operated in a manner so inconsistent with the requirements of this Court, as well as the standard required of all attorneys practicing in the Eighteenth Circuit, as set forth in the Seminole County Bar Association's Standards of professionalism, and so repeatedly in violation of the Court's directives and applicable law, that such conduct can only be described as deliberate, willful, and contumacious.

The decision to impose sanctions, and the severity thereof, are matters within the sound discretion of the trial court. *Turner v. Anderson,* 376 So. 2d 899 (Fla. 2d DCA 1979) (finding that Plaintiff's willingness to intentionally refuse to comply with the court's lawful order was justification for the Court to employ the remedies available pursuant to Florida Rule of Civil Procedure 1.380(b)); *see Moakley v. Smallwood,* 826 So. 2d 221, 226-27 (Fla. 2002) [27 Fla. L. Weekly S357b] ("Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice."); *see also Bitterman v. Bitterman,* 714 So.2d 356, 365 (Fla.1998) [23 Fla. L. Weekly S168a] (recognizing the inherent authority of a trial court to award attorneys' fees for bad faith conduct).

Plaintiff and its attorneys repeated willful and deliberate disregard for this Court's numerous Orders and the judicial system as a whole, *see Ham v. Dunmire,* 891 So. 2d 492, 495-96 (Fla. 2004) [30 Fla. L. Weekly S6a], squarely meet the standards set forth by the Florida Supreme Court in *Kozel v. Ostendorf.* Accordingly, it is **ORDERED** that Plaintiff's Complaint filed on February 26, 2020 is stricken and this action is dismissed with prejudice.

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