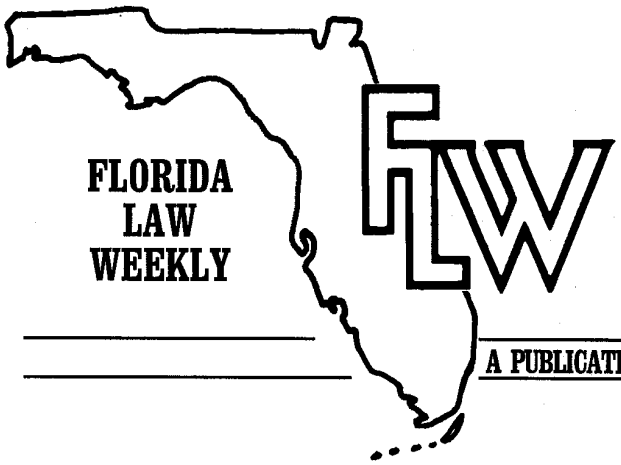
Volume 28, Number 12, April 30, 2021



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 1047-1160

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.

- **PUBLIC RECORDS—FAILURE TO COMPLY—E-MAIL REQUEST—ANTI-SPAM SOFTWARE—ATTORNEY'S FEES. A circuit court found that a school district violated policies established by the Florida Legislature under the Public Records Act by implementing an automated anti-SPAM system that quarantined a plaintiff's legitimate e-mail public records request and allowed it to be deleted and permanently purged where the district failed to establish any procedural safeguards to ensure that legitimate public records requests were not inadvertently sent to spam. The court held that the district violated various provisions of the Act by failing to promptly acknowledge the plaintiff's legitimate public records request; failing to provide the records within a reasonable time and to respond to the request in good faith; failing to cooperate in good faith to determine whether various records requested by the plaintiff existed; and failing to provide the records in the electronic medium requested. The court rejected the district's defense that certain duties under the Act were never triggered because the plaintiff's e-mail request and notice were never received to the "inbox" of the district's account. The court further held that the plaintiff was entitled to attorney's fees where the district unlawfully refused to provide the records requested and the plaintiff provided written notice identifying the public records request to district's custodian of public records at least five days prior to filing the civil action against the district. Although the district argued that the plaintiff's written notice identifying the public records request was never received by its "custodian of public records," the court rejected that argument, concluding that, because the district designated its own IT Department as the recipient of incoming e-mails, and charged the IT department with the responsibility to safeguard the public records e-mail account from malicious spam, the IT department was, in this context, a designee of the custodian of records.** *STEVEN J. BRACCI, P.A. v. THE SCHOOL BOARD OF LEE COUNTY. Circuit Court, Twentieth Judicial Circuit in and for Lee County, Civil Division. January 12, 2021. Full Text at Circuit Courts-Original Section, page 1105c.*

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Bold denotes decision by circuit court in its appellate capacity.

INSURANCE (continued)

ZONING

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TABLE OF CASES REPORTED

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TABLE OF CASES REPORTED (continued)

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DISPOSITION ON APPELLATE REVIEW

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

* * *

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Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Hardship license—Denial—Hearing officer correctly considered both single incident of licensee driving while license suspended and licensee's driving record containing other DWLS incidents in determining that licensee demonstrated indifference to safety and welfare of others—Petition for writ of certiorari is denied

MARQUITA SHANTELL FLOYD, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 1st Judicial Circuit (Appellate) in and for Escambia County. Case No. 2019 CA 001634, Division F. January 13, 2021. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(THOMAS DANNHEISSER, J.) **THIS CAUSE** comes before the Court on the Petition for Writ of Certiorari filed by counsel on October 7, 2019, and Brief in Support of Petition for Writ of Certiorari, filed December 6, 2019. Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicle's final order denying early reinstatement of Petitioner's driving privilege which was revoked due to Petitioner's status as a habitual traffic offender. Having considered the petition, brief, attachments to the brief, and Respondent's reply, the Court finds as follows:

A circuit court's review of an administrative agency decision is limited to the following three-part standard of review: 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]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dept. of Highway Safety and Motor Vehicles v. Hirtzel,* 163 So. 3d 527 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citations omitted).

Petitioner alleges there is no competent substantial evidence to support the hearing officer's decision to deny Petitioner's request for a hardship license. Specifically, Petitioner asserts that the sole basis for the denial was Petitioner driving with a suspended license on one occasion which does not evince a disregard for the welfare and safety of others. The record reflects otherwise.

The hearing officer properly based her decision on section 322.263, Florida Statutes, which states in pertinent part:

> It is declared to be the legislative intent to:
>
> . . .
>
> (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 laws of the state and the orders of the state courts and administrative agencies.

§ 322.263(2), Fla. Stat. Emphasis added. The final order expressly states that the hearing officer also considered Petitioner's driving record, not just a single incidence of driving with a suspended license. Petitioner's driving record contains several incidences which support the hearing officer's determination that Petitioner demonstrated an indifference for the safety and welfare of others.

Based on a review of the petition and the appendix, the Court finds that the limited three-part standard of review has been met: Petitioner was accorded due process and the essential requirements of law were observed. Moreover, the administrative findings and judgment are supported by competent substantial evidence. Consequently, certiorari relief is not warranted.

ACCORDINGLY, it is **ORDERED and ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Due process—Notice—Hearing officer did not depart from essential requirements of law by conducting hearing on charge of refusing to submit to breath test when notice given to licensee stated that he was charged with driving under influence where charge was amended after notice was sent, and hearing officer offered licensee opportunity to request continuance—Petition for writ of certiorari is denied

ROBERT WILLIAM PITTON III, 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. 2017 AP 36. D.L. No. P-350-779-94-350-0. January 22, 2019. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHARLES DODSON, J.) Petitioner petitions for certiorari review of an order the Department of Highway Safety and Motor Vehicle hearing officer entered on August 28, 2017 suspending Petitioner's driver's license. Petitioner argues the hearing officer departed from the essential requirements of the law when he held the suspension hearing on a theory of refusal to submit to a blood-alcohol-level test when the notice Petitioner received indicated it would be based on a theory of driving under the influence.

This Court's standard of review is "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). All three have been met.

The hearing officer, upon learning that Petitioner was not prepared to defend a refusal suspension, stated that the charge had since been amended and said; "If you wish to make a continuance on the record, then we can go about this at a later time." Petitioner did not request a continuance, and instead rested his case on a motion to invalidate the suspension based on the fact that the officer checked the wrong box. Tr. at 4-7. The officer denied his motion. Pet. Appx. at 21-22.

Based on the competent substantial evidence, Petitioner refused a blood-alcohol-level test. Pet. Appx. at 10. The checkbox issue was corrected through amendment, and any notice issue could have been corrected through a request for a continuance, which the hearing officer indicated would have been granted.

DENIED.

* * *

Licensing—Driver's license—Revocation—Permament—Fourth DUI conviction—Out-of-state convictions—Appeals—Certiorari—There was competent substantial evidence to support hearing officer's determination that petitioner's driving privilege was properly revoked—Entries on petitioner's driving record constitute competent substantial evidence that petitioner was convicted of DUI four times, which requires the permanent revocation of petitioner's driver's license under section 322.26(1)—Driving record of an individual is self-authenticating—To the extent petitioner asserts that the California convictions reported to Florida and placed on his driving record are not his, petitioner's recourse is to pursue remedy of the error with California

BRYAN ANTHONY DAVID, 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-000015. January 14, 2021. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(J. LAYNE SMITH, J.) This matter comes before this Court on Petitioner, Bryan Anthony David's, Petition for Writ of Certiorari, filed on June 3, 2020. Having reviewed the Petition and the Respondent's response thereto, examined the record before this Court, and being otherwise fully advised, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief.

The standard of certiorari review of an administrative action in circuit court is (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. See *Department of Highway Safety and Motor Vehicles v. Favino,* 667 So.2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a] and *Department of Highway Safety and Motor Vehicles v. Smith,* 687 So.2d 30, 32 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a].

Petitioner argues that there was no competent substantial evidence for the hearing officer below to sustain the revocation of his driving privilege and that the hearing officer did not accord him due process. September 7, 1988, and September 1, 1989, the Department permanently revoked the driving privilege of Petitioner pursuant to §322.26(1)(a), Fla. Stat. (1989), due to having four DUI convictions. On May 13, 2020, a hearing was held to afford Petitioner the opportunity to submit evidence to show why his driving privilege should not have been revoked. Petitioner argued that the convictions listed on his Florida driver record were not his and offered into evidence his California Criminal History Information, dated March 3, 2020. After review of the evidence, including Petitioner's Florida driver record, the hearing officer found that Petitioner's Florida driving privilege was properly revoked.

There was competent substantial evidence to support the hearing officer's determination. The entries on Petitioner's driver record, which was admitted into evidence at the hearing below, constitute competent substantial evidence that he was convicted four times for DUI. *Vandetti v. Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 399a (Fla. 2nd Cir. Ct. 2017). Section 322.26(1)(a), Fla. Stat. (2001), mandates the permanent revocation of a person's driver license who is convicted four times of DUI. Also, Section 322.201, Fla. Stat. (2001), states that the driving record of an individual is self-authenticating evidence establishing the prior DUI convictions. *McKinnon v. Department of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 201a (Fla. 13th Cir. Ct. April 1, 2020).

Petitioner had the burden to show cause why his driving privilege should not have been permanently revoked. *Midgett v. Department of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 795b (Fla. 4th Jud. Ct. 2009). Rule 15A-1.0195, Florida Administrative Code, gives a person whose license has been cancelled, suspended, or revoked the opportunity to petition the Department to show cause why his or her driving privilege should not have been cancelled, suspended, or revoked. Petitioner failed to establish that Florida erroneously placed the California convictions on his Florida driver record. The State of California reported the Petitioner's convictions to Florida, which was then required to place those convictions on Petitioner's Florida driver record pursuant to the Driver License Compact found in Section 322.44, Fla. Stat. To the extent that Petitioner asserts that the convictions reported to Florida are not his, his recourse is to pursue remedy of this error with California. *Matias v. Department of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 365c (Fla. 2nd Cir. Ct. June 29, 2020).

Finally, Petitioner failed to meet his burden that he was not accorded due process at the May 13, 2020 administrative hearing. The hearing officer heard and considered Petitioner's testimony, evidence, and his Florida driver record, as stated in his order. The hearing officer's role is to weigh evidence and to determine the credibility of witnesses. *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). After consideration of the evidence and testimony, the hearing officer affirmed the revocation of Petitioner's driving privilege, as supported by the competent substantial evidence.

For the reasons discussed above, Petitioner has not carried his burden for a writ of certiorari to issue.

It is therefore **ORDERED:** The Petition for Writ of Certiorari is denied.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—PIP policy that states that insurer will reduce any payment to medical provider by any amounts it deems to be unreasonable does not clearly and unambiguously elect use of statutory fee schedules

NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Rachel K. Kopp, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Lakeria Clark, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Karen Hamilton, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case Nos. 2017-AP-7, 2017-AP-29, 2016-AP-69. January 25, 2018. Appeal from County Court, in and for Duval County. Counsel: Adam Saben and Melissa Winer, Shuster & Saben, LLC, Jacksonville, for Appellants. Betsy E. Gallagher and Michael C. Clarke, Kubicki Draper, P.A., Tampa, for Appellee.

OPINION

(HEALEY, J.) This matter came before the Court upon thirteen appeals from the Duval County Court, which the Chief Judge of the Fourth Judicial Circuit consolidated because all deal with insurance policies from Progressive Insurance Company and because the basic facts of the consolidated cases are the same. The Court instructed and the parties agreed to further consolidate the cases into two categories to facilitate uniform resolution where possible. On July 1, 2012, the Legislature revised the Personal Injury Protection (PIP) statute found at section 627.736, Florida Statutes (2012). The first category of cases has a date of loss before July 1, 2012, and the parties agreed to consolidate these cases under the *Kopp* appeal (2017-AP-7). The second category of cases has a date of loss on or after July 1, 2012, and the parties agreed to consolidate these cases under the *Williams* appeal (17-AP-34). This Opinion is limited to resolution of the first category of cases as consolidated under *Kopp.*

I. Discussion

Section 627.736, Florida Statutes (2011), requires "insurers to reimburse eighty percent of reasonable expenses for medically necessary services." *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 154 (Fla. 2013) [38 Fla. L. Weekly S517a]; *Allstate Fire and Cas. Ins. v. Stand-Up MRI of Tallahassee, P.A.,* 188 So. 3d 1, 2 (Fla. 1st DCA 2016) [40 Fla. L. Weekly D693b]. The question then becomes how does an insurer determine "reasonable expenses." The statute provides two methods for doing so. The first method is the *default* method and directs the insurer to engage in a fact-dependent inquiry, which also apparently results in higher reimbursements.

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

§ 627.736(5)(a)1., Fla. Stat. (2011).

The second method is the *permissive* method whereby the insurer may elect to calculate reimbursements by relying on the Medicare Part B and Worker's Compensation fee schedules.

> The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
>
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
>
> c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
>
> d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
>
> e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

§ 627.736(5)(a)2, Fla. Stat. (2011).

For an insurer to use the permissive method for calculating reimbursements, it must provide notice of its decision to do so. *Virtual Imaging,* 141 So. 3d at 159[1]; *see also Progressive Select Ins. Co. v. Emergency Physicians of Cent. Fla., LLP,* 202 So. 3d 437, 438 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a] ("Because Progressive failed to elect specifically to limit payments based on the fee schedule . . . , Progressive may not avail itself of the fee schedule limitation under section 627.736(5)(a)2.f., Florida Statutes (2008).").

When the language in an insurance contract is plain and unambiguous, a court must interpret the policy according to the plain meaning "so as to give effect to the policy as written." *Washington v. Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S616b]. Moreover, a court "should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect . . . [and] avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Id.* (citations omitted). Finally, "policy language is considered to be ambiguous . . . if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 570 (Fla. 2011) [36 Fla. L. Weekly S469a]).

In *Virtual Imaging,* the court explained, "when the plain language of the PIP statute affords insurers two different mechanisms for calculating reimbursements, the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Virtual Imaging,* 141 So. 3d at 158 (citing *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]).

Courts have looked closely at insurance policies to determine whether an insurer has provided clear *permissive* method to calculate reimbursement of medical expenses. The First District Court of Appeal considered a policy from the Allstate Insurance Company that contained the following language: "Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules." *Stand-Up MRI*, 188 So. 3d at 3.

That court agreed with Allstate "that the policy gives sufficient notice of its election to limit reimbursements by use of the fee schedules. Our conclusion stems from the policy's plain statement that reimbursements 'shall' be subject to the limitation in § 627.736, including 'all fee schedules.' " *Id.*

II. Standard of Review

Here, as the parties do not dispute the facts, the Court must interpret provisions of the PIP statute as well as interpret the insurance policy. Consequently, the Court will review the trial court's application of the law *de novo. See Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1219 (Fla. 2016) [41 Fla. L. Weekly S62a] ("These questions are matters of law, which we review *de novo*.")

III. Factual and Procedural Background

On June 7, 2012, Rachel K. Kopp was injured in a motor vehicle accident. At that time, Ms. Kopp was insured under an automobile policy issued by Appellee, Progressive Insurance Company (Progressive). The policy included PIP benefits through an endorsement (Form AO41).[2] Ms. Kopp sought medical treatment for her injuries from Appellant, Neurology Partners. It is undisputed that Neurology Partners's services and care were reasonable, necessary, and related to the accident.

Neurology Partners submitted its bills for Ms. Kopp's medical treatment that occurred between August 7, 2012, and January 16, 2013. The total amount for which Neurology Partners sought reimbursement was $6,693.00. Progressive issued payment of $3,570.91 pursuant to the *permissive* method as set out in section 627.736(5)(a)2, Florida Statutes (2011).[3]

Neurology Partners filed its Complaint in the County Court claiming Progressive improperly used the *permissive* method to calculate the reimbursement. According to Neurology Partners, Progressive failed to clearly and unambiguously elect to use section 627.736(5)(a)2, Florida Statutes (2011), the *permissive* method to calculate reimbursement. The parties filed cross motions for summary judgment, and the trial court found Progressive's policy contained a clear and unambiguous election to reimburse Neurology Partners pursuant section 627.736(5)(a)2, Florida Statutes (2011), the *permissive* method.

IV. Analysis

The pertinent policy language seems to suggest Progressive is electing to use the *permissive* method; i.e. the Medicare Part B and Worker's Compensation fee schedules for reimbursement.

UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS

If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, we may refuse to pay for those **medical benefits** and contest them.

We will determine to be unreasonable any charges set forth in Section 627.736(5)(a)(2)(a-f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida Law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:

a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.

b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.

c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.

d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.

e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.

f. For all other medical services. supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, **we** may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation will not be reimbursed by **us**.

If Progressive's policy reimbursement language had ended here, the Court would find a clear and unambiguous election to use the permissive method of calculating reimbursement. Progressive did not stop here however. Instead, Progressive added the following provision:

***We** will reduce any payment to a medical provider under this Part II(A) by any amounts **we** deem to be unreasonable **medical benefits**.* However, the **medical benefits** shall provide reimbursement only for such services, supplies, and care that are lawfully rendered, supervised, ordered, or prescribed. Any reductions taken will not affect the rights of an insured person for coverage under this Part II(A). Whenever a medical provider agrees to a reduction of **medical benefits** charged, any co-payment owed by an **insured person** will also be reduced.

In response to the Court's inquiry regarding the language contained in the aforementioned provision, counsel for Progressive acknowledged that it was always Progressive's intention to pay reimbursements due pursuant to the *permissive* method and that there was no intention to ever pay benefits pursuant to the default method.

Counsel for Progressive further acknowledged that the language in the statute and policy as it relates to the *permissive* method and the Medicare Part B and Worker's Compensation fee schedules, covers all reimbursable expenses. Consequently, there would be no need for Progressive to consider whether an expense is reasonable, as it matters not what the provider charges, only whether or not the service provided is reimbursable under Medicare Part B or Worker's Compensation schedules.

According to Black's Law Dictionary, the word "deem" is construed to mean "[t]o consider, think, or judge." *Deem,* BLACK'S LAW DICTIONARY (10th ed. 2014).

The language in the policy under subsection f., clearly explains that if Medicare and workers compensation will not reimburse for medical services, Progressive will not reimburse that cost. There is no room for *Progressive* to consider, think or judge whether to reduce any payment. By electing the permissive method to calculate reimbursements, Medicare and workers compensation determine whether the insurer will pay for medical expenses. By adding the language that Progressive will reduce any payment to a medical provider by any amounts Progressive deems to be unreasonable, Progressive muddied the waters and created ambiguity. The language in Progressive's policy is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. Consequently the policy is unclear and ambiguous and as such Florida law dictates that the language be construed against Progressive and in favor of the insured. *See Ruderman,* 117 So. 3d at 952.

Thus, there is no need for the policy to reference unreasonable medical benefits as there is no such thing. In essence, it matters not what the provider charges, only whether or not the service provided is reimbursable under Medicare Part B or Worker's Compensation schedules. If the service is not reimbursable pursuant to the aforementioned schedules, the insurance company does not have to make any reimbursement.

V. Conclusion

The Court reverses the trial court orders in Case Numbers 2017-AP-7, 2017-AP-9, and 2016-AP-69.

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[1]The holding in *Virtual Imaging* applies to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology through the effective date of the 2012 amendment. *See id.* at 150. The instant policy falls within this period.

[2]All three cases consolidated for this appeal used Progressive Policy Form A041.

[3]In its Initial Brief, Neurology Partners incorrectly identifies the applicable statute as section 627.736(5)(a)(1) (2012). To start, the 2012 version of the statute did not go into effect until July 1, 2012, and Ms. Kopp's accident took place on June 7, 2012. Consequently, the 2011 statute is the applicable statute. Moreover, Neurology Partners incorrectly identifies the subsection of the 2011 statute applicable to the Medicare Fee Schedule. The correct subsection is 627.736(5)(a)(2), which was renumbered in the 2012 version. *See* § 627.736(5)(a)1 (2012).

* * *

Licensing—Driver's license—Suspension—Lawfulness of stop—Careless driving—Community caretaking—Welfare check—Hearing officer did not depart from essential requirements of law by finding officer lawfully stopped licensee based on concern for licensee and public's safety, as well as on anonymous tip reporting erratic driving pattern—Officer who responded to an anonymous tip reporting a driver who ran a red light and was driving on the sidewalk had basis for stopping vehicle to ensure that vehicle did not have any mechanical problems that placed driver, motoring public, or pedestrians in danger where officer observed vehicle with license plate number matching that provided by tipster next to sidewalk and followed vehicle as licensee pulled away from sidewalk and drove with flashing hazard lights at a slow rate of speed—Licensee's contention that officer impermissibly stopped vehicle for careless driving does not change result, as officer's observations provided basis for stop to conduct welfare check

RHONDA WIND, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-7, Division AP-A. January 15, 2021. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: L. Lee Lockett, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) This cause is before this Court on Petitioner, Rhonda Wind's "Petition for Writ of Certiorari," filed on January 21, 2020. The Petition raises one argument for review: Whether or not the Department departed from the essential requirements of the law when the hearing officer denied Petitioner's motion to invalidate the administrative suspension based on an unlawful traffic stop.

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 the Department departed from the essential requirements of the law when the hearing officer denied Petitioner's motion to invalidate the administrative suspension based on an unlawful traffic stop. Although Officer Carter cited Petitioner for Careless Driving, Petitioner claims competent, substantial evidence does not support the citation. The record does not demonstrate Petitioner's driving pattern endangered another person's life, limb, or property. Petitioner further argues that Officer Carter could not have based his traffic stop on the presumably anonymous complainant's tip about Petitioner's erratic driving pattern because Officer Carter did not independently corroborate the tip.

Under the community caretaking doctrine, "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop . . . in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety and Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). The purpose of such a stop, or welfare check, is to determine whether the driver needs assistance due to illness, fatigue, or impairment. *Id.* A welfare check "must be based on specific articulable facts showing that the stop was necessary for the protection of the public." *Majors v. State,* 70 So. 3d 655, 661 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a].

To determine whether third-party information provides the requisite reasonable suspicion for a temporary detention, courts will consider the reliability of the informant and the reliability of the proffered information. *Berry v. State,* 86 So. 3d 595, 598 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1101c]. A tip with a relatively low degree of reliability, such as from an anonymous or unknown tipster, requires independent corroboration in order to establish the requisite quantum of suspicion needed. *Id.*

Here, the hearing officer did not depart from the essential requirements of the law by finding Officer Carter lawfully stopped Petitioner. Officer Carter possessed the requisite reasonable suspicion to perform a stop based on concern for Petitioner and the public's safety, as well as on the tip about Petitioner's driving. Officer Carter was dispatched to the intersection of Rampart Road and Collins Road in reference to a driver who ran a red light and was driving on the sidewalk. The tip, which resulted in the dispatch, included the license plate number and description of the vehicle, a silver Lexus SUV.

When Officer Carter arrived at the intersection of Rampart Road and Collins Road, he observed the Petitioner's vehicle stopped next to a sidewalk. A group of people stood around the vehicle. Petitioner was driving a silver Lexus SUV. The license plate number of her vehicle matched the license plate number provided by dispatch. Officer Carter followed Petitioner as she pulled away from the sidewalk and drove with flashing hazard lights at a slow rate of speed. Such evidence provided a basis for stopping Petitioner to ensure her vehicle did not have any mechanical problems that placed her, the motoring public, or pedestrians in danger.

Nevertheless, Petitioner argues Officer Carter unlawfully stopped Petitioner because competent, substantial evidence did not support his citation of Petitioner for Careless Driving. The constitutional validity of a traffic stop depends on an objective test, which " 'asks only whether any probable cause for the stop existed,' making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] (quoting *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]). Here, regardless of whether Officer Carter claims he stopped Petitioner for Careless Driving, his observations provide a basis for stopping Petitioner to conduct a welfare check. Accordingly, Petitioner's claim is denied.

On February 19, 2020, 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.)

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention—Where licensee sat motionless at stoplight after it turned green, had slow slurred speech and unsteady stance, and appeared to be confused, officer had reasonable suspicion for DUI investigation—Officer's personal opinion as to what observations gave him probable cause or reasonable suspicion for investigation is irrelevant—Petition for writ of certiorari is denied

JENNIFER ANN LUST, 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-22, Division AP-A. December 29, 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, Susan Z. Cohen, and Spencer George, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(ROBERSON, J.) Petitioner seeks certiorari review of the administrative order upholding the suspension of her driver's license.

In her first point, Petitioner argues that she was illegally detained for the DUI investigation. Petitioner seizes on Officer Williams' testimony that he only needed probable cause that the driver had been drinking to conduct a DUI investigation. Petitioner also seeks to contrast the evidence on the video of the officers' encounter with Ms. Lust with the officers' testimony at the administrative hearing.

In reviewing the video, the officers come upon Ms. Lust's vehicle stopped at a green light on Third Street at the intersection with Beach Boulevard. Another vehicle has to go around her because she sat motionless at the green light. The officers very understandably conduct a welfare check.

Ms. Lust appears to be confused and she did not understand the officers' request to put the vehicle in park. In speaking with the officers, Ms. Lust's speech is so slow and slurred that it is barely comprehensible. When she gets out of her vehicle she is unsteady and tentative on her feet, such that officers had to hold Ms. Lust's elbow to help her walk to the side of the road.

The video is entirely consistent with Officer Williams' testimony. Petitioner seizes on the following testimony by Officer Williams:

> Q: Okay. All right. And you smelled the odor (of alcohol). So you know she'd been drinking.
>
> A. Yes, sir.
>
> Q. So that gave you the probable cause to do a DUI investigation?
>
> A. Yes.

This testimony followed Officer Williams testifying that he smelled

a strong odor of alcohol coming from Petitioner's mouth. Although it is not what he said, Petitioner seizes on this exchange to argue that "Officer Williams believed he could begin a DUI investigation based solely on the fact of consumption of alcohol." Because that is the wrong standard, Petitioner continues, the detention for a DUI investigation was illegal.

This argument lacks any basis in fact or law. It is well settled that an officer's personal opinion as to whether probable cause (or in this case, reasonable suspicion) exists is irrelevant. *Knox v. State*, 689 So. 2d 1224, 1225 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D683a]. A determination of probable cause is determined by objective facts and circumstances, not on the officer's personal opinions. *State v. Durden*, 655 So. 2d 215, 216 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1310a]; *Jackson v. State*, 456 So. 2d 916 (Fla. 1st DCA 1984). Reasonable suspicion, not probable cause is the standard for initiating a DUI investigation. *See State v. Welch*, 279 So. 3d 832, 834-35 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2382a]. Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence". *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Petitioner cannot advance a good faith argument that Officer Williams lacked reasonable suspicion to begin a DUI investigation.

Petitioner's second argument has been repeatedly rejected and will be rejected once again.

The Petition and Motion for Oral Argument are both **DENIED**. (SALVADOR, and CHARBULA, JJ., concur.)

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—PIP policy that states that insurer will not pay charges it deems to be unreasonable and reserves right to contest and reduce any amounts it deems to be unreasonable does not clearly and unambiguously elect use of statutory fee schedules—2012 amendment to PIP statute did not supercede "clear and unambiguous election" standard set by *Virtual Imaging*

PROGRESSIVE SELECT INSURANCE COMPANY, Appellant, v. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Phyllis Easley, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2016-AP-000061. L.T. Case No. 16-2015-SC-3690. September 7, 2017. Counsel: Michael Clarke and Betsy Gallagher, Kubicki Draper, Tampa, for Appellant. Adam Saben and Melissa Winer, Shuster & Saben, Jacksonville, for Appellee.

OPINION OF THE COURT

(SUZANNE BASS, J.) Progressive Select Insurance Company ("Progressive") appeals the final judgment entered in favor of Neurology Partners, P.A. d/b/a Emas Spine & Brain Specialists as assignee of Phyllis Easley ("Neurology Partners"), after the trial court denied Progressive's Amended Motion for Summary Judgment. On appeal, Progressive argued that the trial court erred in finding that its personal injury protection ("PIP") policy including Endorsement A085FL (05/12) failed to make a clear and unambiguous election to calculate reimbursements pursuant to §627.736(5)(a)1(2012) (referred to as the "permissive payment methodology"). This Court finds that the trial court did not err and affirms its denial of Progressive's Amended Motion for Summary Judgment and Final Judgment in favor of Neurology Partners.

Neurology Partners submitted medical bills for payment to Progressive for treatment related to a date of loss of October 26, 2013. Progressive paid said bills by applying the reimbursement limits provided under §627.736(5)(a)1(2012).[1] The question before the Court is whether Progressive's policy contains clear and unambiguous notice of its election to calculate reimbursements pursuant to the fee schedules identified in §627.736(5)(a)1.

ANALYSIS

I. *Virtual Imaging* and *Orthopedic Specialists*

In *Geico General Ins. Co. v. Virtual Imaging Services,* 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a] ("*Virtual*"), the Florida Supreme Court held that an automobile insurance carrier can reimburse properly submitted bills on a PIP claim using one of two payment methodologies. The first methodology, known as the "reasonableness" method, found in §627.736(5)(a)(2012)[2] calculates reimbursements at eighty percent of a reasonable charge. It is a fact-based calculation based on a list of enumerated factors in §627.736(5)(a)(2012).[3] The second payment methodology, found in §627.736(5)(a)1(2012) is *not* fact-dependent. This alternative, "permissive" payment methodology, created in 2008, calculates reimbursements by merely applying a charge to a Medicare fee schedule. Although reimbursements using the permissive method are less than 80% of the submitted charge, such reimbursements still meet the PIP statute's "reasonable medical expenses coverage" mandate. See *Virtual,* at 156. However, in order to avail itself of the permissive payment option, Progressive must provide "clear and unambiguous" notice in its policy of its election to use the permissive payment method to *calculate reimbursements*.[4]

In 2017, the Supreme Court in *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S538a] ("*Orthopedic Specialists*"), affirmed the ruling of the First DCA in *Allstate Fire & Cas. Ins. v. Stand-Up MRI of Tallahassee, P.A.,* 188 So.3d 1, (Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b] ("*Stand-Up*") finding that Allstate made a clear and unambiguous election based on *Virtual.* The Court reiterated its holding from *Virtual* that "when the plain language of the PIP statute affords two different mechanisms for calculating reimbursements, the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Orthopedic Specialists,* at 977, citing, *Virtual,* at 158. Applying *Virtual* and *Orthopedic Specialists* to the relevant portion of Progressive's policy language, this Court concurs with the trial court and finds that Progressive failed to make a clear and unambiguous election to use the permissive payment methodology. The Court will address each clause at issue in this appeal.

First, the middle of Progressive's A085 FL (05/12) Endorsement, essentially, tracks the language incorporating the permissive payment method from §627.736(5)(a)1(2012).[5] However, the paragraph immediately preceding the permissive payment language titled "**Unreasonable or Unnecessary Medical Benefits**" reads:

> **UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS**
>
> "If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those **medical benefits** and contest them."[6]

The deeming or defining of a medical benefit (expense) as unreasonable is compatible *only* with the ***reasonableness*** methodology. The permissive methodology *dispenses* with considerations over the reasonableness of a medical provider's expenses. Deeming or defining a charge above the fee schedule as unreasonable begets a concomitant right by the medical provider to deem its charge as reasonable, thereby defeating the intent of the permissive method, which removes the subjective differences over reasonableness of charges from the calculation reimbursement paradigm. Therefore, Progressive cannot deem or define a charge as "unreasonable" while also claiming to make a clear and unambiguous election to use the permissive method to calculate reimbursements.

Progressive also reserves the right to ***contest*** a charge that they deem ***unreasonable.*** The permissive method eliminates contesting

unreasonable charges by supplanting an objective "fee schedule" calculation method for the fact-dependent "reasonableness" calculation method. Medical providers must accept the lower reimbursement *without contest* because they (through the insured) were placed on notice *by virtue of the election* in the insurer's policy as to the reimbursement. Therefore, Progressive cannot reserve the right to contest unreasonable charges (and there is no reason to) while also claiming to make a clear and unambiguous election to use the permissive method to calculate reimbursements.

Progressive argues that inclusion of the right to contest unreasonable charges is merely a statement of its statutory right to refuse or limit reimbursement claims for which it has no responsibility under the law. *This misses the point.* Progressive's right to refuse or limit payment on claims that it has no responsibility to pay is a *separate issue* from its affirmative duty to clearly and unambiguously elect the permissive payment method. Progressive *cannot* put such language in its policy as it creates ambiguity, which violates *Virtual* and *Orthopedic Specialists.* This Court's Opinion involves an insurer's right to use the permissive payment method to calculate reimbursements. It does not infringe on Progressive's right to deny reimbursement pursuant to any other legal or contractual right in any other section of its policy.

The second clause that creates ambiguity in Progressive's endorsement immediately follows its permissive payment language section. The policy states, in pertinent part:

> "**We** will reduce any payment to a medical provider under this Part II(A) by any amounts **we** deem to be unreasonable **medical benefits.**" (bold in original).

As stated, *supra,* to deem, or define, a charge as "unreasonable", *by definition,* requires a fact-based adjusting of the claim by the criteria in the ***reasonableness*** method. This begets the countering opinion by the medical provider that its charges are ***reasonable***; which creates a question of fact that only occurs when the insurer elects the ***reasonableness*** method.

Progressive reserves the right to reduce payments "by any amount". A plain reading of that phrase suggests that if Progressive elects to reduce a charge it deems unreasonable to an amount *lower than the fee schedule,* it can. Reimbursement using the permissive method is fixed and static based on an objective fee schedule. "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Orthopedic Specialists,* at 975-6. The words "by any amount" plainly do not restrict Progressive's right to reduce a charge solely to the fee schedule cap. While Progressive's endorsement may have limiting language as a *ceiling* for reimbursement, it does not so limit itself as a *floor*. Therefore, the right to reduce a payment by any amount is consistent with the ***reasonableness*** method and inconsistent with the permissive method, creating further ambiguity.

The certified question in *Virtual* requires this Court to review not the clarity of the payment limitation, but the clarity of the calculation methodology ("reasonableness" or "permissive") elected to reach that payment limit. Reviewing Progressive's definition of "unreasonable" charges, its reservation of reducing payments "by any amount", and its ability to "contest" charges it deems as unreasonable, any objective, plain reading connotes the use of the ***reasonableness*** method. However, this Court cannot even afford Progressive the benefit of a plain reading. Instead, this Court must read any ambiguous terms *against* the drafter. As the Supreme Court said in *Orthopedic Specialists,* "Policy language is considered to be ambiguous. . .if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and one limiting coverage.' " *Orthopedic Specialists,* at 976. Ambiguities in insurance policies are interpreted liberally in favor of the insured and strictly against the insurance company that drafted the policy. In this regard, it is important for insurance companies to draft their insurance policies in an unambiguous manner, so that they can be readily understood by insureds. Reading Progressive's policy as a whole, this Court concurs with the trial court that Progressive's policy is ambiguous and fails to make a proper election pursuant to *Virtual* and *Orthopedic Specialists.*

Progressive argued that two recent cases support its position. In *Progressive Select Ins. Co. v. Injury Treatment Ctr. of Boynton Beach, Inc. a/a/o Jean Genovese,("Genovese"),* 25 Fla. L. Weekly Supp. 223a, the Fifteenth Judicial Circuit, sitting in its appellate capacity, ruled that Progressive's policy did not create an ambiguous policy. However, in that case, the Plaintiff argued that Progressive's defining of "medical benefits" as 80% of all reasonable charges when read with the Insuring Agreement created an ambiguity. In the instant case, Neurology Partners agreed that including "80% of all reasonable charges" within Progressive's definition of "Medical benefits" does not create an ambiguity because no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate. See *Virtual,* at 155. Therefore, *Genovese* is distinguishable and does not address the language at issue in this appeal.

Progressive also relies on *Virga v. Progressive Am. Ins. Co., ("Virga"),* 215 F. Supp. 3d 1320 (S.D. Fla. 2016) [27 Fla. L. Weekly Fed. D3a]. In *Virga,* the Plaintiff argued that defining "medical benefits" as 80% of all reasonable charges and the use of CMS (Medicare) reductions contained within the fee schedule language created an ambiguity. See *Virga,* at 1325. Neurology Partners agreed such language does not create an ambiguity. Therefore, *Virga* is distinguishable and does not address the language at issue in this appeal.

When comparing the Allstate policy language reviewed in *Orthopedic Specialists* and *Stand-Up* to Progressive's policy language, this Court reaches the same inescapable conclusion. Allstate's language reviewed in *Orthopedic Specialists* did not reserve the right to "deem" a charge as "unreasonable"; *Progressive did.* It did not reserve the right for Allstate to contest a charge that it deems as "unreasonable"; *Progressive did.* It did not reserve the right to reduce charges "by any amount"; *Progressive did.* In short, this Court applies the same standard that the Supreme Court applied to Allstate's policy in *Orthopedic Specialists* and the First DCA applied in *Stand-Up,* both requiring a clear and unambiguous election. However, unlike Allstate, Progressive's additional reservations that *only* apply to the ***reasonableness*** method, create an ambiguous policy. Therefore, applying the holdings in *Virtual* and *Stand-Up,* which was affirmed in *Orthopedic Specialists,* this Court concurs with the trial court.

Progressive argued that *Orthopedic Specialists* rejected the Fourth DCA's "attempt to impose an analysis of an 'exclusive' reimbursement method for polices after 2012."[7] In fact, the opposite is true. *Orthopedic Specialists* mandates a "clear and unambiguous" election, re-affirming its holding from *Virtual,* not rejecting it. The Court wrote: "[I]n order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." *Orthopedic Specialists,* at 976, citing, *Virtual* at 157. There is also nothing in *Orthopedic Specialists* limiting its holding to policies through 2012.

It is also noteworthy that at least two Duval County trial court judges found that Progressive failed to make a clear election relying on the First DCA's opinion in *Stand-Up,* which was affirmed by *Orthopedic Specialists.* See, *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Arkeelia Evans v. Progressive Select Ins. Co.,* Case No. 2015-SC-5526 (Fla. Duval Cty., July 22, 2016); and, *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/a Heather Tyrie v. Progressive American Insurance Co.,* Case No. 2016-SC-89, (Fla. Duval Cty., August 18, 2016). In *Stand-Up,* the First DCA found

that Allstate's simple statement limiting payments pursuant to the fee schedules was a clear election. Unlike Allstate's "simple statement", Progressive's endorsement language contains additional verbiage that is congruous only with the ***reasonableness*** method, creating an ambiguous policy, as discussed, *supra.*[8]

This Court concurs with the trial court when it succinctly stated, "Simply put, the policy permits Defendant to avail itself of both methodologies." Therefore, the trial court's Order is affirmed.[9]

II. *VIRTUAL* IS VALID AFTER JULY 1, 2012.

Progressive argued that, assuming it failed to make a clear and unambiguous election, after July 1, 2012, Progressive did not need to make an election at all. Instead, Progressive merely had to advise that it *may* limit reimbursement using the permissive payment method or it *may* use the reasonableness method, at its whim. Such a finding, essentially, nullifies *Virtual* despite the fact that the Florida Supreme Court adopted their holding in *Virtual* in 2017 in *Orthopedic Specialists.*

In 2012, the Legislature amended §627.736(5)(a)5(2012), codifying the judicially-created notice requirement when electing the permissive payment method. This Court finds that the amendment to §627.736(5)(a)5(2012) does nothing to change the analysis regarding the sufficiency of an insurer's election per *Virtual.* Florida Statute §627.736(5)(a)5(2012) was amended to read:

> "Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement. If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted." §627.736(5)(a)5(2012).

The statute clearly states that the "office" (which both parties agreed is the Office of Insurance Regulation ("OIR")), was to approve a form to assist insurers with the codified notice requirement. Thus, if the requisite notice was merely to advise that the insurer *may* elect the permissive method or that it *may* elect the reasonableness method, at its whim (which is what Progressive argued), the OIR form would have language consistent with that standard. Conversely, if the notice required insurers make a clear and unambiguous election to use the permissive method (as Neurology Partners argued), consistent with the holdings in *Virtual* and *Orthopedic Specialists,* the OIR form would have language consistent with that level of notice. The OIR Informational Memorandum introduction states, in pertinent part:

> "The purpose of this memorandum is to assist insurers with . . . a new statutory requirement that insurers provide a notice of the schedule of medical charges or 'fee schedule' to insureds ***if the insurer is limiting reimbursement***." OIR Informational Memorandum of May 4, 2012 (emphasis added).

The only reimbursement method that limits reimbursement is the *permissive payment method.* See, *Orthopedic Specialists,* at 979. There is no reference that an insurer *may* elect one payment method or that it *may* elect the other. This is inconsistent with Progressive's position (eliminating the need to make an election) and consistent with Neurology Partners' position that an insurer must make a clear and unambiguous election.

Next, reviewing the OIR "Sample Fee Schedule Endorsement" Form language[10], it contains no definition of "unreasonable charge"; no reduction of charges an insurer deems as unreasonable; no contesting of charges; and, no reservation of the insurer's "right to refuse or limit reimbursement for which it has no contractual or legal responsibility to pay". In short, the OIR Form, created to assist insurers with giving proper notice, contains none of the reservations that create ambiguity in Progressive's policy.

Progressive's argument is also inconsistent with binding authority on legislative adoption of judicial construction of statutes. In 2011, the year immediately preceding the amendment to §627.736(5)(a)5(2012), the Florida judiciary held in *Kingsway Amigo Ins. Co. v. Ocean Health,* 63 So.3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] ("*Kingsway*"), and *Geico Indemnity Company v. Virtual Imaging Services, Inc.,* 79 So.3d 55 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2597a] ("*Geico*") that insurers must "clearly and unambiguously" elect the permissive fee schedule in order to rely on it. "The legislature is presumed to know the judicial construction of a law when enacting a new version of that law." See, *Brannon v. Tampa Tribune,* 711 So.2d 97, (Fla, 1st DCA 1998) [23 Fla. L. Weekly D1035a]; *Baillargeon v. Sewell,* 33 So.3d 130, (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D978a]. Therefore, this Court takes the position, *as a matter of law,* that when the statute was amended in 2012, the legislature adopted the judicial construction of *Geico* and *Kingsway,* requiring notice of a clear and unambiguous election to use the permissive payment method. Progressive's position, eliminating the need to make an election altogether, is the complete *opposite* conclusion.

Progressive's position is actually inconsistent with the very case it relies on in arguing that *Virtual* is inapplicable after July 1, 2012. Progressive cites one line from *Virtual,* which states:

> "our holding applies. . .through the effective date of the 2012 amendment, which was July 1, 2012."

However, looking at the line in context, the Court actually wrote:

> "Because the GEICO policy has since been amended to include an election of the Medicare fee schedules as the method of calculating reimbursements, *and the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012, see* §627.736(5)(a)5., Fla. Stat. (2012), our holding applies. . .through the effective date of the 2012 amendment, which was July 1, 2012." *Virtual,* at 150. (emphasis added).

Put into context, the Supreme Court saw that, in 2012, one year before *Virtual* was decided (in July of 2013), the legislature codified the notice requirement that was judicially created (in *Geico* and *Kingsway, supra)* into §627.736(5)(a)5(2012). Therefore, in reviewing older policies (those prior to July 1, 2012), courts had to look to *Virtual* to find that insurers must clearly and unambiguously elect the permissive payment methodology. However, for policies *after* July 1, 2012, courts need not look to *Virtual,* because the legislature codified the holdings in *Geico* and *Kingsway* to incorporate the notice requirement into §627.736(5)(a)5(2012). The Court in *Virtual* further acknowledged the legislative codification, writing:

> "[A]fter the dispute over the 2008 amendments arose, the Legislature amended the PIP statute to include a specific requirement that insurers notify their policyholders at the time of issuance or renewal *of the insurer's election to limit payment pursuant to the fee schedules* set forth in the PIP statute. This 2012 amendment provided as follows. . . (emphasis added).

Virtual then goes on to cite the amended §627.736(5)(a)5. Therefore, the Supreme Court clarified that the 2012 amendment to §627.736(5)(a)5 incorporated the notice requirement *when an insurer elects* to limit payment pursuant to the permissive payment method. Reading the *Virtual* decision *in pari materia* with *Geico, Kingsway,* and the 2012 legislative change to §627.736(5)(a)5, the mandate is clear that the requirement of a clear and unambiguous election to use the permissive payment method applies before *and after* July 1, 2012. This Court also notes that there is no language in the certified question or holdings of *Virtual* or *Orthopedic Specialists* limiting their decisions to July 1, 2012. Therefore, this Court finds Progressive's reading of §627.736(5)(a)5, requiring no clear and unambiguous

election of an insurer's calculation methodology after July 1, 2012, is incorrect.

III. CONSTRUING TERMS OF A CONTRACT AGAINST THE DRAFTER

It is a basic tenet of Florida law and the common law that ambiguous terms in a contract are to be construed against the drafter. Progressive argued that such ambiguities must be construed in favor of the drafter. Neurology Partners brought this case based on an assignment of benefits. When an assignment of benefits is involved, the assignee is entitled to all of the rights and privileges to litigate the issues in the case as the real party in interest. If the assignee had to litigate an issue that inured to the benefit of the assignor, and not necessarily to itself, the court could not be assured that the issues were being litigated by the real party in interest. The principle behind standing is that it assures the Court that the proper parties litigate any given issue. If a litigant is neither the real party in interest, nor the one who has standing, the Court cannot be assured that legal issues are being resolved and litigated by the parties in the best position to do so. Progressive's position creates an unworkable legal paradigm that is inconsistent with the concepts of "standing" and "assignments" and in derogation of the common law.

Progressive's argument is predicated on a rationale that a court should read a PIP policy to favor the insured, not the provider. This theory on interpretation of contracts is not based on any legal theory. It is not based on any legal precedent. It is not based on any case law precedent. It is inconsistent with principles of contract interpretation that go back to the common law. In essence, Progressive is making a policy argument, which is discordant with fundamental concepts of contract law. While Progressive may argue that policies should be read to maximize benefits for the insured, an argument based on policy cannot trump an argument based on legal principle.

Finally, the issue in this appeal is *clarity of the insurer's election*. Clear and unambiguous notice of an election tells the medical provider *and the insured* what they can expect as payment and how that calculation is reached. Focusing on whether a particular payment methodology inures to the benefit of the insured or the medical provider misses the point because, with respect to *notice,* both the insured *and* the medical provider are *equally entitled* to the same level of clarity. Put another way, Progressive's policy, as written, is *equally ambiguous* to the medical provider and the insured. This Court agrees with the findings of Judge Flower of the lower court who said, "the Progressive policy [as written] permits Appellant to avail itself of both methodologies."

CONCLUSION

Progressive's policy endorsement reserves the rights to: a) deem a charge as ***"unreasonable***"; b) ***contest*** the ***reasonableness*** of a charge; and, c) reduce a charge ***"by any amount",*** *all rights exclusive to the* ***reasonableness*** *method.* Incorporating these rights creates an ambiguity as to the election of Progressive's calculation methodology pursuant to *Virtual* and *Orthopedic Specialists.* This analysis applies to policies both before and after July 1, 2012.

For the above-stated reasons, this Court affirms the trial court's denial of Progressive's Amended Motion for Summary Judgment and affirms Final Judgment entered in favor of Neurology Partners.

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[1]Previously §627.736(5)(a)2(2008) Fla. Stat.

[2]Previously §627.736(5)(a)1(2008) Fla. Stat.

[3]These factors include: usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply. §627.736(5)(a)(2012).

[4]In *Virtual,* the Florida Supreme Court *re-certified the question* to focus on "whether the insurer can use Medicare fee schedules as a method for *calculating* the 'reasonable medical expenses' coverage the insurer is required by section 627.736 to provide, when the policy does not provide notice of the insurer's election to use the fee schedule." See *Virtual,* at 150, fn. 3 (emphasis in original).

[5]This portion reads, in pertinent part:

> Pursuant to Florida law, we will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
>
> . . .
>
> f. for all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B, except as follows:
>
> (1) for services, supplies and care provided by ambulatory surgical centers and clinical laboratories, 200 percent of the allowable amount under Medicare Part B. . .

[6]The policy defines medical benefits, in pertinent part, as, "**Medical Benefits**" means 80 percent of all reasonable expenses incurred for medically necessary medical, surgical, x-ray. . . services." (emphasis in original). Neurology Partners did not allege that this language creates an ambiguity.

[7]See, Appellant's Initial Brief, Page 24.

[8]Both Duval County trial court judges who ruled against Progressive (relying on *Stand-Up*) maintained their rulings *after* the Florida Supreme Court issued its opinion in *Orthopedic Specialists.* See, *Neurology Partners, P.A. d/b/a Emas Spine & Brain Specialists a/a/o Arkeelia Evans v. Progressive Select Ins. Co.,* Case No. 2015-SC-5526 (Fla. Duval Cty. Ct., Motion for Rehearing denied May 1, 2017) and *Neurology Partners, P.A. d/b/a Emas Spine & Brain Specialists a/a/o Heather Tyrie v. Progressive American Ins. Co.,* Case No. 2016-SC-89 (Fla. Duval Cty. Ct., Motion for Rehearing denied on March 8, 2017).

Furthermore, other trial court judges throughout the State have now found Progressive's policy failed to make a clear and unambiguous election relying on *Orthopedic Specialists.* See, *Sea Spine Orthopedic Institute, LLC a/a/o Myriam Ortiz v. Progressive Amer. Ins. Co.,* Case No.: 2016-SC-7787-0 (Fla. Orange Cty., May 11, 2017), *Advantacare of Florida, LLC a/a/o Danely Abreu v. Progressive Amer. Ins. Co.,* Case No.: 2016-20888-CONS, (Fla. Volusia Cty., March 15, 2017) [25 Fla. L. Weekly Supp. 61a], and, *PIP Medical Consultants, LLC a/a/o Rhonda Teitelbaum v. Progressive American Ins. Co.,* Case No.: 16-15313-SP-05 (06) (Fla. Miami-Dade Cty., June 28, 2017).

[9]Progressive argued that the trial court erred because it relied on the now-quashed Fourth DCA decision in *Orthopedic Specialists a/a/o v. Allstate Ins. Co.,* 177 So.3d 19 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1918a]. A review of the trial court's Order reveals no such reliance. While the trial court mentions the decision from the Fourth DCA, its actual analysis of Progressive's policy language relies on *Virtual* and *Stand-Up.* Even assuming that the trial court relied on the decision from the Fourth DCA, its ultimate ruling is supported by *Virtual* and *Orthopedic Specialists.* Pursuant to the "tipsy coachman" rule, "If a trial court reaches the right conclusion, but for the wrong reason, it will be upheld if there is any basis which would support the judgment in the record." *Dade County School Bd. v. Radio Station WQBA,* 731 So.2d 638 (Fla. 1999) [24 Fla. L. Weekly S71a].

[10]The OIR Informational Memorandum was filed with the Court as an Exhibit 10 of Appellee's Appendix.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—PIP policy that states that insurer will reduce any payment to medical provider by any amounts it deems to be unreasonable does not clearly and unambiguously elect use of statutory fee schedules

NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o Roderick A. Williams, Appellant, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o ROSALIE DUNN, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. SILVER CONSULTING SERVICES, INC. a/a/o DEREK HUDSON, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o CURTIS MCFARLANE, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o GLORIA HARTLEY, Appellant, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Appellee. GIBSON CHIROPRACTIC OFFICE, P.A., a/a/o WILLIE MAY HAYES, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o HEATHER TYRIE, Appellee. PHYSICIANS MEDICAL CENTER, INC. a/a/o DEBORAH BUTLER, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. ALTERMAN & JOHNSON FAMILY CHIROPRACTORS, P.A. a/a/o AMELIA BRANGENBERG, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS a/a/o DANIEL L. IRVIN, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case Nos. 2017-AP-34, 2017-

AP-23, 2017-AP-9, 2017-AP-6, 2017-AP-5, 2017-AP-4, 2016-AP-86, 2016-AP-84, 2016-AP-83, 2016-AP-80. January 25, 2018. Appeal from County Court, in and for Duval County. Counsel: Adam Saben and Melissa R. Winer, Shuster & Saben, LLC, Jacksonville, for Appellants. Michael C. Clarke and Betsy E. Gallagher, Kubicki Draper, P.A., Tampa, for Appellee.

[Lower court orders at 25 Fla. L. Weekly Supp. 51a, 24 Fla. L. Weekly Supp. 624a, 24 Fla. L. Weekly Supp. 533a, and 24 Fla. L. Weekly Supp. 689a.]

OPINION

(RUSSELL L. HEALEY, J.) This matter came before the Court upon thirteen appeals from the Duval County Court, which the Chief Judge of the Fourth Judicial Circuit consolidated because all deal with insurance policies from Progressive Insurance Company and because the basic facts of the consolidated cases are the same. The Court instructed and the parties agreed to further consolidate the cases into two categories to facilitate uniform resolution where possible. On July 1, 2012, the Legislature revised the Personal Injury Protection (PIP) statute found at section 627.736, Florida Statutes (2012). The first category of cases has a date of loss before July 1, 2012, and the parties agreed to consolidate these cases under the *Kopp* appeal (2017-AP-7). The second category of cases has a date of loss on or after July 1, 2012, and the parties agreed to consolidate these cases under the *Williams* appeal (17-AP-34). This Opinion is limited to resolution of the second category of cases consolidated under *Williams.*

I. Discussion

An insurer must "reimburse eighty percent of reasonable expenses for medically necessary services." § 627.736(1), Fla. Stat. (2012). The question then becomes how an insurer determines "reasonable expenses." The statute provides two methods for doing so. The first method is the *default* method and directs the insurer to engage in a fact-dependent inquiry, which also apparently results in higher reimbursements.

> In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

§ 627.736(5)(a), Fla. Stat. (2012).

The second method is the *permissive* method whereby the insurer may elect to calculate reimbursements by relying on the Medicare Part B fee schedule.

> The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
>
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
>
> c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
>
> d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
>
> e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> (III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

§ 627.736(5)(a)1, Fla. Stat. (2012).

For an insurer to use the permissive method for calculating reimbursements, it must provide notice of its decision to do so. *Virtual Imaging,* 141 So. 3d at 159[1]; *see also Progressive Select Ins. Co. v. Emergency Physicians of Cent. Fla., LLP,* 202 So. 3d 437, 438 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a] ("Because Progressive failed to elect specifically to limit payments based on the fee schedule . . . , Progressive may not avail itself of the fee schedule limitation under section 627.736(5)(a)2.f., Florida Statutes (2008).").

When the language in an insurance contract is plain and unambiguous, a court must interpret the policy according to the plain meaning "so as to give effect to the policy as written." *Washington v. Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a]. Moreover, a court "should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect . . . [and] avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Id.* (citations omitted). Finally, "policy language is considered to be ambiguous . . . if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 570 (Fla. 2011) [36 Fla. L. Weekly S469a]).

In *Virtual Imaging,* the court explained, "when the plain language of the PIP statute affords insurers two different mechanisms for calculating reimbursements, the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Virtual Imaging,* 141 So. 3d at 158 (citing *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]).

Courts have looked closely at insurance policies to determine whether an insurer has provided clear and unambiguous notice to the insured and the provider that it has elected to use the *permissive* method to calculate reimbursement of medical expenses. The First District Court of Appeal considered a policy from the Allstate Insurance Company that contained the following language: "Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules." *Stand-Up MRI,* 188 So. 3d at 3.

That court agreed with Allstate "that the policy gives sufficient notice of its election to limit reimbursements by use of the fee schedules. Our conclusion stems from the policy's plain statement that reimbursements 'shall' be subject to the limitation in § 627.736, including 'all fee schedules.' " *Id.*

II. Standard of Review

Here, the parties do not dispute the facts, and the Court must

interpret provisions of the PIP statute as well as interpret the insurance policy. Consequently, the Court will review the trial court's application of the law *de novo. See Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1219 (Fla. 2016) [41 Fla. L. Weekly S62a] ("These questions are matters of law, which we review *de novo*.").

III. Factual and Procedural Background

On May 26, 2013, Roderick Williams was injured in a motor vehicle accident. At that time, Mr. Williams was insured under an automobile policy issued by Appellee, Progressive Insurance Company (Progressive). The policy included PIP benefits through an endorsement (Form 1652FL).[2] Mr. Williams sought medical treatment for his injuries from Appellant, Neurology Partners. It is undisputed that Neurology Partners's services and care were reasonable, necessary, and related to the accident.

Neurology Partners submitted its bills for Mr. Williams's medical treatment that occurred between June 25, 2013, and October 30, 2013. The total amount for which Neurology Partners sought reimbursement was $6,132.00. Progressive issued payment of $3,343.04 pursuant to the Medicare Part B fee schedule as set out in section 627.736(5)(a)1, Florida Statutes (2012).

Neurology Partners filed its Complaint in the County Court claiming Progressive improperly used the *permissive* method to calculate the reimbursement. According to Neurology Partners, Progressive failed to clearly and unambiguously elect to use the *permissive* method to calculate reimbursement. The parties filed cross motions for summary judgment, and the trial court found Progressive's policy contained a clear and unambiguous election to reimburse Neurology Partners pursuant to the *permissive* method in all but one case, 2016-AP-86. In that case, the trial court granted Neurology Partners's motion for summary judgment and denied Progressive's motion for summary judgment finding Progressive did not clearly and unambiguously elect to use the *permissive* method.

IV. ANALYSIS

According to the policy language, Progressive seems to be electing to use the Medicare Part B fee schedules.

> **UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS**
>
> If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, we may refuse to pay for those **medical benefits** and contest them.
>
> **We** will determine to be unreasonable any charges set forth in Section 627.736(5)(a)(2)(a-f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida Law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
>
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
>
> c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
>
> d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
>
> e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, **we** may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation will not be reimbursed by **us**.

If Progressive's policy reimbursement language had ended here, the Court would find a clear and unambiguous election to use the permissive method of calculating reimbursement by the Medicare Part B fee schedules. Progressive did not stop here however. Instead, Progressive added the following provision:

> ***We** will reduce any payment to a medical provider under this Part 11(A) by any amounts **we** deem to be unreasonable **medical benefits.*** However, the **medical benefits** shall provide reimbursement only for such services, supplies, and care that are lawfully rendered, supervised, ordered, or prescribed. Any reductions taken will not affect the rights of an insured person for coverage under this Part II(A). Whenever a medical provider agrees to a reduction of **medical benefits** charged, any co-payment owed by an **insured person** will also be reduced.

In response to the Court's inquiry regarding the language contained in the aforementioned provision, counsel for Progressive acknowledged that it was always Progressive's intention to pay reimbursements due pursuant to the *permissive* method and that there was no intention to ever pay benefits pursuant to the default method.

Counsel for Progressive further acknowledged that the language in the statute and policy as it relates to the *permissive* method and the Medicare Part B and Worker's Compensation fee schedules, covers all reimbursable expenses. Consequently, there would be no need for Progressive to consider whether an expense is reasonable, as it matters not what the provider charges, only whether or not the service provided is reimbursable under Medicare Part B or Worker's Compensation schedules.

According to Black's Law Dictionary, the word "deem" is construed to mean "[t]o consider, think, or judge." *Deem,* BLACK'S LAW DICTIONARY (10th ed. 2014).

The language in the policy under subsection f., clearly explains that if Medicare and workers compensation will not reimburse for medical services, Progressive will not reimburse that cost. There is no room for *Progressive* to consider, think or judge whether to reduce any payment. By electing the permissive method to calculate reimbursements, Medicare and workers compensation determine whether the insurer will pay for medical expenses. By adding the language that Progressive will reduce any payment to a medical provider by any amounts Progressive deems to be unreasonable, Progressive muddied the waters and created ambiguity. The language in Progressive's policy is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. Consequently the policy is unclear and ambiguous and as such Florida law dictates that the language be construed against Progressive and in favor of the insured. *See Ruderman,* 117 So. 3d at 952.

Thus, there is no need for the policy to reference unreasonable medical benefits as there is no such thing. In essence, it matters not what the provider charges, only whether or not the service provided is reimbursable under Medicare Part B or Worker's Compensation schedules. If the service is not reimbursable pursuant to the aforementioned schedules, the insurance company does not have to make any reimbursement.

V. Conclusion

The Court reverses the trial court orders in Case Numbers 17-AP-34, 17-AP-23, 17-AP-9, 17-AP-6, 17-AP-5, 17-AP-4, 16-AP-84, 16-AP-83, and 16-AP-80. The Court affirms the trial court order in Case

Number 16-AP-86.

[1]The holding in *Virtual Imaging* applies to policies in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology through the effective date of the 2012 amendment. *See id.* at 150. Although the instant policies fall outside that timeframe, *Virtual* applies to the analysis here.

[2]Of the ten appeals consolidated here, Progressive used Form 1652 FL in *Williams* and *Irvin*; Form A085 in *Brangenberg, Hartley, McFarlane, Tyrie,* and *Dunn;* and Form 9611D in *Hudson.* The language in each form is identical for purposes of this Opinion.

* * *

Contracts—Construction—Quantum meruit—Privity—Appeals—Absence of transcript—Appeal of final judgment finding that defendant benefitted from new roof repaired by plaintiff and awarding damages under equitable doctrine of quantum meruit—Without a transcript, defendant is unable to overcome presumption of correctness of the trial court's ruling regarding ownership of the subject property and the amount of damages—Judgment affirmed

STEPHEN J. SPENCER, Appellant, v. GEORGE KONOTOS ROOFING, INC., Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000029AP-88A. L.T. Case No. 15-005143CO. UCN Case No. 522019AP000029XXXXCI. December 7, 2020. Appeal from Final Judgment Pinellas County Court. Myra McNary, Judge. Counsel: James A. Staack, Staack, Simms & Reighard, PLLC, Clearwater, for Appellant. Anthone R. Damianakis, Peacock Gaffney & Damianakis, P.A., Clearwater, for Appellee.

(**PER CURIAM**.) THIS CAUSE is before the Court on appeal from the Order on Final Judgment entered March 22, 2019, in favor of George Konotos Roofing, Inc. Upon review of the briefs, the record on appeal and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm the findings of the trial court.

STATEMENT OF FACTS

On March 7, 2017, Appellee filed a First Amended Complaint in County Court, Case NO. 15-005143CO, alleging that Appellant breached an oral and written contract and sought damages under the equitable doctrine of quantum meruit seeking $14,865.05 for the work of repairing and replacing a roof at Appellant's residence, [Editor's note: Address redacted.], Clearwater, Florida, 33767. Appellant denied the allegations arguing that there was no privity of contract between the parties. The case proceeded to a non-jury trial and an Order on Final Judgment was rendered March 22, 2019.

Appellant argues that the Order on Final Judgment is in error as Appellant was not the "owner" of the property and therefore he could not benefit or retain a benefit from the new roof on the subject property and that even if Appellant received some benefit from the new roof, the amount of damages were incorrectly calculated.

STANDARD OF REVIEW

When an appellant fails to provide a transcript or an approved statement of the proceedings, this Court can only look for fundamental error on the face of the order. *See Tramontana v. Bank of New York Mellon*, 230 So. 3d 601, 602 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2433a] ("Without a transcript, and in the absence of fundamental error on its face, an appellate court will affirm a trial court's decision.").

DISCUSSION

On appeal, Appellant raised three issues. Appellant challenges the trial court's findings that a benefit was conferred on him by the repair of the roof of the home he resided in as Appellant is not the "owner" of the home. The trial court found that Appellant listed the subject property as his residence in his Petition for Bankruptcy as well as service of process of the complaint which is the subject of this appeal. Without a transcript of the trial, this Court cannot determine what testimony was produced concerning the title of the property. The appellate record is silent as to the ownership of the subject property.

Appellant also challenges the trial court's findings that Appellee's claim for quantum meruit is supported by the weight of the evidence. Quantum meruit is a "legal doctrine which, in the absence of an express agreement, imposes legal liability on a contract that the law implies from facts where one receives goods of services . . . where . . . a reasonable person receiving such benefit would ordinarily expect to pay for it." *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So.2d 297, 305 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D559a]. See *Daake v. Decks N Such Marine, Inc*., 201 So.3d 179(Fla. 1st DCA 2016) [41 Fla. L. Weekly D1992e]. Appellant cites to several cases in which a tenant could not be found to have received a benefit from improvements. These cases are not applicable. The trial court found that Appellant "used this property enough to classify it as his residence at least during a two year period, thereby making the roof job a direct benefit to the defendant." And that the subject property "has been in Defendant's family for over 30 years according to Defendant." Appellant is unable to demonstrate that the trial court committed error in the proceedings below.

Appellant challenges the trial court's factual findings of the amount of damages. However, Appellant does not cite to anything in the appellate record to support his argument, and, there is no testimony adduced at the trial reported. *Bei v. Harper*, 475 So.2d 912, 915 (Fla. 2d DCA 1985)(finding that without a sufficient record to review the points raised on appeal, appellate court cannot say that trial court erred in awarding damages.) The law in Florida is that the decision of the trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979). The trial court is charged with determining the weight, credibility, and sufficiency of the testimony and evidence presented, Appellant is unable to overcome the presumption of correctness of the trial court's ruling without a transcript. See *Applegate.* The trial court specifically found that the "testimony of Defendant was not credible" and that "[t]he credibility of the witnesses and the weight of the evidence demonstrates that Defendant acquiesced in the provision of service provided by Plaintiff" See *Smiley v. Greyhound Lines, Inc*., 704 So.2d 204, 205 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D158a] (explaining that the appellate court cannot substitute its opinion of the evidence but rather must indulge every fact and inference in support of the trial court's judgement, which is the equivalent of a jury verdict.). Accordingly, the Court finds that the trial court's judgment must be affirmed.

Therefore, it is

ORDERED AND ADJUDGED that the Order on Final Judgment rendered March 22, 2019 is affirmed. (JACK R. ST. ARNOLD, PATRICIA A. MUSCARELLA, and KEITH MEYER, JJ.)

* * *

Real property—Unlawful detainer—Record of conveyances—Action filed against defendant tenant who entered into an unrecorded written lease with the original owner prior to the execution of quit claim deed to plaintiff—Because lease was for a term longer than one year, it was subject to section 695.01—Plaintiff, a subsequent purchaser who purchased the property for value and without notice of the lease, had title which was superior to that of defendant—Failure to record power of attorney under which original owner's son executed quit claim deed did not invalidate the transfer—Recording of lease after transfer of the property did not put subsequent purchaser on notice

DARIUSZ DOLACINSKI, Appellant, v. ZHEZHERIA VALENTYN, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 20-000009AP-88A. UCN Case No. 522020AP000009XXXXCI. December 9, 2020. Appeal from Final Judgment Pinellas County Court. Edwin Jagger, Judge. Counsel: Dariusz Dolacinski, Pro se, St. Petersburg, Appellant. Gregory Bryl, Sunny Isles Beach, for Appellee.

(**PER CURIAM**.) THIS CAUSE is before the Court on appeal, filed by Dariusz Dolacinski, from the Final Judgment for Unlawful Detainer entered January 27, 2020, in favor of Zhezheria Valentyn. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm the findings of the trial court.

STATEMENT OF FACTS

Appellant entered into a written lease with a Mr. Damian Glowaty for a term longer than one year for property located at [Editor's note: Address redacted.], Tarpon Springs, FL 34688 on January 25, 2019. Appellant did not immediately record the lease in the official records of Pinellas County. Appellant states he paid a year rent in advance to Mr. Damian Glowaty. Appellee received title to the [Editor's note: Address redacted.] property through a quit claim deed from Mr. Damian Glowaty's son, Nicholas Glowaty acting under a power of attorney executed by Mr. Damian Glowaty. The subject property was quit claim deeded to Portfolio Investments, LLC which in turn executed a quit claim deed to Appellee on April 26, 2019. Appellant argues that he has superior right to the property because he had signed a lease with Mr. Damian Glowaty prior to Appellee taking ownership of the property. On October 28, 2019, Appellee filed a Complaint for Unlawful Detainer. Appellant recorded his lease with Mr. Damian Glowaty on November 13, 2009. The matter proceeded to an evidentiary hearing on the Plaintiff's Motion for Final Judgment for Unlawful Detainer on January 16, 2020. After consideration of the evidence and the testimony presented, the trial court found that Appellee satisfied the due diligence requirements at the time of the purchase of the [Editor's note: Address redacted.] property, that Appellee had no knowledge of a written lease and that Appellee's title was superior to Appellant's title. Final Judgment for Unlawful Detainer was entered January 27, 2020. Appellant timely appealed the trial court's ruling.

STANDARD OF REVIEW

The standard of review is whether the trial court's findings of fact are supported by competent substantial evidence. *Michele K. Feinzig P.A. v. Deehl & Carlson, P.A.*, 176 So.3d 305 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1866a].

DISCUSSION

Appellant raises several issues on appeal. We affirm the trial court's Final Judgment for Unlawful Detainer and write only to address the most coherently presented issues. Appellant argues that the transfer of the property from Nicholas Glowaty to Portfolio Funding through the power of attorney is not valid as the original power of attorney was not filed in the official records and the quit claim deed from Portfolio Funding to Appellee only transferred "the quit claimer's interest, not the interests of the other parties, such as [Appellee]. Additionally, Appellant argues that because he entered into a lease prior to the transfer of the property to Portfolio Funding and then Appellee, he is the rightful tenant and should be allowed to remain at the residence.

Florida is a "notice" jurisdiction. Fla. Stat. 695.01 provides that "[n]o conveyance, transfer, or mortgage or real property, or any interest therein, nor any leaser for a term of 1 year of longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law." The trial court found that Appellant's lease was for a term longer than one year, therefore it is subject to Fla. Stat. 695.01. See *Winn-Dixi Stores, Inc. v. Dolgencorp, Inc.*, 964 So.2d 261 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2244c].The Appellee is a subsequent purchaser who purchased the subject property for value and without notice of the lease. Appellee's title is superior to Appellant. Appellant argues that the failure to record the power of attorney prior to the quit claim deed rendered the transfer invalid. The statute does not invalidate the transfer, but failure to record the power of attorney could make the transfer vulnerable to attacks by subsequent purchasers. As Appellee was the subsequent purchaser, she would be vulnerable party.

Appellant argues that once he recorded his lease in the official records, he remedied the notice provision. Appellant is incorrect. The recording of the lease after the transfer of the property to Appellee does not put Appellee on notice prior to her purchase of the property. The requirement of recording a lease in excess of one year is to put any potential buyers on notice that there may be a superior right in the property. Appellee was unable to determine if there was any other interest in the property, such Appellant's lease, as he failed to record the lease thereby putting all potential buyers on notice.

Further, and more importantly, the Court finds that there is not a transcript or a statement of the evidence from the trial below. The law in Florida is that the decision of the trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979); *Bei v. Harper*, 475 So.2d 912, 914 (Fla. 2d DCA 1985). As the trial court is charged with determining the weight, credibility, and sufficiency of the testimony and evidence presented, Appellant is unable to overcome the presumption of correctness of the trial court's ruling without a transcript. See *Applegate*; see also *Smiley v. Greyhound Lines, Inc.*, 704 So.2d 204, 205 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D158a] (explaining that the appellate court cannot substitute its opinion of the evidence but rather must indulge every fact and inference in support of the trial court's judgement, which is the equivalent of a jury verdict.). Therefore it is,

ORDERED AND ADJUDGED that the Final Judgment for Unlawful Detainer is affirmed. (JACK R. ST. ARNOLD, PATRICIA A. MUSCARELLA, and SHERWOOD COLEMAN, JJ.)

* * *

Municipal corporations—Land use—Development agreement—Appeals—Certiorari—Petition for writ of certiorari not the correct remedy to challenge city's development agreement and alleged voting conflict of the members of the city council—Circuit court sitting in its appellate capacity may only affirm or quash the local government's decision and has no power, in exercising its jurisdiction in certiorari, to enter judgment on the merits of the controversy under consideration nor to direct respondent to enter any particular order or judgment—Additionally, petitioner did not preserve argument that members of the city council had ethical conflicts where petitioner did not allege ethical conflicts at public hearings on the proposed development—Petitioner was afforded procedural due process where he was given notice and an opportunity to be heard at two public hearings—There is no requirement that the city's decisionmaking body ask questions of the speakers at the public hearings—City council's decision to approve development proposal did not depart from essential requirements of the law—Proposed development order comports with city's comprehensive plan, and decision to enter the development agreement is supported by competent substantial evidence—Fact that there was no public testimony in support of proposed development and strong public testimony in opposition does not mean city did not have competent substantial evidence to support its decision

ROBERT WATT, Petitioner, v. THE CITY OF CLEARWATER, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000013AP-88A. UCN Case No. 522019AP000013XXXCI. December 9, 2020. Petition for Writ of Certiorari from Decision of City of Clearwater to Enter into a Hotel Density Development Agreement. Counsel: Robert Watt, Pro se, Clearwater, Petitioner. Michael P. Fuino, Senior Assistant City Attorney, Clearwater, for Respondent.

(**PER CURIAM**.) Petitioner, Robert Watt, seeks certiorari review of the February 7, 2019 decision of Respondent, City of Clearwater, to enter into a hotel density development agreement with Decade Properties. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The petition is denied.

STATEMENT OF FACTS

In 2001, in response to a consistent downward trajectory in the economics and aesthetics of Clearwater Beach, the City enacted Ordinance 6689-01 adopted a community redevelopment plan entitled Beach by Design. The goal of the ordinance and plan were to revitalize the city's beach tourist district by incentivizing the development of new "destination resorts" in a specific area of Clearwater Beach, a limited area fronting the Gulf of Mexico. At the time, hotel development was limited to 40 rooms per acre. In order to stimulate the desired catalytic resort projects, Beach by Design was developed. The Beach by Design plan established a limited pool ("Destination Resort Density Pool") of 600 additional hotel rooms to be made available for use by developers within a limited geographical area for a period of ten years. The plan allowed developer of certain destination resorts to exceed density restriction by applying to utilize the Density Pool of 600 hotel units for use in developing the resorts. The Density Pool was limited to a specific geographical area. Section A.6.1.4 of the City's Comprehensive Plan restricted the use of the Destination Resort Density Pool to a specific, limited geographical area, stating"

> The use of the density pool of additional hotel rooms established in Beach by Design: A Preliminary Design for Clearwater Beach and Design Guidelines is permitted in the following areas:
>
> 1. The Land located between Mandalay Avenue and the Gulf of Mexico between Rockaway Street and Papaya Street; and
>
> 2. The land located south of the Pier 60 parking lot and north of the southerly lot lines of Lots 77 and 126 of the Lloyd-White-Skinner Subdivision between South Gulfview Boulevard and Coronado Drive.

This geographical limitation on the Destination Resort Density Pool is also found in Beach by Design, which clearly requires that the Destination Resort Density Pool be used only for true destination resorts fronting the Gulf of Mexico.

In 2008, the City enacted Ordinance 7925-08 which amended the Beach by Design and created a separate and distinct number of hotel units named "Hotel Density Reserve". This was to incentivize the development and redevelopment of mid-priced boutique hotels to allow for affordable accommodations on Clearwater Beach. The ordinance identified the previous limited pool of 600 units as the "Destination Resort Density Pool" and the newly created reserve was identified as "Hotel Density Reserve". The ordinance did not place any geographic restrictions on the Hotel Density Reserve. Section A.1.6.4 of the City's Comprehensive Plan was not amended to place a geographical restriction on the Hotel Density Reserve.

On January 17, 2019, the City Council Board Meeting addressed agenda item 8.11 which was to provide direction on the proposed development between Decade Properties, the property owned, and the City of Clearwater, providing for the allocation of 27 units from the Hotel Density Reserve under Beach by Design and confirmed a second public hearing in City Council Chambers before City Council on February 7, 2019. At the City Council Board Meeting, Mark Parry, of Planning and Development with the City of Clearwater, described the proposal for the construction of a new hotel on the property now occupied by the Chart House Hotel. The record reflects that members of the City Council asked questions of staff and the representatives of the applicant, Decade Properties. The members of the public were allowed to address the proposal. There was no public comment in support of the proposal. Those opposed to the proposal were allowed three minutes each or could allow their allotted time to be credited to one speaker. Upon conclusion of the discussion, the City's staff was directed to develop a proposed Development Agreement to grant 27 additional units to Decade Properties and a second public hearing was scheduled for February 7, 2019.

At the February 7, 2019 City Council Board Meeting the agenda item was for the City Council to approve or disapprove a Development Agreement between Decade Properties, the property owner, and the City of Clearwater that provided for the allocation of 27 units from the Hotel Density Reserve pursuant to Beach by Design. Members of the public were present to voice their opposition to the proposal. Members of the City Council asked questions of the applicant as well as of staff. Upon conclusion of the discussion, the proposal was put to a vote of the City Council and the Development Agreement to grant 27 additional units to Decade Properties passed by a vote of three in favor, two opposed.

Petitioner filed this Petition for Writ of Certiorari to challenge the alleged violation of the City's Comprehensive Plan for development by approving the Development Agreement between the City of Clearwater and Decade Properties as well as challenging an alleged voting conflict of some members of the City Commission.

STANDARD OF REVIEW

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate Procedure 9.100. We must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings. See *Falk v. Scott*, 19 So.3d 1103, 1104 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2060b]. The reviewing court "above all cannot reweigh the "pros and cons" of conflicting evidence." *Id.* at 1104. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

DISCUSSION

Petitioner has filed a Petition for Writ of Certiorari seeking review of the City of Clearwater's decision to enter into a development agreement. The appropriate remedy to challenge a development agreement is through an action for injunctive relief. Development agreements are governed by Fla. Stat. §§ 163.3220-163.3243. The statutes provide that any aggrieved or adversely affected person can challenge compliance with a development agreement and the local government's comprehensive land use plan, but the statute stats that the challenge must be through an action for injunctive relief.

The circuit court sitting it its appellate capacity may only affirm or quash the local government's decision. "The appellate court has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular order or judgment." *Broward County v. G.B.V. Intern, Ltd.*, 787 So.2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S389a] citing *Tamiami Trail Tours v. Railroad Commission*, 174 So.2d 451, 454 (Fla. 1973).

Procedurally, Petitioner has sought an incorrect remedy to challenge the development agreement.

Petitioner has also incorrectly sought relief through the petition for writ of certiorari to challenge the alleged voting conflict of the members of the City Commission. Petitioner alleges several members of the City Council had ethical conflicts due to prior political campaign donations and being involved in similar business activities. Petitioner did not allege these ethical conflicts at either of the public

hearings on the proposed development between Decades Properties and the City of Clearwater for allocation of the additional hotel rooms from the hotel density reserve. Petitioner did not raise those arguments at the hearings and as such he is barred from raising the argument before this Court. Petitioner did not "preserve" that argument and the rule of preservation prohibits reviewing courts from considering new arguments for the first time on appeal that were not raised and considered by the lower tribunal. *Castor v. State*, 365 So.2d 701 (Fla. 1978). Additionally, even if the allegations of ethical conflicts had been raised in the lower proceedings, a petition for writ of certiorari is not the correct pleading to challenge the alleged voting conflict. Fla.Stat. §112.3175(b)(3). A circuit court sitting in its appellate capacity cannot issue either a judgment or a decree in a certiorari petition challenging a local government's decision.

Notwithstanding the procedural deficiencies, the Court addresses the merits of Petitioner's issues raised in the Petition. Petitioner argues that the City Planning Department was remiss in its approval of Decade Properties application as the planning department ignored the inconsistencies in the zoning area of Clearwater Point. The City's Comprehensive Plan states that the maximum density for properties with land-use categories of Resort Facilities High (which the property herein is categorized) in Clearwater Beach is controlled by the Beach by Design. The Beach by Design created a distinct and separate group of hotel units called the "Hotel Density Reserve". This group is distinct from the Destination Resort Density Pool which has a geographic limitation. The Hotel Density Reserve has no geographic limitations. Additionally, the Comprehensive Plan was not amended to place a restriction on the Hotel Density Reserve. See Clearwater City Ordinance 7925-08; Comprehensive Plan Section A.1.6.4. The only restriction of the Density Reserve is that it be in the Beach by Design planning area. Additionally, the planning staff and planning director at the public hearing testified that the Density Pool and Density Reserve are two separate density allocations.

Petitioner incorrectly asserts the Council generally dismissed the residents' reasons for their opposition to the Development Agreement between Decade Properties and the City of Clearwater. The City Council held two public hearings, received numerous emails and letters which the Council acknowledged and allowed the public to voice their opposition to the Development Agreement. There is nothing in the record, other than the approval of the Development Agreement by the City Council by a vote of three to two that supports Petitioner's assertions.

Petitioner argues that the Council Meetings were biased in favor of the applicant and against the Public. There was no testimony or evidence presented that the Council Meetings or the Commissioners were biased for or against any of the participants. Additionally, as this issue was not raised during the public hearings, the issue is not preserved and this Court is prohibited from reviewing issues not raised in the lower tribunal. See *Castor.*

Petitioner's additional arguments are without merit. The Court's review on first-tier certiorari review is limited to whether due process was afforded, was there a departure from the essential requirements of law and was the decision supported by substantial competent evidence. Procedural due process is the method for ensuring fair treatment through the proper administration of justice when substantive rights are at issue. *J.B. v Fla. Department of Children and Family Services,* 768 So.2d 1060 (Fla. 2000) [25 Fla. L. Weekly S715a]. As cited by Respondent, "In the land-use context, the requisite level of procedural due process is much less stringent than in the judicial context. The proceeding need only be "essentially fair" which requires that there is notice and an opportunity to be heard. The Petitioner was afforded both. The City Council conducted two public hearings, with notice to the public, and provided a forum for the Petitioner to voice his opposition to the Development Proposal. Petitioner argues that his time to speak was limited and the Council asked no questions of him or other members of the public. Fla. Stat. §286.0115 governs public access to quasi-judicial proceedings on local government land use matters. Section 286.0115(2)(b) provides that a person "who is not a party or a party-intervenor shall be allowed to testify before the decision making body, subject to control by the decisionmaking body, and may be requested to respond to questions from the decisionmaking body." In the case at bar, Petitioner was given an opportunity to address the decisionmaking body, the City Council, but there is no requirement that the Council ask questions of the speakers.

The City Council's decision to approve the development proposal did not depart from the essential requirements of law. A departure from the essential requirement of law is quite narrow and deferential to a local government's decision. It is not de novo review. *City of Jacksonville Beach v. Marisol Land Development, Inc*., 706 So.2d 354 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D349c]. "A departure from the essential requirements of law means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Haines City Community Development v. Heggs*, 658 So.2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a]. Petitioner asserts that there was a voting conflict due to prior political campaign donations and members the City Commission and the applicant of the being involved in similar business activities. There was no evidence or testimony presented at either public hearing to sustain Petitioner's assertion. Additionally, Fla. Stat. §112.3143(d) prohibits a municipal officer from voting on a measure that will inure to the special gain or loss of either himself; a principal that has retained him; or a relative or business associate. There was no evidence of special gain or loss to any of the city commissioners, a principal retained by the city commissioners or a relative or business associate of the city commissioners.

Petitioner posits that the development proposal violates the City's Comprehensive Plan. There are two categories of additional hotel units. The Density Pool has geographical restrictions. The Density Reserve under Beach by Design, created by city ordinance 7925, does not have geographical limitations. The proposed development comports with the City's comprehensive plan which provides that property with a land-use category of Resort Facilities High, would be controlled by Beach by Design.

Petitioner's position that the decision by the City Commission to approve the development proposal is not supported by the evidence. Competent evidence has been defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957). The City conducted two public hearings, the City's planning staff reviewed the application and testimony established the application is consistent with the City's land development regulations and Beach by Design. The recommendation and testimony of staff and staff's written report constitute "strong evidence" to support a land-use decision. See *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc*., 857 So.2d 202, 205 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1686a]; *Metro-Dade County v. Fuller,* 515 So.2d 1312, 1314 (Fla. 3d DCA 1987) confirming that professional staff reports analyzing a proposed use constituted competent substantial evidence.

There was no public testimony in support of the proposed development. There was strong public testimony in opposition to the proposed development, but that does not mean that the City Commission did not have competent substantial evidence before it to support its decision approving the proposed redevelopment.

Petitioner's remaining arguments, such as redeveloping and

improving the existing hotel would result in an increased crime rate, that the proposed redevelopment would reduce property values and sales in Clearwater Point, or that the increased traffic from the proposed development are not supported by the evidence in the record and are without merit.

CONCLUSION

This Court concludes that based on the facts and the analysis set for above, procedural due process was accorded and the City Council's February 7, 2019 decision to enter into a hotel density development agreement with Decade Properties is supported by competent substantial evidence, the essential requirements of law have been observed and procedural due process was afforded. The Petition for Writ of Certiorari is denied. (JACK R. ST. ARNOLD, PATRICIA A. MUSCARELLA, and SHERWOOD COLEMAN, JJ.)

* * *

Licensing—Driver's license—Permanent revocation—Reinstatement—Consumption of alcohol within 5 years—Certiorari challenge to Department of Highway Safety and Motor Vehicles' decision to deny reinstatement to licensee who admitted to eating cake with rum frosting, which allegedly caused interlock ignition device reading of 0.083, is denied—Statute requiring that licensee be drug-free for five years prior to license reinstatement makes no exception for accidental consumption

STEVEN BRIAN ARMENDINGER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al., Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 20-000024AP-88B. UCN Case No. 522020AP000024XXXXCI. December 22, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent DHSMV.

ORDER AND OPINION

(**PER CURIAM.**) Denied. Petitioner admitted to eating two-thirds of a piece of cake with rum frosting. Assuming arguendo that it was the cause of the interlock ignition device's breath-alcohol reading of 0.083, the applicable statute requires Petitioner to have "been drug-free for at least 5 years prior to the hearing" and makes no exception for accidental consumption. *See* § 322.271(5)(a)3, Fla. Stat. Accordingly, Respondents' decision is supported by competent, substantial evidence. In addition, Petitioner has not demonstrated a violation of his due process rights that would allow this Court to grant the Petition. *See Keeling v. Dep't of Highway Safety & Motor Vehicles,* 17 Fla. L. Weekly Supp. 952a (Fla. 6th Cir. Ct. App., Apr. 16, 2010) (holding that "the lack of an attorney does not deprive Petitioner of a meaningful review or due process"); *Paul v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1043a (Fla. 6th Cir. Ct. App., Sept. 15, 2008) (holding that where a petitioner was not advised of the ability to get a urine sample retested, "if [it] was error, it was harmless, because the petitioner's defense was not that he had not consumed a prohibited substance, but that he had done so unknowingly and by mistake"). (PAMELA A.M. CAMPBELL, LINDA R. ALLAN, and THOMAS M. RAMSBERGER, JJ.)

* * *

Insurance—Personal injury protection—Summary judgment—Trial court did not err in entering summary judgment in favor of medical provider where insurer did not file evidence in opposition to summary judgment, and at time of entry of summary judgment, insurer had not filed answer to complaint or sought relief from technical admissions

GEICO GENERAL INSURANCE COMPANY, Appellant, v. EDGEWOOD HEALTHCARE AND REHAB CENTER, LLC, a/a/o Marie Mirville, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CV-000034-A-O. December 30, 2020. Appeal from the order of Honorable Elizabeth Starr, Orange County Judge. Counsel: Rebecca L. Delaney and Scott W. Dutton, Dutton Law Group, P.A., Tampa, for Appellant. Dave T. Sookal, Anthony-Smith Law, P.A., Orlando, for Appellee.

(Before LATIMORE, CARSTEN, and YOUNG, JJ.)

(**PER CURIAM**.) Appellant, Geico General Insurance Company ("Geico"), seeks review of a final judgment entered in favor of Edgewood Healthcare and Rehab Center, LLC ("Edgewood") on April 1, 2019.

On August 8, 2017, Edgewood filed suit against Geico for payment of PIP benefits. Over the course of the next eight months, Geico failed to substantially respond to the complaint. During that time, Edgewood served a Request for Admissions, Interrogatories and Request for Production on August 15, 2017. Edgewood's Request for Admissions was automatically deemed admitted due to lack of a response as of September 29, 2017 based on Rule 1.340. 1.350, and 1.370, Fla. R. Civ. P. (2017).

On January 5, 2018, Edgewood filed a motion for summary judgment, which was set for hearing on April 11, 2018. Geico still failed to file any documents or pleadings prior to the hearing of April 11, 2018.

At the summary judgment hearing, Edgewood argued that Geico's admissions established Edgewood's prima facie burden and that Geico's failure to file anything in opposition supported summary judgment. The trial court agreed and entered its order granting summary judgment in favor of Edgewood on April 30, 2018.

Only after entry of summary judgment did Geico finally file an answer, responses to requests for admissions, and a motion for reconsideration on May 3, 2018. Notably, Geico did not file any motion seeking relief from its technical admissions of September 29, nor did it file a motion seeking leave to file the belated answer. Instead, it appears Geico merely hoped that its late filings would muddy the waters enough to create grounds for a do-over on appeal. The trial court denied the motion for reconsideration. Finally, the trial court granted Edgewood's amended motion for entry of final judgment after the outstanding issue of the amount of damages had been established.

DISCUSSION

The proper standard of review of a summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a].

The merits of the instant case were determined, with the sole exception of the amount of damages, on the basis of the summary judgment hearing held on April 11, 2018. The record clearly demonstrates that at the time of the summary judgment hearing Geico had not filed any summary judgment evidence in opposition to Edgewood's motion. In fact, Geico had not even filed an answer to the complaint and its failure to respond to the request for admissions properly resulted in technical admissions against Geico. During the hearing, as well as during the intervening time between the hearing and rendition of the order, Geico made no effort to seek relief from these technical admissions or to provide adequate excuse for its failure to timely respond to the complaint. *See Morgan v. Thomson*, 427 So. 2d 1134, 1134-35 (Fla. 5th DCA 1983). Without a motion for relief from admissions, or any other evidence in opposition, the trial court did not err by granting summary judgment for Edgewood. Further, the trial court did not abuse its discretion by denying Geico's motion for a continuance at the hearing. *Cole v. Heritage Cmtys.*, 838 So. 2d 1237, 1238 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D659a]. Geico's failure to file any substantive documents for nearly eight months is clearly demonstrated in the record despite Edgewood's diligent prosecution of its case.

Geico's additional arguments seek only to further muddy the waters of the case. Each of the arguments was either not properly preserved or originated only after the trial court entered summary

judgment against Geico. By the time Geico filed its unauthorized answer and other pleadings, the merits of the case had already been decided on summary judgment, and all that remained as a determination regarding the amount of damages.

CONCLUSION

Based on the foregoing, we **AFFIRM** the trial court's entry of Final Judgment.

Appellee's "Motion for Award of Appellate Attorneys' Fees and Costs," filed December 19, 2019, is **CONDITONALLY GRANTED** and the matter is **REMANDED** to the trial court to determine the amount of fees and costs.

The Court will not entertain any motion for rehearing. (CARSTEN and YOUNG, JJ., concur.)

* * *

Municipal corporations—Zoning—Variances—Appeals—Timeliness—Petition for writ of certiorari challenging quasi-judicial order of city board of adjustments denying application for variance is dismissed where petition was filed more than thirty days after rendition of order

ALTMED, LLC, Petitioner, v. CITY OF MIAMI BEACH, FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-199 AP 01. February 4, 2021.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

(Before DARYL E. TRAWICK, LISA S. WALSH, and MARIA DE JESUS SANTOVENIA, JJ.)

(PER CURIAM.) This matter came before the court on Respondent, City of Miami Beach's Motion to Dismiss Petitioner's Petition for Writ of Certiorari for Lack of Jurisdiction ("City's Motion") and Petitioner's Motion to Accept Brief Out of Time ("Petitioner's Motion"). The City's Motion is hereby GRANTED, for the following reasons:

Petitioner ALTMED, LLC ("Petitioner"), seeks review of a quasi-judicial order entered on July 10, 2020 by the City of Miami Beach Board of Adjustment denying Petitioner's application for a variance for a medical cannabis dispensary. Petitioner asserts that the Court has jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.100(c)(2), which permits the review by certiorari of quasi-judicial action of agencies, boards, and commissions of local government not directly appealable under any other provision of general law. Florida Rule of Appellate Procedure 9.100(c) specifically states that any such petition for certiorari "shall be filed within 30 days of the rendition of the order to be reviewed."

The Board of Adjustment's Order dated July 10, 2020 was rendered when it was filed with the Clerk of the Board of Adjustment on August 25, 2020. The 30-day statutory filing period expired September 24, 2020.

The time fixed within which a petition for writ of certiorari must be filed is jurisdictional, and, where a petition is not filed within the requisite timeframe, no jurisdiction is conferred on the court. *State of Fla. Dep't. of Highway Safety & Motor Vehicles v. Melendez,* 132 So. 3d 1237 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D458a] ("The 30-day filing deadline established by Rule 9.100(c) is jurisdictional in nature and not merely a matter of procedure. . .As such, an untimely Petition divests this court of jurisdiction over the untimely filed Petition and it should be dismissed") (citations omitted).

Based on review of the respective motions and responses of the parties, Petitioner filed its Petition for Writ of Certiorari ("Petition") on October 5, 2020, more than 30 days after the quasi-judicial order of the City of Miami Beach was rendered. As a result, this court lacks jurisdiction to conduct certiorari review in this matter and the Petition must be dismissed for lack of jurisdiction.

Petitioner's Motion requests that the Petition be accepted out of time because of filing difficulties with the Clerk's Office caused by the COVID-19 pandemic. Given that the 30-day filing deadline is jurisdictional, that this court has no discretion to extend the filing deadline, and that the court lacks jurisdiction to review this matter, Petitioner's Motion must be and is DENIED.

WHEREFORE, for the foregoing reasons, Petitioner's Petition for Writ of Certiorari is dismissed. (TRAWICK, WALSH, and SANTOVENIA, JJ., Concur.)

* * *

Municipal corporations—Code enforcement—Order of code enforcement board authorizing city to remove unanchored shipping containers intended for use as farmer's market vendor stalls from owner's property and lien removal costs against property is affirmed—Owner was not denied opportunity to be heard where CEB denied owner's request for extension of time for compliance due to owner's failure to demonstrate good faith effort to remove containers even after deadline for compliance had been extended multiple times over more than three years—No merit to argument that owner is entitled to new hearing due to undisclosed ex parte communication between CEB and city commissioner where there is no evidence of ex parte communication—No merit to argument that CEB denied due process by failing to hear evidence on issue of selective enforcement where that argument was raised as to separate violation that was subject of hearing after CEB had resolved container violation—Challenge to rescission of temporary use permit for farmer's market is not subject to court's review where TUP was rescinded by zoning department, not by CEB—Arguments regarding vested rights and equitable estoppel are not supported by factual analysis and were not raised below—No merit to argument that city was not permitted to seek enforcement concurrently through CEB and through suit seeking emergency injunction in circuit court

CALLE OCHO MARKETPLACE, LLC., Appellant, v. CITY OF MIAMI, FLORIDA, CODE ENFORCEMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-299 AP 01. L.T. Case No. CE2017-9206. January 21, 2021. On Appeal from and Order of the City of Miami Code Enforcement Board. Counsel: Alexander S. Orlofsky, The Orlofsky Law Firm, for Appellant. Victoria Mendez, City Attorney, and John A. Greco, Deputy City Attorney, City of Miami Attorney's Office, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(PER CURIAM.) Calle Ocho Marketplace, LLC ("Owner") appeals the September 12, 2018 Order ("Order") of the City of Miami Code Enforcement Board ("CEB" or "Appellee") that authorized the City of Miami ("City") to remove unpermitted structures from the Owner's commercial property ("Property") and to secure the Owner's payment of the costs of such removal by imposing a lien upon the Property.

The Property was cited by the City under Case number CE2017009206 for the open and unsecured storage of unpermitted cargo shipping containers that had been cut and re-fastened to make sheds or kiosks ("container kiosks"). These container kiosks were apparently intended to be installed at the Property for use as vendor stalls for a farmer's market. The record reflects that the City wanted these items removed because they were unsafe, not properly fastened or stored, and could cause a hazard during a hurricane.

The September 12, 2018 CEB Order, which is the subject of this appeal, states that "the City of Miami shall have the authority to remove the container/kiosks" located at the Property and "lien any costs associated with such removal against the Property" pursuant to City Code. It also notes that "[t]he property owner was previously ordered to remove all the 'container/kiosks' by Midnight, Sunday, September 9, 2018." In this appeal,[1] the Owner argues that the CEB denied it procedural due process and departed from the essential

requirements of the law.

FACTUAL BACKGROUND

While the Appellant's initial brief contains very few facts, a review of the record indicates a history of City code enforcement involvement with the Property. In a nutshell, the Owner was first cited for the violation regarding the container kiosks in May of 2017, following which the CEB granted the Owner multiple extensions of time to cure the violation. For more than a year before the CEB's September 12, 2018 hearing, the Owner failed to cure the violations. Part of the Property, which was purchased by the Owner in 2015, was in the process of being developed for use as a farmer's market or an outdoor vendor market. The City inspectors found several violations on the Property, at least one of which existed before the Owner's purchase. Each of the violations was cited under a different case number with separate hearings and orders issued for each violation. The other violations are not the subject of this appeal.

In this case, the Owner was cited for "Work Performed Without Finalized Permit" in violation of Section 2104 of the Miami 21 Code, which provides as follows:

> Structures and uses to be as provided in applications, plans, building permits, certificates of use, and special permits in relation thereto. Building permits or certificates of use issued by the zoning administrator on the basis of plans and applications authorize only the use, arrangement, and construction set forth in the approved plans and applications, subject to any conditions or safeguards attached thereto, and no other. Use, arrangement, or construction at variance with that authorized, or failure to observe conditions and safeguards, shall be deemed a violation of this zoning ordinance.

STANDARD OF REVIEW

In an appeal of a decision of an administrative agency, this Court reviews whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.[2] *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); *Dusseau v. Metropolitan Dade County Bd. of C'ty Comm'rs,* 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a].

PROCEDURAL DUE PROCESS

Procedural due process requires that the agency provide reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson,* 464 So. 2d 158, 164 (Fla. 2d DCA 1985). A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County,* 589 So. 2d 1337, 1340-41 (Fla. 4th DCA 1991).

Opportunity to Be Heard

In the instant case, it is undisputed that the Owner received notice of the hearing. Instead, the Owner argues that the CEB "refused to even hear argument from the Appellant" and thereby failed to accord procedural due process.

This allegation mischaracterizes the record of the September 12, 2018 CEB hearing ("Hearing"). The Owner appeared at the Hearing through counsel, who requested additional time to comply. In response to the CEB's inquiry as to why the Owner had not removed even one of the container kiosks, the Owner's attorney responded that it was the Owner's intent to re-permit the Property. The CEB listened to the Owner's arguments and discussed them, but ultimately was not persuaded to grant additional time for compliance. The CEB found that the Owner did not demonstrate a good faith effort to remove the container kiosks even after the deadline for compliance had been extended multiple times. The Owner had ample opportunity to present arguments and was fully heard.

The Owner's allegation that it did not receive an opportunity to be heard also ignores the record history of the violation. The Owner received the first Notice of Code Violation from the City on May 22, 2017, under Case Number CE2017009206, regarding the presence of container kiosks on the Property. The notice directed the Owner to correct the violation by June 1, 2017. On September 28, 2017, a summons to appear before the CEB was issued to Owner for a hearing on October 11, 2017 because an inspection of the Property revealed that the Owner had failed to correct the violation. Following the October 11, 2017 hearing, the CEB entered a Final Administrative Enforcement Notice ordering the Owner to correct the violation by January 11, 2018 or be fined $250 per day. No notice of compliance was submitted by Owner, resulting in the City's Affidavit of Non-Compliance entered on January 4, 2018.

A CEB hearing was held on January 30, 2018 because the violation had still not been corrected. At that hearing, Owner requested an extension of time and the CEB entered an Order on January 31, 2018 extending the compliance date to March 2, 2018. Thereafter, two additional extensions of time were granted for the Owner to correct the violation. The time for compliance was extended to May 24, 2018. Notices of violation were posted at the Property on May 26, 2018 and photos were taken of the container kiosks still at the Property. Correspondence was also exchanged between the City's Building Director and a representative for the Owner which explained why the container kiosks were a violation of the City Code and why they needed to be removed.

On August 20, 2018, the City Attorney's Office sent a letter to the Owner explaining why the existence of the container kiosks on the Property is a violation of the City's Temporary Use Permit which had been issued for the Property ("TUP"), and why the container kiosks needed to be removed during the hurricane season. The letter stated:

> At this time it appears there are 'container kiosks' on site which are not fastened down and sitting tilted on cement blocks. The Farmer's Market TUP approved in July, by the office of Zoning, has a building requirement that any of this equipment have anchorage. As you know, this requirement is due to a very real possibility of hurricane force winds and the type of container you have decided to use. Any of this equipment on the property that is not anchored as required by any approved permit is a violation of section 3.63(3) of Miami 21, the Zoning Code of the City of Miami, Florida. This section does not allow equipment to be stored in anything other than a "storage facility or other approved places where they are concealed from public view." The photographs taken last week, and which were provided to you previously, show the particular issues and the equipment should be removed or stored appropriately no later than Wednesday, August 22, 2018, by 5pm.

On September 6, 2018, a CEB hearing was held regarding the violation where the City requested that the CEB enter an order for the removal of the container kiosks from the Property, allowing 24-48 hours for compliance. The Owner requested 30 days for compliance. At the conclusion of the hearing, the CEB granted 36 hours for the Owner to remove the container kiosks from the Property. The CEB stated that if the Owner did not remove the container kiosks, the CEB would enter an order allowing the City to remove them and that the City could charge for the costs of such removal by placing a lien on the Property. The CEB announced that the deadline for compliance was midnight on Sunday, September 9, 2018.

On September 10, 2018, an Affidavit of Noncompliance was filed confirming that the Owner had not removed the container kiosks. The matter was then set for the September 12, 2018 CEB calendar.

The foregoing history does not evidence lack of either notice or an opportunity to be heard regarding the violation, but rather a record of

notice and multiple opportunities to correct the violation over an extended period of time.

Non-disclosure of Alleged Ex Parte Communication with CEB

Owner next argues that it was denied an opportunity for hearing and is entitled to a new hearing because the CEB failed to disclose timely its alleged ex parte communication with a City Commissioner regarding the Property. However, Owner provides no record support that any such ex parte communication took place.

Appellant's initial brief references and the record does reflect that a City Commissioner spoke at the CEB hearing on September 6, 2018 against granting Owner any additional extensions. However, Appellant points to no impropriety regarding the Commissioner's expression of his opinion on the record at a public hearing where there was an opportunity to rebut the Commissioner's opinion. Accordingly, Appellant's argument on this point is without merit.

Selective Enforcement

The Owner also alleges that the CEB violated its due process rights by refusing to hear any evidence of selective enforcement by the City of Miami. At the September 12, 2018 CEB meeting, there were two hearings regarding two separate violations on the Owner's Property. The hearing regarding the container kiosks at which the CEB entered the subject Order authorizing the City to remove the container kiosks was held first. Following the hearing on the subject violation, the CEB conducted a separate hearing on an unrelated violation. This other violation, cited under a different case number, CE2017018184, involved a non-permitted overhang over the alleyway between two buildings on the Property.

For that separate violation, the CEB entered a separate order granting the Owner three weeks to comply. It was during the second CEB hearing on September 12, 2018 that the Owner raised the issue of "selective enforcement." Thus, by the time the Owner raised the selective enforcement issue, the CEB had already heard and voted on the violation regarding the container kiosks, and had already entered the ruling reflected in the Order regarding the removal of the container kiosks[3].

Nor does *Powell v. City of Sarasota,* 953 So. 2d 5, 7-8 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2349a] support Appellant's argument. The procedural posture in *Powell* was the following:

> In the hearing before the Board, the Powells asserted a defense of selective enforcement. They attempted to introduce evidence that the City's nuisance abatement efforts targeted predominantly African-American neighborhoods. The Board refused to consider this evidence, and it refused to allow the Powells to make a proffer of the excluded evidence. In the circuit court certiorari review proceeding, the Powells argued that those refusals denied them procedural due process.
>
> The circuit court rejected this claim. In so doing, it failed to apply the correct law. Section 893.138(3) provides that in a nuisance abatement proceeding the property owner "shall have an opportunity to present evidence in his or her defense[.]" The Equal Protection Clause prohibits selective enforcement of the law based on considerations such as race. *Glock v. Moore,* 776 So. 2d 243, 252 (Fla.2001) [26 Fla. L. Weekly S9a]; see also *Polk County v. Mitchell,* 931 So. 2d 922, 926 n. 4 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D153a] (describing selective enforcement defense to ordinance as "deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification"). Thus, under the law, the Powells' defense to the nuisance abatement charge was legally cognizable, and they were entitled to present evidence in proof of it. The circuit court failed to apply this law when ruling that the Board afforded procedural due process to the Powells.

Unlike *Powell,* the Owner here did not raise the issue of selective enforcement during the Hearing on the subject violation involving the container kiosks, nor does Owner even allege that the City's enforcement actions against Owner or the Property were "deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification." *See Polk County v. Mitchell,* 931 So. 2d 922, 926 n. 4 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D153a]. Because selective enforcement was never raised to contest this violation, it may not provide grounds to quash the order on review.

ESSENTIAL REQUIREMENTS OF THE LAW

The applicable standard of review also requires that this Court must determine whether the lower tribunal applied the correct law. *Vaillant,* 419 So. 2d at 624. A departure from the essential requirements of the law occurs when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983).

Vested Rights

In the instant case, the Owner is not challenging the City ordinance or the existence of the violation regarding the container kiosks. Rather, the Owner challenges the revocation of the Owner's permits. Appellant alleges generally that it had an open building permit issued for the development of the Property which was set to expire on October 14, 2018, as well as a TUP allowing for the use of the Property as a farmer's market and the temporary structures to be used for such events.

The factual history regarding the TUP, while not mentioned in Appellant's brief, is relevant to refute the Owner's argument that the permits were revoked suddenly and prematurely by the City.

On December 11, 2017, the Owner applied for a temporary use permit. On July 11, 2018, the City issued the TUP. On April 17, 2018, the City approved Owner's building plans to anchor the container kiosks.

Significantly, the record indicates that written notice was issued by the City's Zoning Department to the Owner regarding the TUP permit revocation. On September 4, 2018, the City Zoning Director and Administrator sent the Owner a notice that the TUP for the farmer's market was being rescinded. That notice states:

> City records indicate that code violations were issued and pending prior to issuance of Temporary Use Permit (TUP) 18-021 on July 11, 2018 for a Farmer's Market located at 1380 SW 8th St. These violations remain open to-date and as such, require that TUP 18-021 be rescinded pursuant to City of Miami code Section 62-622 (c). This Section mandates that, 'no temporary farmers' market permit shall be issued to a property that has any outstanding code enforcement violations or city liens.' These violations must be complied prior to the submittal of a new application.

The revocation of the TUP was a separate decision by the City's Zoning Department, in response to multiple open and pending violations that continued to exist on the Property. Thus, the revocation of the TUP is not the subject of this Court's review because it was a decision made by the Zoning Department, rather than the Code Enforcement Board. Furthermore, the Zoning Department's revocation of the TUP occurred prior to the CEB's Order to remove the container kiosks from the Property. The Order in this appeal pertinent to CEB action on the container kiosks does not involve the revocation of the TUP or of any permit.

Ignoring that the TUP had been rescinded, Appellant argues that the CEB departed from the essential requirements of law because the Owner had a vested interest in the Property based on the permits issued by the City. Appellant cites, without any analysis, case law defining when a vested right arises. *See Monroe Cty. v. Ambrose,* 866 So. 2d 707 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2836a]. Appellant also cites *Bay Point Club, Inc. v. Bay Cty.,* 890 So. 2d 256 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2375c], in which the court held that

"developer's vested rights in previously approved DRI did not include proposed changes, and thus developer's changes had to be approved by county board of commissioners."

In arguing that the CEB interfered with the Owner's vested rights, the Owner states that Owner "relied on the City's actions and substantially changed its position in reliance to make earnest efforts in securing the container kiosks." However, no factual foundation whatsoever is provided—nor does one exist—to support this statement. Furthermore, there is no citation to any part of the record where this argument was raised at the Hearing or in the proceeding below. "As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Ass'n v. Robbins,* 914 So. 2d 925, 928 (Fla. 2005) [30 Fla. L. Weekly S763a]; see *Robins v. Colombo,* 253 So. 3d 94, 97 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1821a].

Equitable Estoppel

The Owner also argues that the City is equitably estopped from changing its position on the approvals of the building permit and TUP. The doctrine of equitable estoppel will preclude a municipality from exercising its administrative power where a "property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right the acquired." *Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10, 15-16 (Fla. 1976) *citing Salkolsky v. City of Coral Gables,* 151 So. 2d 433 (Fla. 1963).

The Owner points to its "good faith reliance on the City's Temporary Use Permit, Building Permit, as well as the Code Enforcement Order entered on September 10, 2018."

No order was entered on September 10, 2018, and thus, it is unknown to what order the Owner refers. Similar to its argument on vested rights, no factual analysis whatsoever is provided in support of the equitable estoppel argument. Nor is there any citation to the record where this argument was raised at the Hearing or in the proceeding below. As noted above, "[a]s a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Ass'n v. Robbins,* 914 So. 2d 925, 928 (Fla. 2005) [30 Fla. L. Weekly S763a]; see *Robins v. Colombo,* 253 So. 3d 94, 97 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1821a].

Concurrent Prosecution Under Section 162.13 of the Florida Statutes

Appellant's last argument on appeal is that the CEB erred in allowing the subject case to proceed while the injunction suit was pending in the Circuit Court. In its Initial Brief, the Owner argues that the City lacked authority to prosecute the same violation against Owner concurrently through the court system and the CEB. The record reflects that there were simultaneous cases pending before different tribunals regarding the container kiosks on the Property. However, each case sought to enforce a different code violation.

On August 23, 2018, the City filed a lawsuit in Circuit Court under Section 3.6 of the Miami Code seeking an emergency injunction to remove the container kiosks. The injunction motion was heard on September 6, 2018 by a Circuit Court judge who made no substantive ruling on the motion, but instead dismissed the petition for injunction without prejudice because it was not filed as a verified motion. Notably, the injunction motion in the Circuit Court case was premised on a different code violation than the violation before the CEB (the Circuit Court case alleged that the Owner was in violation of a City Code provision that requires inoperable vehicles to be stored out of public view).

Code enforcement proceedings are governed by Chapter 162 of the Florida Statutes. Section 162.13, Fla. Stat. provides: "It is the legislative intent of ss. 162.01-162.12 to provide **an additional or supplemental means** of obtaining compliance with local codes. Nothing contained in ss. 162.01-162.12 shall prohibit a local governing body from enforcing its codes by any other means." (emphasis added). This provision is unambiguous. *Goodman v. Cty. Court in Broward Cty.,* 711 So. 2d 587, 589 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D963a]. Accordingly, our sole function "is to enforce [the statute] according to its terms." *Dodd v. United States,* 545 U.S. 353, 359, 125 S. Ct. 2478, 2483, 162 L.Ed. 2d 343 (2005) [18 Fla. L. Weekly Fed. S414a] (citation omitted). Thus, our analysis "begins with 'the language of the statute,' " and because the "statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438, 119 S. Ct. 755, 760, 142 L.Ed. 2d 881 (1999) (citations omitted).

The plain meaning of the terms "additional" and "supplemental" in the statute evidences that it is intended to be an additional, as opposed to an exclusive, means of compliance. A local government is permitted to enforce its ordinances through means other than code enforcement boards or by invoking cumulative remedies. For example, the local government may pursue enforcement by bringing a civil action or even through criminal prosecution. *See* § 162.22, Fla. Stat.; *Goodman, supra.,* 711 So. 2d at 589 ("The creation of the code enforcement board and the assignment to it of the enforcement of housing code violations does not prohibit the City from bringing a charge in county court for a municipal code violation.").

Appellant argues that Chapter 162, Fla. Stat. does not provide "a means by which a local governing body may bring multiple lawsuits against one of its citizens under Chapter 162 **and** through the courts", citing *Deehl v. Weiss,* 505 So. 2d 529 (Fla. 3d DCA 1987). The court in *Deehl* held that:

> there is no basis for the circuit court's determination on appeal that the City of Miami, by virtue of having created a board to hear some of its technical code violations, is presently deprived of access to the Dade County Court for enforcement of technical code violations it chooses not to bring before its municipal board.

Id. at 531. *Deehl* does not support the proposition for which it is cited, nor does it address the same circumstance in the instant case where compliance was sought in both the court and in an administrative proceeding.

Quite simply, no legal authority cited by Appellant supports that the Order should be quashed because the City had a venue other than the CEB to pursue legal action as to the violation involving the container kiosks.[4]

Appellee relies on *Rudge v. City of Stuart,* 65 So. 3d 645 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1606c] in support of the Order. There, the court determined that "[t]he City was not foreclosed from obtaining injunctive relief simply because monetary civil infraction fines for code enforcement violations were also available to the City." *Id.* at 647. While Appellant correctly points out that *Rudge* does not mention Section 162.13, Fla. Stat., *Rudge* (decided after the 1994 addition of Section 162.22, Fla. Stat. to the statutory code enforcement scheme) governs and is on point regarding the specific factual scenario presented in this appeal.

Furthermore, Section 162.30, Fla. Stat. (2003) allows for the civil action filed by the City. That statute, which governs "Civil actions to enforce county and municipal ordinances", provides, in pertinent part, that:

> In addition to other provisions of law authorizing the enforcement of county and municipal codes and ordinances, a county or municipality may enforce any violation of a county or municipal code or ordinance by filing a civil action in the same manner as instituting a civil action. The action shall be brought in county or circuit court, whichever is appropriate depending upon the relief sought.

Notably, Appellant's argument nowhere addresses that the injunction motion in the Circuit Court case was premised on a different code violation than the violation before the CEB. Moreover, the subject case before the CEB existed long before the case in the Circuit Court and was active and ongoing since May of 2017. For 16 months, the Owner did not challenge the subject violation or the CEB's authority to address it. It is undisputed that the CEB had jurisdiction and properly exercised its authority to enter the Order.

As procedural due process and the essential requirements of the law were observed, the Code Enforcement Board's Order is AFFIRMED. (TRAWICK, WALSH and SANTOVENIA, JJ. concur.)

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[1]The City asserts in its answer brief that this appeal is moot because the container kiosks were removed from the Property in 2018 and there is no related lien on the Property. An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Godwin v. State,* 593 So. 2d 211, 212 (Fla.1992) (citing *DeHoff v. Imeson,* 153 Fla. 553, 15 So. 2d 258 (1943)). "A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Id.* (citing Black's Law Dictionary 1008 (6th ed. 1990)). "A moot case generally will be dismissed." *Id.* However, mootness does not destroy an appellate court's jurisdiction when the questions raised are of great public importance, are likely to recur, or if collateral legal consequences that affect the rights of a party flow from the issue to be determined. *Id.* (citing *Holly v. Auld,* 450 So. 2d 217, 218 n.1 (Fla. 1984); *Keezel v. State,* 358 So. 2d 247 (Fla. 4th DCA 1978)). While the City's argument would appear to be meritorious, Owner did not file a reply brief responding to the City's mootness argument. Accordingly, this court cannot determine whether the mootness argument is dispositive of this appeal because it is not clear whether any "collateral legal consequences that affect the rights of a party flow from the issue to be determined" and remain, especially given the various proceedings regarding the Property.

[2]Appellant only argues that procedural due process was not accorded and that the essential requirements of the law were not observed and does not challenge the existence of competent, substantial evidence to support the subject Order. The record, as cited *infra.,* shows that the subject Order is supported by competent substantial evidence.

[3]Even assuming *arguendo* that the selective enforcement argument were pertinent to the Order in this appeal, the CEB *did* consider the issue of selective enforcement as to the separate violation and explained why it did not find the argument to be persuasive. One of the CEB members asked the Owner's attorney, multiple times, to elaborate on his assertion that the City or CEB was targeting the Property specifically. The Owner's counsel did not elaborate, seek to enter evidence to support his general allegation, or present a case on this issue. Moreover, the Owner admitted that the code violations existed on the Property. The CEB did not find the selective enforcement argument to be convincing, considering that the Property Owner admitted to the existence of the code violations on the Property which the City and CEB had a duty to address. Lastly, the Owner's counsel expressed that the CEB was not the proper venue to raise this issue.

[4]Appellant also relies on *City of Tampa for Use & Benefit of City of Tampa Code Enf't Bd. v. Braxton,* 616 So. 2d 554 (Fla. 2d DCA 1993), which held that:

> We conclude that once the City opted for a code enforcement board under chapter 162, it was prohibited by article 1, section 18 of the state constitution to enforce its ordinance by any other manner except that described in chapter 162. We therefore affirm the trial court's order dismissing the City's action for a money judgment.

Id. at 556. *Braxton* pertains to a city's attempt to collect fines via a money judgment. *Id.* at 555. The *Braxton* court held that since no statutory provision permitted enforcement by way of a money judgment, such relief was unavailable. *Braxton* did not address the issue here; ie; whether two legally available avenues for the City to enforce its code provisions can be pursued concurrently.

The Owner also relies on *Goodman, supra.,* incorrectly citing the holding therein. However, *Goodman* actually supports the Appellee's position. The issue in *Goodman* was whether a city could elect to prosecute a code violation in county court rather than through the code enforcement board. The *Goodman* court held the following:

> We think the provisions of the statute [Section 162.13, Fla. Stat.] are clear and unambiguous and fully address the petitioner's arguments. The City may elect either method of prosecution. The creation of the code enforcement board and the assignment to it of the enforcement of housing code violations does not prohibit the City from bringing a charge in county court for a municipal code violation. The Legislature has provided that the code enforcement board procedure is supplemental to other means of securing code compliance. The City was therefore authorized to bring the county court action. . . .

711 So. 2d at 589. *Goodman* also does not address a local government's concurrent attempts to enforce compliance through both the court and the administrative board. It should also be noted that the *Goodman* court highlighted that:

> in 1994, after the decisions in *City of Tampa* and *Deehl,* the Legislature added section 162.22, which specifically provides, in pertinent part:
>
> The governing body of a municipality may designate the enforcement methods and penalties to be imposed for the violation of ordinances adopted by the municipality. These enforcement methods may include, but are not limited to, the issuance of a citation, a summons, or a notice to appear in county court or arrest for violation of municipal ordinances as provided for in chapter 901.

Id. at 589.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Where trooper observed licensee parked on interstate highway in potential violation of law, and licensee was asleep and unresponsive behind wheel, trooper had reasonable basis to investigate to determine if there was infraction and perform welfare check—Fact that emergency medical services determined that licensee was not in need of medical attention did not negate need for trooper to conduct welfare check to determine if he was incapable of safely operating vehicle—Trooper had probable cause for arrest where investigation revealed that vehicle was not disabled, licensee was wearing bar wristband, there was vomit on armrest and odor of alcohol, and licensee made multiple inconsistent statements and performed poorly on field sobriety exercises—It was not improper to transport licensee to safer location for performance of exercises—Petition for writ of certiorari is denied

ANDRIX JOHNSON, 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-5394, Division H. January 25, 2021. Counsel: A. Randall Haas, Fort Lauderdale, for Petitioner. Christie S. Utt, General Counsel, and Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMMETT L. BATTLES, J.) This case is before the court on Petition for Writ of Certiorari filed July 1, 2020. The petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. He contends that his detention amounted to a de facto arrest that was both unlawful and requires invalidation of the suspension. The court has reviewed the petition, response, appendices, and relevant case law. Petitioner did not file a reply. Based upon the parties' submissions, the court determines that where law enforcement personally observed Petitioner parked on a limited access roadway in potential violation of § 316.1945(1)(a)11, Florida Statutes, and where Petitioner was asleep behind the wheel and initially unresponsive, law enforcement had a reasonable basis to further investigate to determine if it were, in fact a violation, and perform a welfare check. Based on investigation, which revealed that the vehicle was not disabled, and that Petitioner was wearing a wristband customarily used in bars and clubs, there was vomit on the armrest, the odor of alcoholic beverage, multiple inconsistent statements and poor performance of field sobriety exercises, probable cause for arrest developed. For that reason, the detention, arrest, and resulting request that Petitioner submit to a breath test were lawful, and the suspension is upheld. The petition is, therefore, denied.

This court reviews the administrative decision upholding the suspension to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). In this case, Petitioner does not assert that he was denied due process. Rather, he contends the hearing officer departed from the essential requirements of law in concluding that law enforcement had probable cause to detain Petitioner. Because Petitioner contends that the alleged departure invalidated his refusal of a breath test, he adds there is no

competent, substantial evidence to uphold the suspension.

Trooper Sheinberg of the Florida Highway Patrol testified that emergency medical services personnel (EMS) were checking on Petitioner's welfare on the side of Interstate 4 at about midnight on February 15, 2020 when he approached Petitioner's parked vehicle from the rear. Tpr. Sheinberg went to the rear passenger side of the vehicle and observed the driver asleep in the driver's seat with the key in the ignition. He observed the driver use low-toned speech in speaking with the EMS attendants, that he had lethargic movements, and noted regurgitation on the armrest between the front driver and passenger seats. The driver told the EMS attendants that he was sleeping due to "working" and did not require medical attention.

After EMS cleared Petitioner medically, Tpr. Sheinberg continued his welfare check of the driver. He noted, along with the previous observations, that Petitioner had a paper wrist band consistent with those used at bars and clubs. He also detected the odor of alcohol coming from the driver's vehicle. On questioning, Petitioner gave conflicting and nonsensical accounts of his travel and whether he had consumed alcohol that evening. Tpr. Sheinberg returned to his patrol vehicle to check Petitioner's driver license and vehicle registration. Upon returning to Petitioner's vehicle, he smelled a strong "cover odor" consistent with the smell of cologne that had not been present before. He requested Petitioner to exit his vehicle; Petitioner complied. Tpr. Sheinberg noted Petitioner was unbalanced upon exiting his vehicle.

After the arrival of an additional backup unit, Tpr. Sheinberg requested Petitioner to perform field sobriety exercises, to which request Petitioner consented. Because of safety concerns, however, Tpr. Sheinberg transported Petitioner to another location away from Interstate 4, to perform the exercises. Petitioner performed poorly on the field sobriety exercises and was arrested for driving under the influence. Petitioner refused Tpr. Sheinberg's request that Petitioner submit to a breath alcohol test. After this refusal his driving privilege was administratively suspended for a year.

Petitioner requested a formal administrative review of the suspension. In proceedings to determine whether to uphold an administrative suspension of a person's driving privilege for driving under the influence (DUI), the hearing officer must determine whether three elements have been established by a preponderance of the evidence: 1) whether law enforcement had probable cause to believe that the person whose license was suspended was in actual physical control of a motor vehicle in this state while under the influence of drugs or alcohol; 2) whether the person whose license was suspended refused to submit to a test of his or her blood alcohol level after being requested to do so by law enforcement; and 3) whether the person was advised that refusal to submit to a test would result in the suspension of his or her driving privileges for one year. *See* §322.2615(7), Florida Statutes.

At the formal review Petitioner argued that he was unlawfully detained and arrested. In the order that followed on July 1, 2020, the hearing officer found that Tpr. Sheinberg's initial contact with Petitioner was not an unlawful detention as he was entitled to conduct his own welfare check after EMS completed theirs because he had observed "lethargic movements" and "low-toned speech." It is not clear whether the hearing officer considered the presence of regurgitation on the armrest, but the hearing officer determined that the detection of the odor of alcohol Tpr. Sheinberg observed when he made contact with Petitioner at the window provided reasonable suspicion to detain Petitioner. The hearing officer further concluded that Petitioner was not placed under arrest until he completed the field sobriety exercises. The resulting order determined that the arrest was lawful and upheld the suspension of Petitioner's driving privileges.

Petitioner now contends the hearing officer departed from the essential requirements of law when the order upholding the suspension concluded the detention and ensuing arrest were lawful. Petitioner argues the Fourth Amendment requires that police officers articulate some minimal level of objective justification for an investigatory stop. *Santiago v. State*, 133 So. 3d 1159, 1163 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a]. Petitioner contends that was not done here. As he did in the hearing below, Petitioner again contends that he was unlawfully detained from the moment EMS left because EMS determined that Petitioner needed no medical attention, leaving nothing more for law enforcement to investigate. Petitioner additionally argues that Tpr. Sheinberg's observation of regurgitation on the armrest should be disregarded because it was improperly obtained when the trooper leaned inside the vehicle's window with a flashlight to make the observation. Finally, he argues that Petitioner should not have been transported away from the scene of the stop because it was an arrest for which probable cause had not been developed.

This case is very similar to the recently decided *Michael Devere Lester v. State Department of Highway Safety and Motor Vehicl*es, 28 Fla. L. Weekly Supp. 200a, (Fla. 13th Judicial Circuit [Appellate] April 20, 2020). In *Lester,* the driver was pulled over on the side of the interstate after law enforcement received a call about a vehicle matching the description of his vehicle being operated recklessly. While stopped, law enforcement was alerted by two citizens that Lester's vehicle was involved in a hit and run accident. Also during the stop, law enforcement observed signs of impairment. Lester was transported to a location off of the interstate to perform field sobriety tests. In *Lester,* wherein the driver made similar arguments to those presented here, the court determined that § 316.1932(1)(a), Florida Statutes, deems a driver to have consented to a breath test if the person is lawfully arrested for *any offense* (not necessarily DUI) allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcohol.

Here, the objective facts establish, among other things, a violation of s. 316.1945(1)(a)11., Florida Statutes, which prohibits parking on the shoulder of a limited access roadway unless a vehicle is disabled. *See also Fulmer v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014)(a vehicle parked on the shoulder of I-4 was both illegally parked in violation of the statute regardless of whether the stop was initiated for that purpose, and also warranted a welfare check). Moreover, where, as here, a driver is asleep in a vehicle on the side of a roadway with the keys in the ignition, a welfare check is warranted. *Bachiochi v. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 215b (Fla. 6th Cir. Ct. Mar. 14, 2017). That EMS cleared Petitioner medically did not negate the need for the welfare check Tpr. Sheinberg conducted, where the respective goals of EMS and law enforcement diverge. The role of EMS is to determine whether an individual has an immediate need for medical assistance. Law enforcement is tasked with determining whether there is a danger to the driver or general public because a driver is incapable of safely operating a motor vehicle for medical or other reasons. Tpr. Sheinberg acted appropriately when he continued with his welfare check due to continued concerns as to whether Petitioner's condition was due to fatigue or impairment. It was, therefore, not an improper seizure for Tpr. Sheinberg to look in the open rear window to assess Petitioner's condition. *Florida v. Harmon*, 24 Fla. L. Weekly Supp. 278a (Fla. 17th Cir. Ct. Feb. 26, 2016)(opening of car door was a continuation of welfare check). During the welfare check, Tpr. Sheinberg made observations as required by *Santiago,* 133 So. 3d at 1163, including the wristband, odor of alcohol, and later, cover odor, that supported further investigation. Once vehicle has been lawfully stopped, police officers may order drivers to get out of vehicle without violating

Fourth Amendment's proscription of unreasonable searches and seizures. *State v. Bernard*, 650 So.2d 100, 102 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D272a]. This is particularly true if there is a danger, where, as here, there remained a risk that Petitioner might attempt to regain control of his vehicle and drive away. It was, therefore, not improper for Tpr. Sheinberg to ask Petitioner to exit his vehicle.

It was also not improper to transport Petitioner to another, safer location to perform field sobriety exercises. *Lester,* 28 Fla. L. Weekly Supp. 200a; *Weaver v. Dep't of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 161a (Fla. 13th Cir. Ct. Jan. 8, 2003). Because Petitioner performed poorly on those tests, he was properly placed under arrest. When he refused to take a breath test under these circumstances, the suspension of his driving privilege was proper.

In consideration of the foregoing, the petition is DENIED on the date imprinted with the Judge's signature.

* * *

Landlord-tenant—Eviction—Appeals—Stay of eviction judgment pending appeal is conditioned upon tenant continuing to pay rent into court registry

VIERGINIE JACQUES, Appellant, v. OSPINA LAND TRUST, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE15-009336 (AP). L.T. Case No. CONO15-001712. June 3, 2015. Counsel: Hegel Laurent, Laurent Law Office, P.L., North Miami, for Appellant. Brian M. Abelow, Benson, Mucci & Weiss, P.L., Coral Springs, for Appellee.

ORDER ON APPELLANT'S EMERGENCY MOTION TO REVIEW TRIAL COURT'S DENIAL: OF EMERGENCY MOTION TO STAY FINAL JUDGMENT INCLUDING WRIT OF POSSESSION AND THE RELEASE OF FUNDS IN THE COURT REGISTRY

(MARINA GARCIA-WOOD, J.) THIS CAUSE is before the court, sitting in its appellate capacity, upon Appellant's Emergency Motion to Review Trial Court's Denial: of Emergency Motion to Stay Final Judgment Including Writ of Possession and the Release of Funds in the Court Registry. Having carefully reviewed the motion, the court file, and the applicable law, it is hereby

ORDERED that the Emergency Motion to Review Trial Court's Denial: of Emergency Motion to Stay Final Judgment Including Writ of Possession and the Release of Funds in the Court Registry is **GRANTED.** The Final Judgment, including the Writ of Possession and the release of funds in the court registry is **STAYED.** As a condition of this stay, Appellant shall pay the monthly rent into the court registry pending the disposition of this appeal.

* * *

VIERGINIE JACQUES, Appellant, v. OSPINA LAND TRUST, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case Nos. CACE15-009336 (AP), CACE15-009455 (AP). L.T. Case No. CONO15-001712. September 25, 2015. Counsel: Hegel Laurent, Laurent Law Office, P.L., North Miami, for Appellant. Brian M. Abelow, Benson, Mucci & Weiss, P.L., Coral Springs, for Appellee.

ORDER ON APPELLANT - DEFENDANT'S REQUEST FOR ACKNOWLEDGMENT OF ABEYANCE AND MOTION TO RELINQUISH JURISDICTION

(JOHN J. MURPHY, III, J.) **THIS CAUSE** came before this Court, sitting in its appellate capacity, upon Appellant-Defendant's Request for Acknowledgment of Abeyance and Motion to Relinquish Jurisdiction. Having considered the Appellant-Defendant's Request for Acknowledgment of Abeyance and Motion to Relinquish Jurisdiction, the court files, the applicable law and otherwise being fully advised in the premises, it is,

ORDERED AND ADJUDGED as follows:

1. Appellant-Defendant's Request for Acknowledgment of Abeyance regarding the county court's authority to consider Appellant-Defendant's Motion for Directed Verdict and Motion for New Trial is hereby **GRANTED.**

2. This appeal shall be held in abeyance until the filing of signed, written orders disposing of Appellant-Defendant's Motion for Directed Verdict and Motion for New Trial pursuant to Florida Rule of Appellate Procedure 9.020(i)(3).

3. Appellant shall file copies of the signed, written orders disposing of Appellant-Defendant's Motion for Directed Verdict and Motion for New Trial with this Court within ten (10) days from the date of such orders.

4. Appellant-Defendant's Motion to Relinquish Jurisdiction is hereby **GRANTED IN PART** as to the Rule 2.330(H) Motion for Reconsideration and **DENIED IN PART** as to the Motion to Dismiss for Lack of Subject Matter Jurisdiction.

5. This Court relinquishes jurisdiction for thirty (30) days from the date of this Order for the county court to consider the Rule 2.330(H) Motion for Reconsideration.

6. Appellant shall file a copy of the signed, written order disposing of the Rule 2.330 (H) Motion for Reconsideration within ten (10) days from the date of such order.

* * *

FAMILY DOLLAR STORES, INC., Appellant, v. LUVENIA LEE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-018043. L.T. Case No. 42-2018WR. January 21, 2021. Appeal from the Broward County Office of Professional Standards/Human Rights Section, Christopher Narducci, Hearing Officer. Counsel: Shannon P. McKenna, Clarke Silverglate, P.A., Miami, for Appellant. G. Ware Cornell, Jr., Cornell & Associates, P.A., Weston, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Final Order rendered on July 24, 2019 is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorneys' Fees pursuant to Broward County Ordinance 2012-32 is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the Broward County Office of Professional Standards/Human Rights Section upon remand. (BOWMAN, M. ROBINSON, and COLEMAN, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of stop—Officer who observed licensee drive over lane markers on passenger side of vehicle and then over lane divider line on driver's side of vehicle had probable cause for stop—Petition for writ of certiorari is denied

ANN MARIE MCGINNIS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Charlotte County, Civil Action. Case No. 20-300CA. December 29, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(GEOFFREY H. GENTILE, J.) THIS CAUSE comes before the Court on a Petition for Writ of Certiorari, filed April 2, 2020, pursuant to § 322.31, Florida Statutes, through which the Petitioner has challenged Respondent's March 4, 2020, final decision order sustaining the suspension of her driving privilege for driving with an unlawful breath alcohol level. Having reviewed the petition and appendix, the Respondent's response thereto, the Petitioner's reply, and the applicable law, upon due consideration, the Court finds as

follows:

Petitioner's driver's license was suspended as a result of her arrest for driving under the influence (DUI) and subsequent breath alcohol reading exceeding .08. Petitioner subsequently requested a formal administrative review of her license suspension pursuant to § 322.2615, Florida Statutes. A Formal Review Hearing was held on March 3, 2020, at which Hearing Officer Thurmond admitted the following items into evidence:

1. DDL #1, DUI Citation # AB3VOEE
2. DDL #2, Punta Gorda Police Department (PGPD) Warning—Failure to Maintain Lane
3. DDL #3, Petitioner's Driver's License
4. DDL #4, FDLE Breath Alcohol Test Affidavit
5. DDL #5, Agency Inspection Report—Intoxilyzer 8000
6. DDL #6, PGPD Implied Consent Warning—Breath
7. DDL #7, PGPD Influence Report
8. DDL #8, Intoxilyzer Operator Influence Report
9. DDL #9, PGPD Probable Cause Affidavit (PCA)

The Petitioner has attached each of the above referenced documents in an appendix to her petition, along with the order on review and a transcript from the evidentiary hearing. According to the final order of license suspension, just after midnight on February 3, 2020, Officer Brandon Meddaugh of the Punta Gorda Police Department observed the passenger side tires of Petitioner's vehicle cross over the solid white line on the right side of the roadway, thereafter, the driver's side tires crossed over the lane divider intermittent white lines on the left side of that lane for approximately fifteen (15) to twenty (20) yards while traveling north on U.S. 41, approaching the intersection of East Retta Esplanade in Punta Gorda, FL.

The probable cause affidavit (DDL9) admitted at the hearing describes Petitioner's alleged driving conduct, which conduct supplied the probable cause for the stop of Petitioner's vehicle, and indicates that Officer Meddaugh approached the vehicle driven by the Petitioner and observed the Petitioner to have a pungent odor of alcohol, slurred speech, and bloodshot-watery eyes, and abnormal basic motor function skills. Officer Meddaugh asked Petitioner to complete field sobriety exercises, which Petitioner performed poorly. Subsequent to an implied consent warning, Petitioner agreed to provide a breath sample. The breath alcohol test affidavit indicates that the breath tests, conducted on instrument 80-001739, returned a result of .164g/210L and .160g/210L, which resulted in the suspension of Petitioner's driving privilege.

Hearing Officer Thurmond concluded that law enforcement had probable cause to believe that Petitioner had driven under the influence of alcohol, and that Petitioner had an unlawful breath alcohol level of .08 or higher. The suspension of Petitioner's driving privilege was therefore sustained. The instant petition followed.

Circuit court review of an administrative agency decision is limited to a determination of: (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. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

Petitioner asserts that the Respondent's position as stated in its March 4, 2017 decision is not supported by competent, substantial evidence and is a departure from the essential requirements of the law. Notwithstanding, the Department submits that each of Hearing Officer Thurmond's findings required by § 322.2615, Florida Statutes, were supported by substantial competent evidence in the record. It is the duty of Hearing Officer Thurmond, as trier of fact, to weigh the record evidence, resolve any conflicts in the evidence, and make findings of fact. *Dep't of Highway Safety v. Dean,* 662 So. 2d 371, 373 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c]; and *Dep't of Highway Safety and Motor Vehicles v. Satter,* 643 So. 2d 692, 695 (Fla. 5th DCA 1994). At the Petitioner's formal review hearing, Hearing Officer Thurmond determined by a preponderance of the evidence through both sworn written reports and live testimony that sufficient cause existed to sustain Petitioner's suspension and properly resolved each of the statutory issues against the Petitioner.

Petitioner contends that "there was no competent substantial evidence to support the finding of probable cause to justify the stop of Petitioner based failure to maintain a single lane." Officer Meddaugh's PCA states that he observed Petitioner's vehicle first cross over the solid white line on the passenger side of the vehicle and then cross over the lane divider line on the driver side of the vehicle, for approximately fifteen (15) to twenty (20) yards, in violation of Fla. Stat. § 316.089 (failure to maintain a single lane).

In order to have a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity. *Terry v. Ohio,* 392 U.S.1, 88 S.Ct. 1868, 20 L Ed.2d 889 (1968); *Weems v. State,* 492 So. 2d 1139 (Fla. 1st DCA 1986). The driving pattern does not have to rise to the level of a traffic infraction to justify a stop; specifically, "failure to maintain a single lane alone, can under appropriate circumstances, establish probable cause." *Dep't of Highway Safety and Motor Vehicles v. Jones,* 935 So. 2d 532 (Fla. 3rd DCA 2006) [31 Fla. L. Weekly D1518a].

If an individual's driver's license has been suspended due to the result of a breath-alcohol test indicating the driver was impaired, the scope of the hearing officer's review is limited to (1) whether the enforcement officer had probable cause to believe the person whose license was suspended was under the influence of alcoholic beverages, and (2) the person whose license was suspended had an unlawful blood-alcohol level. Fla. Stat. § 322.2615(7)(a). The documents and testimony introduced at the administrative hearing support the finding that law enforcement had probable cause to justify a stop, to believe that Petitioner had driven under the influence of alcohol, and that the instrument was in substantial compliance with the rules and Petitioner had an unlawful breath alcohol level of .08 or higher. As such, the Court finds that the Petitioner has failed to demonstrate either a departure from the essential requirements of law or a lack of competent substantial evidence to support the order on review.

Accordingly, it is,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari, filed April 2, 2020 is hereby DENIED.

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Personal injury protection—Application—Material misrepresentations—Failure to disclose household resident over age 15—Recission of policy

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ERICKA MAURISHA WALKER, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of TYQUON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of QUINTON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of FAITH ROSS, a minor, NIKIA CHAVON HAGANS, FIRST COAST MEDICAL CENTER, INC., JAY J. MURPHY, MARSHALL BISCHOFF, KIMBERLY ANN DAVIS, and GEICO GENERAL INSURANCE COMPANY, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 2019-CA-008536. January 13, 2021. Marianne Aho, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Ericka Maurisha Walker, Pro se, and Nikia Chavon Hagans, Pro se, Jacksonville, Defendants.

ORDER GRANTING PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, ERICKA MAURISHA WALKER, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of TYQUON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of QUINTON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of FAITH ROSS, a minor, AND NIKIA CHAVON HAGANS

THIS CAUSE having come before this Court at the hearing on January 5, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, ERICKA MAURISHA WALKER, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of TYQUON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of QUINTON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of FAITH ROSS, a minor, and NIKIA CHAVON HAGANS, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED,** as follows:

It is hereby **ORDERED AND ADJUDGED** as follows:

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED.**

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, ERICKA MAURISHA WALKER, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of TYQUON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of QUINTON ROSS, a minor, ERICKA MAURISHA WALKER, as the Parent, Natural and Legal Guardian of FAITH ROSS, a minor, and NIKIA CHAVON HAGANS.

c. This Court hereby reserves jurisdiction to consider any claim for attorney's fees and costs.

d. Plaintiff shall serve a copy of this Order, by regular mail, to all parties not receiving service of court filings through the Florida Courts E-Filing Portal, and shall file a certificate of service in the court file within three (3) business days.

e. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment are not in dispute:

i. The Defendant, ERICKA MAURISHA WALKER, did not disclose NIKIA CHAVON HAGANS (her sister) as an additional household resident over the age of 15 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPAXXXXX5941, issued by DIRECT GENERAL INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, ERICKA MAURISHA WALKER for any property damage liability coverage, accidental death, or personal injury protection coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

iii. Notwithstanding the policy rescission, the subject insurance policy does not provide any bodily injury liability insurance coverage;

iv. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ERICKA MAURISHA WALKER, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim for NIKIA CHAVON HAGANS arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

vi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim brought by TYQUON ROSS, a minor, arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

vii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim brought by QUINTON ROSS, a minor, arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

viii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim brought by FAITH ROSS, a minor, arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

ix. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any property damage liability claim for JAY J. MURPHY arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim for JAY J. MURPHY arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim for MARSHALL BISCHOFF arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ERICKA MAURISHA WALKER for any bodily injury claim for KIMBERLY ANN DAVIS arising from the accident of June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xiii. There is no personal injury protection ("PIP") insurance coverage for ERICKA MAURISHA WALKER for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xiv. There is no personal injury protection ("PIP") insurance coverage for NIKIA CHAVON HAGANS for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xv. There is no personal injury protection ("PIP") insurance coverage for TYQUON ROSS, a minor, for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xvi. There is no personal injury protection ("PIP") insurance coverage for QUINTON ROSS, a minor, for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xvii. There is no personal injury protection ("PIP") insurance coverage for FAITH ROSS, a minor, for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xviii. There is no property damage liability coverage for JAY J. MURPHY for the accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xix. There is no obligation to provide Personal Injury Protection benefits coverage to FIRST COAST MEDICAL CENTER, INC. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 19, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xx. The Defendant, ERICKA MAURISHA WALKER, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxi. The Defendant, NIKIA CHAVON HAGANS, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxii. The Defendant, TYQUON ROSS, a minor, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxiii. The Defendant, QUINTON ROSS, a minor, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxiv. The Defendant, FAITH ROSS, a minor, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxv. The Defendant, FIRST COAST MEDICAL CENTER, INC., is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxvi. The Defendant, JAY J. MURPHY, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxvii. The Defendant, MARSHALL BISCHOFF, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxviii. The Defendant, KIMBERLY ANN DAVIS, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxix. The Defendant, GEICO GENERAL INSURANCE COMPANY, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 accident;

xxx. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Defendant, GEICO GENERAL INSURANCE COMPANY shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941, for the June 19, 2019 motor vehicle accident;

xxxi. There is no insurance coverage for the motor vehicle accident which occurred on June 19, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xxxii. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 19, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xxxiii. There is no accidental death coverage for the accident which occurred on June 19, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xxxiv. There is no property damage liability coverage for the accident which occurred on June 19, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5941;

xxxv. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX5941, is rescinded and is void *ab initio.*

xxxvi. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy # FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ERICKA MAURISHA WALKER to any medical provider, doctor and/or medical entity is void;

xxxvii. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy # FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from TYQUON ROSS, a minor, to any medical provider, doctor and/or medical entity is void;

xxxviii. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy # FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from QUINTON ROSS, a minor, to any medical provider, doctor and/or medical entity is void;

xxxix. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy # FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from FAITH ROSS, a minor, to any medical provider, doctor and/or medical entity is void;

xl. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy # FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from NIKIA CHAVON HAGANS to any medical provider, doctor and/or medical entity is void;

xli. Since the policy of insurance issued to the Defendant, ERICKA MAURISHA WALKER, bearing policy

FLPAXXXXX5941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from any claimant to FIRST COAST MEDICAL CENTER, INC. is void.

* * *

Criminal law—Possession of narcotics—Search and seizure—Vehicle stop—Traffic infraction—Where deputy's body-worn camera shows that neither deputy nor his accompanying trainee were in position to see whether defendant failed to stop his vehicle before stop bar at intersection, state has failed to show proper basis for stop and subsequent search of vehicle—Motion to suppress is granted

STATE OF FLORIDA, v. JERRONE J. BOOTHER, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020-100013 CFDL. December 23, 2020. Dawn D. Nichols, Judge. Counsel: Mark Interlicchio, for State. Claude A. Van Hook, III, DeLand, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come before the court for hearing on defendant's Motion to Suppress on December 7, 2020, and the court having heard testimony, having viewed body-worn camera video footage, having heard argument from counsel and otherwise being fully advised in the premises, the court FINDS:

1. The search conducted in this case was not pursuant to either an arrest warrant or search warrant.

2. On January 2, 2020, Volusia County Sheriff's Deputy William Leven (Deputy Leven) was part of the West Volusia crime suppression team and was acting as a field training officer. Deputy Leven and his trainee were involved with enforcement and proactive patrol in the Spring Hill area on the date in question. According to Deputy Leven there is a lot of narcotics activity in the area. Numerous shootings and homicides have also occurred in the area in the past year. Deputy Leven testified that the purpose of the proactive patrol and proactive traffic stops was to show a police presence in an effort to suppress crime in the area.

3. Deputy Leven advised that his attention was drawn to a silver Ford in the Spring Hill area. He further testified that he saw the vehicle pull up to a stop sign and cross the stop bar at the intersection of Vermont and Delaware streets in DeLand (Spring Hill area) prior to coming to a stop. It is alleged the defendant was "way over the stop bar". A traffic stop was concluded on the vehicle and contact was made with the driver, Mr. Boother, the defendant in this cause.

4. This court viewed the video footage from Deputy Leven's body-worn camera, which captures the alleged traffic infraction. The video footage does not show defendant's vehicle crossing over the stop bar prior to making the legal stop. In fact, the video footage reflects that it would be virtually impossible for Deputy Leven to make a determination as to the placement of the front of the defendant's vehicle. Deputy Leven's vehicle was traveling well behind defendant's vehicle. In addition there were 11-12 seconds on the video footage where defendant's vehicle was completely out of sight.

5. The court may disregard Deputy Leven's testimony as to the defendant's driving and whether defendant stopped prior to or beyond the stop bar The court as the finder of fact is free to ignore or to place less emphasis on certain testimony, based on credibility determinations. *Sunby v. State,* 845 So.2d 1006, 1007 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1255b].

6. The defendant's testimony was of little assistance and the court found his testimony was not credible. He made numerous inconsistent statements about the stop as well as how the drugs came into his possession. He had large amounts of money on his person as well as trafficking amounts of drugs. It is the state, however, which has the burden in this case.

7. The video footage is the best evidence as to whether defendant failed to stop before the stop bar. The court may disregard Deputy Leven's testimony if it is inconsistent with what is represented in the video. The video footage clearly shows that neither Deputy Leven, nor his trainee, were in a position to get a good view of the stop. In fact, video footage of Deputy Leven and defendant discussing the visibility of the stop reflects that Deputy Leven attempted to explain to defendant how he determined where defendant had stopped. Deputy Leven stated that "from the side of it, can clearly see the white line." (See Video at 8:07 states Exhibit #2) It is clear from all of the video footage presented that Deputy Leven never obtained a side view to determine whether the front of defendant's vehicle crossed the stop bar. It also appears from the video footage that Deputy Leven, nor his trainee, ever had a sufficient view of the front of defendant's vehicle and whether the front of the vehicle improperly passed the stop line.

8. Based upon the above, the court is unable to conclude that the defendant failed to make a proper stop prior to the stop line. The court is further unable to find a proper basis for the stop and subsequent search of defendant's vehicle.

IT IS HEREBY ORDERED:

1. The defendant's Motion to Suppress is granted.

* * *

Insurance—Automobile liability—Coverage—Business use exclusion

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. GEORGE ROBERT PARKER III, TONG KYU PARKER, JESSIE AMEER MOHAMMED, JEANA LYNN SANDERS, BRADLEY PAUL KEISER, MASON SCOT REIGGER, THE VILLAGE GREENERY, INC., GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendants. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA-20-0789. January 28, 2021. Kenneth James Janesk II, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. George Robert Parker III, Pro se, Palm Coast; Tong Kyu Parker, Pro se, Palm Coast; Jessie Ameer Mohammed, Pro se, Palm Coast; Mason Scot Reigger, Pro se, Saint Augustine; and The Village Greenery, Inc., Pro se, Palm Coast, Defendants.

ORDER GRANTING PLAINTIFF, INTEGON PREFERRED INSURANCE COMPANY'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, GEORGE ROBERT PARKER III, TONG KYU PARKER, JESSIE AMEER MOHAMMED, MASON SCOT REIGGER AND THE VILLAGE GREENERY, INC.

THIS CAUSE having come before this Court at the hearing on January 4, 2021, on the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Amended Motion for Final Summary Judgment against the Defendants, GEORGE ROBERT PARKER III, TONG KYU PARKER, JESSIE AMEER MOHAMMED, MASON SCOT REIGGER and THE VILLAGE GREENERY, INC., and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that:

a. The summary judgment evidence submitted by Plaintiff establishes there is no genuine issue of material fact and Plaintiff is entitled to judgment in its favor as a matter of law.

b. Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Amended Motion for Final Summary Judgment is hereby **GRANTED**.

c. This Court enters final judgment for Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, and against the Defendants, GEORGE ROBERT PARKER III, TONG KYU PARKER, JESSIE AMEER MOHAMMED, MASON SCOT REIGGER and THE VILLAGE GREENERY, INC.

d. The Court finds as follows:

i. There is no bodily injury liability coverage or property damage liability coverage for the motor vehicle accident of October 4, 2019 based on the business use exclusion contained in the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, bearing policy # XXXXXX6947;

ii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, GEORGE ROBERT PARKER III, for any claim for bodily injury liability coverage or property damage liability coverage arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

iii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, TONG KYU PARKER, for any claim for bodily injury liability coverage or property damage liability coverage arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

iv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify THE VILLAGE GREENERY, INC., for any claim for bodily injury liability coverage or property damage liability coverage arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

v. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JESSIE AMEER MOHAMMED, for any claim for bodily injury liability coverage or property damage liability coverage arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

vi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, GEORGE ROBERT PARKER III, for any liability claims arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

vii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, THE VILLAGE GREENERY, INC., for any liability claims arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

viii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, TONG KYU PARKER, for any liability claims arising from the motor vehicle accident of October 4, 2019 under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

ix. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, JESSIE AMEER MOHAMMED, for any liability claims arising from the motor vehicle accident of October 4, 2019 under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

x. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify GEORGE ROBERT PARKER III for the bodily injury liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify THE VILLAGE GREENERY, INC. for the bodily injury liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TONG KYU PARKER for the bodily injury liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xiii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JESSIE AMEER MOHAMMED for the bodily injury liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xiv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify GEORGE ROBERT PARKER III for the property damage liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify THE VILLAGE GREENERY, INC. for the property damage liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xvi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TONG KYU PARKER for the property damage liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xvii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JESSIE AMEER MOHAMMED for the property damage liability claim for JEANA LYNN SANDERS arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xviii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify GEORGE ROBERT PARKER III for the bodily injury liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xix. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify THE VILLAGE GREENERY, INC. for the bodily injury liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xx. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TONG KYU PARKER for the bodily injury liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JESSIE AMEER MOHAMMED for the bodily injury liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify GEORGE ROBERT PARKER III for the property damage liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxiii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify THE VILLAGE GREENERY, INC. for the property damage liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxiv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TONG KYU PARKER for the property damage liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JESSIE AMEER MOHAMMED for the property damage liability claim for BRADLEY PAUL KEISER arising from the motor vehicle accident of October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, as asserted by BRADLEY KEISER and JEANA SANDERS against JESSIE AMEER MOHAMMED and THE VILLAGE GREENERY, INC., in St. Johns County Circuit Court, under Case No.: CA-20-0334;

xxvi. There is no bodily injury liability insurance coverage for JEANA LYNN SANDERS for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxvii. There is no bodily injury liability insurance coverage for BRADLEY PAUL KEISER for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxviii. There is no bodily injury liability insurance coverage for MASON SCOT REIGGER for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxix. There is no property damage liability insurance coverage for JEANA LYNN SANDERS for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxx. There is no property damage liability insurance coverage for BRADLEY PAUL KEISER for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxxi. There is no property damage liability insurance coverage for MASON SCOT REIGGER for the motor vehicle accident which occurred on October 4, 2019, under the aforementioned policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY;

xxxii. The Defendant, GEORGE ROBERT PARKER III, is excluded from any liability insurance coverage under the aforementioned policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxiii. The Defendant, THE VILLAGE GREENERY, INC., is excluded from any liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxiv. The Defendant, TONG KYU PARKER, is excluded from any liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxv. The Defendant, JESSIE AMEER MOHAMMED, is excluded from any liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxvi. The Defendant, JEANA LYNN SANDERS, is excluded from any liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxvii. The Defendant, BRADLEY PAUL KEISER, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxviii. The Defendant, MASON SCOT REIGGER, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xxxix. The Defendant, GEICO INDEMNITY COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xl. The Defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xli. Since INTEGON PREFERRED INSURANCE COMPANY is not obligated to provide any property damage liability coverage and/or indemnity to any of the potential claimants, Defendant, GEICO INDEMNITY COMPANY shall have no rights of subrogation against Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xlii. Since INTEGON PREFERRED INSURANCE COMPANY is not obligated to provide any property damage liability coverage and/or indemnity to any of the potential claimants, Defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY shall have no rights of subrogation against Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, for the October 4, 2019 motor vehicle accident;

xliii. There is no bodily injury liability coverage for the motor vehicle accident which occurred on October 4, 2019, under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY.

xliv. There is no property damage liability coverage for the motor vehicle accident which occurred on October 4, 2019, under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY.

* * *

Limited liability companies—Derivative action—Breach of fiduciary duty—Consolidated derivative actions brought on behalf of three companies in which plaintiff and defendant held ownership interests—Plaintiff failed to sustain burden to prove that defendant breached fiduciary duty by failing to defend first company's claim in a bankruptcy action in which company was listed as an unsecured creditor—Plaintiff did not establish that company suffered any harm as a proximate cause of alleged breach of fiduciary duty where plaintiff failed to show that there would have been any funds available to pay first company if defendant had successfully defended its claim—Defendant breached fiduciary duty as manager of second company by failing to make any distributions from sales proceeds of company's real property; using proceeds to pay balance of a settlement defendant was obligated to pay; and by paying out a "consulting fee" to a company defendant solely owned as a means to deprive plaintiff of its proportionate share of sale proceeds—Defendant breached fiduciary duty as manager of third company in connection with sale of company's real property to defendant's buyer company by causing third company to give a credit to buyer company when defendant could not supply his portion of the funds needed to complete the sale—Defendant also breached his fiduciary duty to third company by taking remaining cash proceeds from company the day after closing rather than maintaining those funds on behalf of company so that company would have funds to distribute to plaintiff—Furthermore, by taking the remaining cash proceeds, defendant committed civil theft and constructive fraud—Defendant did not breach fiduciary duty by selling property for fair market value and taking fair commission on sale through affiliation known to plaintiff—Damages, including treble damages, calculated

KEVTER, INC., Plaintiff, v. MALLORY KAUDERER, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-007455-CA-01, Section CA43. February 11, 2021. Michael Hanzman, Judge. Counsel: Law Office of Richard A. Ivers, Coconut Creek, and Andrew T. Lavin, Co-Counsel, Miami, for Plaintiff. Jose A. Loredo, Carlton Fields Jorden Burt, P.A., Miami; Brendan S. Everman, Pryor Cashman, LLP, Co-Counsel, Miami; and John E. Bergendahl, Co-Counsel, Miami, for Defendants.

FINAL JUDGMENT IN FAVOR OF PLAINTIFF KEVTER, INC., AND AGAINST DEFENDANTS MALLORY KAUDERER, REGENTS PARK EQUITY, LLC, AND LITTLE RIVER REALTY, LLC

Plaintiff, Kevter Inc. ("Kevter"), brings this action derivatively on behalf of nominal Defendants Little River Studios, LLC ("LRS"), Edgewater Studios, LLC ("Edgewater") and Jefferson Avenue Holdings, LLC ("Jefferson"). The case was tried before the Court on January 11, 2021 through January 15, 2021. At the close of the evidence the Court granted Brown Family Properties, LLC's ("BFP") and Barnett Brown's ("Brown") Motion for Involuntary Dismissal, finding that Plaintiff, derivatively on behalf of LRS, failed to prove its case against *these* Defendants. The Court subsequently entered Final Judgment in favor of BFP and Brown. The Court later addressed each of Plaintiff's derivative claims against the remaining Defendants, Mallory Kauderer ("Kauderer"), Regions Park Equity, LLC ("RPE"), and Little River Realty, LLC ("River Realty"), announcing its ruling on the record. The Court now memorializes those oral rulings and enters its Final Judgment.[1]

I - FINDINGS OF FACT

A. **The Parties Acquire the LRS, Edgewater and Jefferson Properties**

1. Plaintiff Kevter is owned by Robert Gothard ("Gothard"). Gothard is a photographer. Defendant Kauderer and Gothard have known each other since the 1980s. Over time they developed a friendship. In the early 1990s, Kauderer became a real estate developer and commercial real estate broker, purchasing and selling properties in South Florida. In 1999, Kauderer and Gothard began to invest together in real estate, first forming Edgewater Studios, Inc., the predecessor to Edgewater, and—through Edgewater—acquiring property located at 423 N.E. 23rd Street, Miami, Florida (the "Edgewater Property"). The property was then operated as a photo studio.

2. In 2000, Kauderer and Gothard formed LRS, which purchased a second photo studio property located at 300 N. E. 71st Street, Miami, Florida (the "LRS Property"). At that time, Kauderer brought in a third partner, Vera Mender ("Mender"). Kauderer, Gothard, and Mender originally each owned 1/3 interests in Edgewater and in LRS. Kauderer was—and has continued to be—the Manager of both LRS and Edgewater.

3. On July 29, 2005, Edgewater sold its property, generating net cash proceeds of approximately $1,970,000.00. Instead of distributing any of the sales proceeds to the members of Edgewater, Kauderer transferred all of these funds to non-party Regents Park Investments, Inc. ("RPI"), a management company that he solely owned. At about the same time, Gothard and Kauderer reached an agreement for Gothard to reduce his ownership interest in Edgewater by 18%, in consideration of acquiring from Kauderer: a 25% interest in non-party 2121, LLC ("2121"), which owned a shopping center located at 2090 NW 21st Street, Miami, Florida 33142 (the "2121 Property"); anda 15% interest in Jefferson, which owned an apartment building located at 635 and 643 Jefferson Avenue, Miami Beach, Florida 33139 (the "Jefferson Property").

Kauderer retained the remaining 75% interest in 2121, and the remaining 85% interest in Jefferson.[2]

4. Soon after RPI received the proceeds of the sale of the Edgewater Property, it advanced portions of the funds to Jefferson and to 2121. These transfers were booked as loans made by Edgewater to these two entities, and were memorialized by promissory notes executed by the companies in favor of Edgewater. Ultimately, Edgewater loaned its sales proceeds to the following parties, who owed it the following sums: RPI - $495,000.00 (the "RPI Loan");2121 - $612,000.00 (the "2121 Loan"); andJefferson - $895,000.00 (the "Jefferson Loan").

B. **The Mender Litigation and 2121 Bankruptcy**

5. In 2008, Mender filed suit against Kauderer and Gothard alleging that she did not receive her share of the Edgewater sales proceeds, or her share of the proceeds of the sale of real estate owned by Barcelona Hotel, LLC ("Barcelona"), another entity controlled by Kauderer. Mender's claims were brought derivatively on behalf of Edgewater, Barcelona, and LRS. Kauderer and Gothard were named defendants and represented by Arnaldo Velez, Esq. ("Velez").

6. In 2012, 2121's lender sued to foreclose its mortgage on the 2121 Property. The lender obtained a final judgment of foreclosure. 2121 then filed a bankruptcy proceeding in which it listed Edgewater as an unsecured creditor owed $612,000.00. During the pendency of the bankruptcy proceeding, Kevter relinquished its 25% ownership interest in 2121 to Kauderer in consideration for: (a) Kauderer's agreement to negotiate for Gothard to be released from his guarantee of the 2121 Loan; and (b) an increase in Kevter's membership interest in Jefferson. As a result, Kauderer was left as the sole owner of 2121.

7. In the 2121 bankruptcy proceeding, General Financial Services ("GFS"), which had acquired the 2121 mortgage, objected to Edgewater's claim. Edgewater did not respond to the objection and, as a result, Edgewater's $612,000.00 claim was stricken. Ultimately, the 2121 bankruptcy proceeding was resolved. 2121 reached a settlement with GFS, pursuant to which a total of $1,328,000.00 was to be paid to GFS in satisfaction of its loan. Pursuant to 2121's approved Plan of Reorganization, of this sum $1,028,000.00 was to be paid by 2121, and the remaining $300,000.00 was to be paid by Kauderer.

C. **The Sale of the Jefferson Property**

8. On September 4, 2013, Jefferson sold its property which generated $1,350,000.00 in cash. Of this sum, Kauderer caused Jefferson to distribute approximately $140,000.00 to RPE without distributing anything to Kevter. Kauderer also transferred $1,135,000.00 to RPI. Approximately $936,000.00 of this sum was used to satisfy the first mortgage on the LRS Property. The balance of approximately $200,000.00 remained with RPI.

9. On the same day the Jefferson property closed, Kauderer caused Jefferson to execute a Consulting Agreement pursuant to which Jefferson was to be paid a $350,000.00 fee from the buyer in consideration for rendering consulting services. Kauderer never told Kevter about the Consulting Agreement. Ultimately, Jefferson received payment of the $350,000.00 which Kauderer paid out to RPI.

D. **The Perry Loan**

10. In October 2013, Kauderer arranged a loan of $1.4 million from James F. Perry and Associates ("Perry") for purposes of funding the 2121 settlement with GFS (the "Perry Loan"). Perry would only make the loan if both the 2121 Property and the LRS Property were pledged as collateral. As a result, 2121 and LRS executed the Perry note and mortgage and both the 2121 Property and the LRS Property were encumbered by mortgages which secured the $1.4 million Perry Loan. 2121 received all of the cash proceeds of the Perry Loan from which it paid GFS $1,128,000.00 leaving a balance due GFS of $200,000.00. Kauderer paid the $200,000.00 balance due GFS by having RPI make two $100,000.00 payments using the balance of the Jefferson sales proceeds that Kauderer had transferred to RPI to do so. While the Perry Loan documents do not allocate the note or mortgage between 2121 and LRS, on the books of the two companies $700,000.00 of the loan was allocated to 2121 and $700,000.00 was allocated to LRS. From and after October 2013, 2121 paid the debt service on $700,000.00 of the $1.4 million Perry Loan and LRS paid the debt service on $700,000.00 of this loan.

11. On August 27, 2014, 2121 sold the 2121 Property for $1,250,000.00. Of this sum, $700,000.00 was paid to Perry in partial payment of the $1.4 million Perry Loan. In consideration of this payment, the Perry mortgage encumbering the 2121 Property was satisfied, leaving the mortgage that encumbered the LRS Property in place to secure the $700,000.00 balance of the loan. Kauderer caused 2121 to disburse to RPE the remaining $425,000.00 of cash proceeds of the sale instead of paying those funds to Perry, a payment that would have reduced the encumbrance on the LRS property RPE (Kauderer's entity) jointly owned with Kevter (Gothard's entity).

E. **The Mender Settlement**

12. In July 2015, Kauderer and Gothard settled the Mender litigation, agreeing to pay Mender $800,000.00 by July 31, 2016. Gothard maintained that Kauderer was responsible to pay at least 75% of this sum because he had taken the Barcelona money owed to Mender and because he owned a much larger percentage of Edgewater thereby taking a greater percentage of the funds claimed by Mender. The obligation to pay Mender the $800,000.00 was to be secured by a second mortgage on the LRS Property. This settlement only became effective if the holder of the LRS first mortgage consented to the recording of the proposed second mortgage. While the first mortgagee never approved the recording of a second mortgage, Kauderer, as manager of LRS, nevertheless executed and recorded a second mortgage in favor of Mender. Gothard was aware of, and consented to, this encumbrance.

F. **The Sale of the Little River Property**

13. During March 2016, Kauderer was attempting to refinance the LRS Property to obtain the $800,000.00 needed to pay to Mender. As part of the loan application, Kauderer submitted to the bank a personal financial statement under penalty of perjury in which he stated that the value of the LRS Property was $4.5 million and that the Business operated on the property was worth an additional $500,000.00. Kauderer never provided his personal financial statement, or disclosed his valuation of the LRS Property, to Gothard. Ultimately, the bank refused to refinance because the Business at the LRS Property did not generate sufficient revenues to support it.

14. At about this same time, Kauderer formed Little River Studios Management, LLC ("Mgmt LLC") which he owned with Alvaro Simonian. Kauderer then ceased operating the Business through LRS and, instead, operated it through Mgmt LLC. As a result, when the studio was booked, instead of the money being paid to LRS the money was paid to, and retained by, Mgmt LLC. Mgmt LLC did not pay LRS anything for the Business and Kauderer did not disclose to Kevter the transfer of the Business. Mgmt LLC still owns and operates the Business at the LRS Property.

15. During late June 2016, Kauderer devised a plan to generate the funds needed to pay Mender (and buy out Kevter) by having LRS sell the LRS Property to River Realty, a company Kauderer owned and controlled. On June 30, 2016, Kauderer met with Brown to discuss the possibility of Brown participating as a partner in the buying group. Brown agreed, and was initially going to become a member of River Realty together with Kauderer.

16. On the same day, Kauderer, as manager of LRS, executed a contract (the "Contract") to sell the LRS Property to River Realty for $3.5 million. The Contract provides for LRS to pay a $200,000.00 commission to District Realty Advisors, a company in which Kauderer owns a 65% interest. According to Kauderer, he set the purchase price at $3.5 million because, while he thought the property

might be worth more, he believed that Brown and the lender, First National Bank of South Miami ("First National"), would accept this price.

17. Because Brown wanted to use money from a 1031 exchange to acquire his interest in the LRS Property, Kauderer and Brown later agreed to purchase the LRS Property as tenants in common with River Realty acquiring a 52.5% interest in the property and BFP acquiring a 47.5% interest in the property. Kauderer, Brown, and River Realty then applied to First National for a $2 million loan to finance the purchase. With respect to the balance of approximately $1.6 million in cash that would be required to close, Kauderer testified that Brown was to provide all of it. Brown testified that Kauderer and he were each obligated to contribute one-half of the cash to close—approximately $800,000.00. On this point, the Court finds Brown's testimony more credible, and finds that both he and Kauderer had agreed to fund their proportionate share of the cash required at closing (*i.e.*, $800,000.00 each).

18. During the loan review process, Kauderer notified First National that, as part of the transaction, Gothard/Kevter was being bought out of the LRS Property, and that Kevter was to be paid out of the closing proceeds. First National prepared loan closing statements identifying the disbursement of the loan proceeds that listed Gothard/Kevter as a party to receive funds at closing. During November 2016, Kauderer instructed First National to eliminate Gothard/Kevter as a recipient of funds from the closing.

19. Sometime in late August 2016, and at Brown's request, Kauderer sent the Contract to Gothard for him to sign, thereby confirming his consent to the transaction. Gothard executed the contract. On October 19, 2016, an appraisal of the property was completed on behalf of First National which opined that the fair market value of the LRS Property was $3.5 million. First National then issued a commitment for a $2 million loan.

20. On or about November 18, 2016, Velez, who was representing both LRS as the seller and River Realty (Kauderer's entity) as one of the joint buyers, sent Kauderer and Gothard a letter to sign to confirm their approval of the sale of the LRS Property and Kauderer's authorization to execute the closing documents (the "November Letter"). Gothard and Kauderer exchanged emails regarding the November Letter. Gothard expressed concern about signing the November Letter because he did not have a written agreement with Kauderer confirming the amount he was going to be paid at closing. Kauderer responded by assuring Gothard that he would receive his "100% share of closing proceeds after expenses right after the deal closes." In reliance thereon, Gothard executed and returned the November Letter.

i. **Kauderer Arranges for LRS to Provide his Entity—River Realty—a Credit at Closing in Lieu of the Cash Kauderer was Required to Contribute**

21. The closing of the transaction was scheduled for December 20, 2016. On December 14, 2016, Kauderer communicated with Brown's lawyer, Richard Mark Mogerman, Esq. ("Mogerman"), regarding River Realty's share of the cash to close. Brown and Mogerman testified that Kauderer advised he did not have the cash to close. Kauderer testified that Brown advised him that *he* (Brown) did not have the full $1.6 million that Kauderer claims Brown was obligated to provide at closing. Ultimately, Kauderer, in his capacity as manager of LRS, determined to have LRS (the Seller) give his entity, River Realty (the 52% Buyer), a credit of $794,692.51, representing the cash that would otherwise be required from Kauderer to close the transaction (the "Credit"). At the time, LRS did not owe River Realty any money, and there was no basis for the Credit. It was provided because, and *only* because, Kauderer was unable to come up with the $800,000.00 in cash required to close (*i.e.*, half of the $1.6 million required).

22. On December 15, 2016, Mogerman prepared a Second Amendment to the Contract (the "Second Amendment"), which was executed by LRS, River Realty, and BFP, pursuant to which the parties agreed that LRS was going to give the Credit to River Realty. The Second Amendment also provided for LRS and River Realty to indemnify BFP, the closing agent, and the title company solely with respect to the Credit. While the Contract and the November Letter were signed by Gothard, the Second Amendment is not set up for signature by Gothard or by Kevter, and Gothard/Kevter was not advised of this contract modification.

ii. **Distribution of the Closing Proceeds**

23. The sale of the LRS Property closed on December 20, 2016. River Realty did not pay any cash at closing, and instead was given the Credit. From the gross sales proceeds, the $708,000.00 first mortgage, which was a refinancing of the $700,000.000 balance of the Perry Loan made on behalf of 2121, was satisfied. The Mender second mortgage of $829,000.00, including accrued interest, also was satisfied. A $200,000.00 commission was paid to District Realty Advisors, and after closing costs and adjustment, the net cash received by LRS was approximately $868,000.00. That $868,000.00 was deposited into LRS's account. After paying certain legal and accounting fees, Kauderer then transferred the remaining $811,000.00 from LRS to RPE, booking it as a distribution. After Kauderer took these funds, LRS had a negative account balance of approximately $13,000.00. No funds were distributed to Kevter even though it owned 50% of the property and approximately $1.6 million in equity was realized from the sale.[3]

24. In sum, Kauderer, as Manager of LRS, withheld $794,692.51 from LRS by giving the Credit to his company, River Realty, and then took the remaining $811,000.00 of sales proceeds, leaving LRS with *nothing* to distribute to Kevter. So, instead of protecting LRS and ensuring that it received the $1.6 million of cash that should have been available from the sale and then distributing this cash (equity) equally to the two members of LRS, Kauderer took all of it—half as a credit to his buyer entity River Realty, and the other half as a distribution to RPE—leaving *nothing* for his "partner."

25. Throughout 2017 and into early 2018, Gothard repeatedly attempted to determine when Kevter would receive its share of the closing proceeds. Kauderer continuously blew him off, and did not make *any* payment.

II—CONCLUSIONS OF LAW

1. Through this consolidated action, Kevter asserted claims derivatively on behalf of LRS, Edgewater, and Jefferson. The claims asserted on behalf of Edgewater and Jefferson were brought against Kauderer, as Manager of the companies, for breach of fiduciary duty. The claims asserted on behalf of LRS were brought against Kauderer, RPE, River Realty, BFP, and Brown, and focused primarily on the sale of the LRS Property. Kevter asserted claims derivatively on behalf of LRS for breach of fiduciary duty, fraud, and civil theft, for rescission of the sale of the LRS Property, and for the imposition of a constructive trust.

2. In a derivative action, the recovery is achieved for the benefit of the entity on whose behalf the claims are asserted, and judgment is typically entered in favor of the entity itself. *Kaplus v. First Cont'l Corp.*, 711 So. 2d 108, 110 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1021b] ("[i]n a derivative action, a stockholder seeks to sustain in his or her name, a right of action belonging to the corporation); *Liddy v. Urbanek*, 707 F.2d 1222, 1224 (11th Cir. 1983) ("[t]he corporation is the real party in interest even though the corporate management has failed to pursue the action"). There are, however, circumstances where courts have found that a judgment in an amount proportionate to their ownership interest should be entered directly in favor of the shareholder/member who asserted the derivative claims, particularly where, as is the case here, the defendant has control (or joint control)

of the entity, thereby creating the possibility of additional disputes regarding the distribution of the recovery. *See Lynch v. Patterson*, 701 P. 2d 1126, 1130-31 (Wyo. 1985) (permitting "pro-rata recovery by individual shareholders to prevent an award from reverting to the wrongdoers who remain in control of the corporation").There are also circumstances where courts have found that it is not equitable for the wrongdoer to share in the recovery, particularly exemplary/punitive damages. *See Lynch,* 701 P. 2d 1126; *Aqua-Culture Technologies, Ltd. v. Holly*, 677 So. 2d 171, 186 (Miss. 1996) (reversal of portion of judgment holding that the wrongdoer defendant in the derivative action was a possible beneficiary of sums recovered by the company, because awarding defendant a percentage the damages awarded would be reimbursing him for his own wrongs); *212 Investment Corp. v. Kaplan*, 847 NYS 2d 905, *13 (Sup. Ct., NY County 2007) (punitive damages awarded in derivative action apportioned to plaintiffs rather than limited partnership; plaintiffs undertook the financing of the litigation, and it would not be appropriate to grant defendant, the general partner, substantial power over the award); *Perlman v. Feldman*, 219 F. 2d 173, 178 (2d Cir. 1955) (plaintiffs in derivative action entitled to recovery in own right since defendant should not share in any judgment rendered, and because defendant's actions directly harmed plaintiffs); *Caparos v. Morton*, 845 N.E. 2d 773, 791 (III. App. 2006) (defendants as fiduciaries should not benefit from their own wrongdoing, and are not to receive any part of compensatory and punitive damages awarded in derivative action to the partnership); *Backus v. Finklestein*, 23 F. 2d 359 (D. Minn. 1927) ("Directors and officers of corporations . . . have no right to deal with themselves and for the corporation at the same time, and they must account for the profits made by the use of the company's assets, and for moneys made by a breach of trust.") (internal citations omitted).

3. While these decisions appear sound, at least one Florida Court has held that even in a case involving a closely held entity, such as we have here, it is error to award damages to the individual rather than the corporation upon whose behalf the action was brought. *Sinibaldi v. Sinibaldi ex rel. Get Strong, Inc.*, 100 So. 3d 72, 74 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2411e] (reversing an award of individual damages to the wronged shareholder in a derivative action where the wrongdoer was the only other shareholder). *Sinibaldi*, however, did not involve punitive/exemplary damages, and the parties here stipulated that—with respect to all compensatory damages—judgment should be entered directly in favor of Kevter for an amount equal to the total awarded by the Court multiplied by Kevter's percentage interest in the entity on whose behalf the claim is brought. The parties have also stipulated that Kevter's ownership interest in the entities is: LRS - 50%;Jefferson - 20%;Edgewater—17.5%.[4]

4. Pursuant to Florida law, a manager of a limited liability company has fiduciary duties of loyalty and good faith and to avoid self-dealing by placing the interests of the company over their personal interests. §605.0805, Fla. Stat. The elements of a claim of breach of fiduciary duty are: the existence of a fiduciary duty;breach of that fiduciary duty; anddamage caused by the breach of fiduciary duty.

Minotty v. Baudo, 42 So. 3d 824, 835-36 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1615a]. Further, a breach of fiduciary duty by a manager of a company constitutes constructive fraud. *Hirchert Family Tr. v. Hirchert*, 65 So. 3d 548, 552 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1290b].

5. A party is liable for aiding and abetting a breach of fiduciary duty if the party has knowledge of the breach of fiduciary duty and substantially assists in, or encourages, the commission of the breach. *M.P., LLC v. Sterling Holding, LLC*, 231 So. 3d 517, 527 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1465c]. A party is liable for conspiring to commit fraud when there is (a) an agreement between two or more parties, (b) to do an unlawful act, or to do a lawful act in pursuance of the conspiracy, and (c) damages the plaintiff as a result of the acts done under the conspiracy. *Id*. at 522.

6. After ruling was rendered in favor of Brown and BFP with respect to all of the claims asserted against them derivatively on behalf of LRS, Kevter, on behalf of LRS, elected the remedy of damages instead of rescission or the imposition of a constructive trust on the LRS property.

A. Claims Brought on Behalf of Edgewater

7. The Court finds that Kevter failed to sustain its burden of proof with respect to its derivative claims on behalf of Edgewater. With respect to the 2121 Loan, even if Kauderer breached a fiduciary duty owed to Edgewater by failing to respond to the motion to strike Edgewater's claim in the 2121 bankruptcy, Kevter did not establish that, had Kauderer defended the claim, there would have been *any* funds available to pay it. In other words, Kevter did not establish, by a preponderance of evidence, that Edgewater suffered *any* harm as a proximate cause of this alleged breach of duty.

8. With respect to the RPI Loan, while Edgewater's General Ledger reflects that the debt remains due and owing, Edgewater's 2015 tax return reports that the loan was written off in 2015 by Edgewater charging the loan against RPE's capital account and thereby purportedly distributing Edgewater's RPI Loan receivable to RPE. Edgewater's records with respect to the RPI Loan are in conflict. This conflict was not resolved at trial, so Kevter shall recover nothing on this claim.

B. Claims Brought on Behalf of Jefferson

9. The Court finds that Kauderer breached his fiduciary duty as the manager of Jefferson in each of the following ways: During December 2013, from the sales proceeds of the Jefferson Property, Kauderer distributed $140,000.00 to RPE without making any distribution to Kevter;Kauderer caused a total of $200,000.00 of the sales proceeds from the sale of the Jefferson Property that he had transferred to RPI to be paid to GFS in payment of the balance of 2121's settlement with GFS. At the time, Kauderer solely owned 2121 and was obligated to pay this sum; andWith respect to the Jefferson Consulting Agreement, and the $350,000.00 paid to Jefferson pursuant thereto which Kauderer paid to RPI, Kauderer failed to present any evidence regarding the bona fides of the Consulting Agreement or the nature or extent of the services allegedly rendered or costs incurred by him in performing the Consulting Agreement. Put simply, the Court finds that the $350,000.00 "consulting fee" was simply taken by Kauderer "off the top" so as to deprive Kevter of its proportionate share of this portion of the sale proceeds.

10. As a 20% member of Jefferson, Kevter is entitled to the entry of judgment in its favor and against Kauderer for 20% of the harm realized at the entity level (*i.e.*, 20% of $690,000.00), which equals $138,000.00, plus pre-judgment interest.

C. Claims Brought on Behalf of Little River Studios

11. The Court finds that Kauderer breached his fiduciary duties as manager of LRS in connection with the transaction by which River Realty and BFP acquired the LRS Property, and committed constructive fraud and civil theft in connection with that transaction.

12. By Order dated December 29, 2020, summary judgment was granted in favor of Kevter, derivatively on behalf of LRS, on Kevter's claims of breach of fiduciary duty against Kauderer and RPE regarding the Credit and the $811,000.00 of cash subsequently distributed to RPE from the closing proceeds. Specifically, Kauderer breached his fiduciary duty to LRS by causing LRS to give the Credit to River Realty. By doing so, and eliminating his obligation to have River Realty pay $794,692.51 at closing, Kauderer acted in his personal interest at the expense of LRS, depriving LRS of receiving the funds at closing. RPE and River Realty aided and abetted Kauderer's breaches of fiduciary duty with respect to the Credit by knowing of, actively participating in, and assisting Kauderer's breach

of fiduciary duty.

13. Kauderer also breached his fiduciary duty to LRS, acting in his personal interest and at the expense of LRS, by taking $811,000.00 remaining cash proceeds the day after the closing. Kauderer (and his entity RPE) had no right to *any* of this money, and had a duty to preserve these funds and maintain them on behalf of LRS so that LRS would have the funds to distribute to Kevter as *those* funds represented Kevter's share of the equity in the property realized on the sale. RPE aided and abetted Kauderer's breach of fiduciary duty with respect to these funds by receiving the funds as a distribution while knowing that Kauderer had no right to take the funds, and assisting in his doing so.

14. Further, Kauderer and RPE committed civil theft by taking the $811,000.00 from LRS.[5] "A person commits civil theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently, deprive the other person of a right to the property or a benefit from the property and appropriate the property to his or her own use or to the use of any person not entitled to use the property." §812.014(1), Fla. Stat. Civil theft has to be established by clear and convincing evidence. *Stuart L. Stein, P.A. v. Miller Industries, Inc.*, 564 So. 2d 539, 540 (Fla. 4th DCA 1990).

15. The evidence clearly and convincingly establishes that Kauderer and RPE acted with criminal intent to deprive LRS, and Kevter, of specifically identifiable funds. First, during trial Kauderer *admitted* he had no right to take this money. Second, at the time Kauderer took the money as a distribution to RPE: he knew that RPE had no right to *any* of these funds;he knew that RPE had already taken its share of the closing proceeds by his entity, River Realty, receiving the Credit;he knew Kevter did not owe any money to LRS, and that Kevter was entitled to the distribution of these funds as *its* share of the closing proceeds; andhe never provided any justification for taking the funds, as there is none.

16. Further evidence that Kauderer and RPE took the money with the criminal intent to permanently deprive LRS (and Kevter) of the funds is the fact that Kauderer has never returned *any* of the money to LRS and has *never* paid *any* of the funds to Kevter at any time after the closing of the property. Instead, Kauderer continued to avoid Gothard and attempted to have his accountant concoct a schedule of money *allegedly* owed by Kevter/Gothard to him and/or his entities, thereby providing him with an "excuse/justification" for not paying these funds to their rightful owner, Kevter. And even *after* this concocted and flawed analysis showed that Kevter/Gothard *allegedly* owed only approximately $200,000.00 (money not actually owed), Kauderer did not tender the $600,000.00 difference, instead electing to keep all the funds for himself.

17. Ultimately, despite knowing that LRS was obligated to distribute in excess of $811,000.00 to Kevter, Kauderer took this money from LRS without intending to return it or pay it to Kevter. As a result, Kauderer and RPE committed civil theft with respect to the $811,000.00 taken as a distribution to RPE. With respect to this claim, LRS is therefore entitled to recover threefold the actual damages of $811,000.00, for a total sum of $2,433,000.00 (the $1,622,000.00 portion of the treble damages in excess of the $811,000.00 stolen, hereinafter referred to as the "Additional Award").

18. If judgment on Kevter's derivative claims on behalf of LRS were to be entered in favor of LRS for the $794,692.51 Credit, and $2,433,000.00 as treble damages for the civil theft of the $811,000.00, it would amount to $3,227,692.51. Of this sum, after payment of capital accounts, RPE, as a 50% member of LRS, would be entitled to 50% of the net recovery, or approximately $1.6 million, resulting in Kauderer paying—and Kevter receiving—"double" not "treble" damages on the $811,000.00. The question then, which appears to be one of first impression in Florida, is whether the "Additional Award" (*i.e.*, treble amount) should go entirely to Kevter so that Defendants will not receive a benefit (*i.e.*, reduction of exposure) due to RPE's 50% ownership of LRS.

19. On the one hand, it can be persuasively argued that the entire amount awarded, including treble damages, is for claims *belonging* to LRS, and the fact that Kauderer/RPE, as a 50% owner, is entitled to receive a proportionate share of any recovery is simply inherent in the nature of a derivative case. That argument is compelling with respect to any compensatory award, interest, etc. The funds are due to the *entity* to compensate it for *its actual* damages, and if a defendant in a derivative case, by virtue of an ownership interest, participates in that recovery, so be it. Again, that is the nature of a derivative case.

20. On the other hand, punitive damages are awarded to punish the wrongdoer, not to compensate for harm suffered. *Mercury Motors Exp., Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981) ("Punitive damages . . . go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others"). Treble damages, like those awarded pursuant to the civil theft statute, are punitive in nature. *Country Manors Ass'n, Inc. v. Master Antenna Sys., Inc.,* 534 So.2d 1187, 1195 (Fla. 4th DCA 1988) (holding treble damages under the civil theft statute are punitive); and *McArthur Dairy, Inc. v. Original Kielbs, Inc.,* 481 So.2d 535, 539-40 (Fla. 3d DCA 1986) (same). And if Kauderer or RPE share in the $1,622,000.00 "Additional Award," thereby receiving back $811,000.00 of this sum, they would only be paying "double" damages, instead of "treble" damages. This would be contrary to the purpose/legislative intent of the civil theft statute. And some courts—albeit outside of Florida—have recognized that permitting the wrongdoer to participate in that type of recovery would be inequitable. *See section II, para. 2, supra.*

21. This issue is no doubt academically interesting and would be debatable in most derivative cases. But under the unusual facts presented here, it would make absolutely no sense to reduce the "Additional Damages" award by RPE's 50% interest in LRS for an obvious reason: the $811,000.00 stolen post-closing, while technically/legally belonging to LRS, was in reality Kevters' share of the closing proceeds as Kauderer had already taken his 50% of the equity via the credit at closing given to his entity, River Realty. Put simply, had it not been stolen, the $811,000.00 would have been distributed *solely* to Kevter as its share of the closing proceeds (*i.e.*, its 50% equity). This is not a case, like most derivative actions, where the funds misappropriated would have otherwise remained in the entity to be distributed to *all* owners proportionately. Again, the funds stolen here would have been distributed *solely* to Kevter. In this unique circumstance, Kevter—as the true and only "victim" of the theft - should receive the entire "Additional Damage" award, particularly given the fact that the Court has not trebled the amount Kauderer took as a credit.

22. The judgment to be entered in favor of Kevter shall, therefore, be in an amount that recognizes Kauderer and RPE's entitlement to participate in the compensatory damages awarded, so that Kevter shall be awarded only 50% of the total compensatory damages suffered by LRS. But consistent with the purpose and express terms of the civil theft statute, and equity,[6] Kauderer and RPE shall not participate in the Additional Award, which shall be awarded *solely* to Kevter. Kevter is therefore entitled to recover: one-half of the $1,605,695.51 taken, comprised of the $794,692.51 Credit, plus the $811,000.00, which is the sum of $802,847.76; andthe entire Additional Award of $1,622,000.00.

Accordingly, with respect to these particular LRS claims, Kevter is entitled to recover a total of $2,424,847.76, plus pre-judgment interest on the $802,847.76 compensatory award.

23. The Court also finds that Kauderer breached his fiduciary duty by distributing to RPE $425,000.00 from the sale of the 2121 Property instead of using these funds to reduce the $700,000.00 first mortgage

that encumbered the LRS Property in connection with the $1.4 million Perry Loan. RPE aided and abetted this breach of fiduciary duty by receiving these funds and failing to pay them towards the LRS first mortgage. Kauderer benefitted himself at the expense of LRS by having RPE keep the $425,000.00 instead of paying it towards the mortgage placed on the LRS Property for the benefit of 2121, when at the time 2121 was solely owned by Kauderer. Accordingly, LRS is entitled to recover the $425,000.00, plus prejudgment interest accruing thereon from August 27, 2014, and Kevter is entitled to judgment in an amount equal to 50% of these sums.

24. With respect to Kevter's remaining derivative claims on behalf of LRS, the Court finds that it failed to meet its burden of proof. Specifically: Kevter maintained that Kauderer breached his fiduciary duty by selling the LRS Property to River Realty and BFP for less than its fair market value, and by failing to disclose to Kevter that, at the time, Kauderer valued the property in excess of $4.5 million. Kevter also maintained that Kauderer received a $25,000.00 payment and a commitment of additional payments from BFP in excess of the purchase price for the LRS Property, which was a corporate opportunity that should have been received by LRS. During November 2016, the LRS Property was appraised and was valued at $3.5 million. Kauderer was not obligated to disclose to Kevter his *opinion* of the value of the LRS Property. The Court also finds that: (a) the property was sold for fair market value; and (b) Kevter/Gothard knew of and approved the purchase price. There also was no competent substantial evidence presented that Kauderer took a corporate opportunity in connection with the sale of the LRS Property. For these reasons, no relief shall be awarded to LRS/Kevter with respect to these claims.Kevter also seeks damages for the loss of the business that operated on the LRS property. The Court finds that the Business did not operate independently of the LRS Property, and did not have any value separate from the value of the LRS Property. Accordingly, LRS and Kevter shall recover nothing with respect to its claim that the Business was wrongfully taken from the company.Kevter next seeks the return to LRS of the $200,000.00 commission paid to District Realty Advisors. The Court finds that Gothard knew of the commission and of Kauderer's affiliation with District Realty Advisors. The Court also finds that this commission was for an amount equal to fair value for services rendered. Accordingly, LRS and Kevter shall recover nothing on this claim. Finally, Kevter insists that Kauderer breached his fiduciary duty to LRS by having the company pay the Mender second mortgage using company funds when he could have invalidated the Mender Settlement Agreement and second mortgage. Kevter also maintains that Kauderer received a personal benefit by having LRS pay this obligation because Kauderer was obligated to pay 75% of the sums due Mender and only owned a 50% interest in the company. The Court finds that Plaintiff failed to prove these claims by a preponderance of evidence, and that Gothard knew of, and approved, the payment to Mender. Kevter/LRS shall receive nothing on this claim.

III—FINAL JUDGMENT

Final Judgment is entered in favor of KEVTER, INC. [Editor's note: Address redacted.], Vineyard Haven, Massachusetts, and against **MALLORY KAUDERER**, [Editor's note: Address redacted.], Miami Beach; SSN?XXX?XX?8059, for the following claims and sums:

A. Jefferson

1. 20% of the $200,000.00 of Jefferson sales proceeds paid on behalf of 2121, which is $40,000.00, plus pre-judgment interest accrued thereon from December 18th 2013[7] - $ 55,586.48

2. 20% of the $140,000.00 distribution made to RPE, which is $28,000.00, plus pre?judgment interest accrued thereon from December 18th, 2013 - $ 38,917.79

3. 20% of the $350,000.00 consulting fee, which is $70,000.00, plus pre-judgment interest accrued thereon from January 11, 2016 - $90.425.94

B. Little River Studios

1 one-half of the total of the Credit of $794,692.51 plus $811,000.00, which is $802,847.76, plus pre-judgment interest accrued thereon from December 21, 2016 -$1,000,651.97

2. the full Additional Award for the civil theft of the $811,000.00 -$1,622,000.00

3. one-half of the $425,000.00 that RPE took instead of using it to reduce the LRS mortgage, which is $212,500.00, plus pre?judgment interest accrued thereon from August 27, 2014 -$288,890.28

4. Payment of Kevter's capital account of $107,000.00, plus pre-judgment interest accrued thereon from December 21, 2016, to date[8] - $133,362.41

TOTAL - $3,229,834.87,

(this sum is referred to as the "Kauderer Total"), for which let execution issue.

Of the Kauderer Total, and *not* in addition thereto, Final Judgment is entered in favor of KEVTER, INC., and against **REGENTS PARK EQUITY, LLC**, [Editor's note: Address redacted.], Miami, jointly and severally, with MALLORY KAUDERER and LITTLE RIVER REALTY, LLC, for the following claims and sums:

1. one-half of the total of the Credit of $794,692.51 plus $811,000.00, which is $802,847.76, plus pre-judgment interest accrued thereon from December 21, 2016 -$1,000,651.97

2. the full Additional Award for the civil theft of the $811,000.00 - $1,622,000.00

3. one-half of $425,000.00, which is $212,500.00, as Kevter's share of the sum received by RPE that should have been paid to reduce the first mortgage encumbering the LRS Property, plus pre-judgment interest accruing thereon from August 27, 2014 - $288,890.28

4. Payment of Kevter's capital account of $107,000.00, plus pre-judgment interest accrued thereon from December 21, 2016, to date • $133,362.41

TOTAL $3,044.904.66,

for which let execution issue.

Of the Kauderer Total, and *not* in addition thereto, Final Judgment is entered in favor of KEVTER, INC., and against **LITTLE RIVER REALTY, LLC**, [Editor's note: Address redacted.], Miami, jointly and severally, with MALLORY KAUDERER and REGENTS PARK EQUITY, LLC, for $794,692.51, comprised of the amount of the Credit, plus pre-judgment interest accrued thereon from December 20, 2016, in the total sum of $990,486.90, for which let execution issue.

Post-judgment interest shall accrue commencing on February 19, 2021 on all sums awarded pursuant to this Final Judgment at the rate

specified by law.

This Court retains jurisdiction for the purpose of determining the amounts to be awarded for attorneys' fees and costs, pursuant to §772.11, Fla. Stat. and §605.0805, Fla. Stat., and to enter an additional Final Judgments.

IT IS FURTHER ORDERED AND ADJUDGED that the Judgment Debtors shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the Judgment Creditor's attorney, Law Office of Richard A. Ivers, [Editor's note: Address redacted.], Coconut Creek, (richard@iverslawfirm.com) within 45 days from the date of this Final Judgment, unless final judgment is satisfied or post-judgment discovery is stayed. Let execution issue forthwith. (*See* Fact Information Sheet attached hereto as Exhibit "A").

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[1]While Plaintiff brings the case derivatively on behalf of LRS, Edgewater and Jefferson, the parties agreed that the Court should enter Final Judgment in favor of Plaintiff for the amount it would receive based upon its ownership percentage of these closely held entities. So, rather than entering Final Judgment in favor of the entities for the entire amount found to be due, the Court has—with one exception discussed *infra*—entered Final Judgment in favor of Plaintiff for the damages sustained by the entities, multiplied by Plaintiff's percentage ownership interest.

[2]During 2010 and 2011, Gothard transferred his interests in LRS, Edgewater, and Jefferson to Kevter, and Kauderer transferred his interest in these entities to Defendant RPE, a company he owns.

[3]But for the Credit, LRS would have received approximately $1,660,000.00 of cash at closing.

[4]The parties, however, dispute whether any "treble" damages awarded on the civil theft claim brought on behalf of LRS should be paid entirely to Kevter. The Court will discuss this issue *infra*.

[5]While the Court finds that Kauderer breached his fiduciary duty to LRS by giving his company, River Realty, the $794,692.51 credit at closing thereby depriving LRS of its right to receive these funds, it concludes that this breach did not amount to civil theft because the amount of the credit equaled (or was close to) the proceeds Kauderer's entity, RPE, would have received as a distribution based upon its 50% ownership of LRS. Simply put, Kauderer took his share of the net sales proceeds as a credit, thereby rolling his equity into the purchase. The Court, however, awards treble damages of the $811,000.00 that represented Kevter's shares of the closing proceeds as Kauderer simply stole those funds.

[6]Derivative actions are equitable proceedings. *See, e.g., McGuire, Woods, Battle & Boothe, L.L.P. v. Hollfelder*, 771 So. 2d 585 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2637a]; *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425 (Fla. 5th DCA 1985).

[7]Pre-judgment interest on all sums awarded was calculated at the statutory rates through February 18, 2021. Post Judgment interest will therefore begin to accrue on February 19, 2021.

[8]It is undisputed that, as of December 31, 2016, Kevter had a $107,141.00 capital account in LRS. If this Final Judgment would have been rendered in favor of LRS, the amount recovered would first be used to pay out Kevter's capital account. This payment would reduce RPE's share of the recovery because RPE had a negative capital account of $108,031.00. Kevter would also receive its full share of the recovery. Kevter should not be deprived of payment of its capital account because the parties stipulated that the judgment shall be entered directly in favor of Kevter, instead of in favor of LRS. Accordingly, the $107,141.00, must be added to the amount of the judgment in favor of Kevter.

* * *

Torts—Negligence—Construction—Economic loss rule—Remote purchasers of house cannot bring claim for negligence against construction company for construction defects without allegation of damages to property other than to house itself

LISA BALKIN and TAYLOR GANG, Individually, Plaintiffs, v. NANCY MUNIZ and JORGE MUNIZ, Individually; and MUNIZ GENERAL CONTRACTORS, INC., a Florida corporation, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-030467-CA-01, Section CC06. September 18, 2020. Luis Perez-Medina, Judge.

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNT IV OR THE AMENDED COMPLAINT

THIS CAUSE having come before the Court upon Muniz General Contractor, Inc.'s Motion to Dismiss Count IV of the Amended Complaint for Negligence Construction, and the Court having reviewed the file and the memoranda submitted by the parties, having heard the argument of counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED and ADJUDGED**:

Defendant's Motion to Dismiss Count IV of the Amended Complaint is **GRANTED**.

Plaintiffs, Lisa Balkin and Taylor Gang filed a two Count Complaint in County Court against Nancy Muniz and Jorge Muniz, individually, and Muniz General Contractors, Inc. ("MGC"). Count I of the Complaint charged breach of implied warranty to construct in a good workmanlike manner and Count II charged breach of implied warranty of fitness and habitability. The Complaint was later amended charging Nancy Muniz with fraudulent misrepresentation, Count I, and charging MGC with breach of implied warranty to construct in a good workmanlike manner, Count II, breach of implied warranty of fitness and habitability, Count III, and negligent construction, Count IV. Plaintiffs also sought damages exceeding the County Court's jurisdiction of $15,000.00. Hence, this case was transferred to Circuit Court.

Plaintiffs alleged that MGC negligently constructed Plaintiff's home causing the master bathroom tiles to fall of the wall. As a result, Plaintiff suffered injury requiring that they "redo all the tile work in their master bathroom." *Plaintiffs' Amended Complaint*. Plaintiffs further alleged that "MGC's negligent construction led to a water leak from a negligently installed pipe." *Id.* The water from the leaking pipe "saturated the building components of the Property" and "ruined" the "downstairs floors, subfloors, walls, baseboards, and wall studs". *Id.*

According to the Residential Contract for Sale and Purchase which was attached to the Amended Complaint, the Plaintiffs bought the home from Jorge and Nancy Muniz, "AS IS". *Id.* Plaintiffs had 10 days to inspect the home and had the sole discretion to terminate the purchase of the property. *Id.* Sellers extended no warranty and made no representations of any type, either express or implied, "as to the physical condition or history of the Property." *Id.*

Eventually, Plaintiffs dropped Nancy and Jorge Muniz from this action and dismissed Counts I, II, and III of their Amended Complaint. This left Count IV, negligent construction against MGC, as the sole remaining count.

The issue before this Court is whether a remote purchaser of a house can bring a claim for negligence against the contractor for construction defects without an allegation of damages to property, other than to the house itself. The economic loss rule, first adopted by the Florida Supreme Court in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So. 2d 899, 902 (Fla. 1987), prohibits tort claims when the only damages alleged are economic losses, without any assertion of personal injury or damage to property other than to the product itself. The rule applies to product liability claims arising in the context of real estate transactions. *Casa Clara Condo Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993). In *Casa Clara*, a condominium association sued a concrete supplier for the alleged damage that their concrete caused to the steel reinforcing bars of the building. *Id.* at 1245. The court applied the "object of the bargain" rule which looks at the product purchased by the plaintiff rather than the product sold by the defendant as a way of determining the character of the loss. *Id.* at 1247. The court went on to state:

> Generally, house buyers have little or no interest in how or where the individual components of a house are obtained. They are content to let the builder produce the finished product, i.e., a house. These homeowners bought finished products—dwellings—not the individual components of those dwellings. They bargained for the finished products, not their various components. The concrete became an integral part of the finished product and, thus, did not injure "other" property.

Id.

Plaintiffs argue that *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 405 (Fla. 2013) [38 Fla. L. Weekly S151a], overruled *Casa Clara*. The Third District Court of Appeal recently addressed this issue and held that *Casa Clara* is still good law. *Hollywood Beach Condominium Ass'n v. TRG Holiday, LTD.*, 45 Fla. L. Weekly D2179a (Fla. 3d DCA 2020). In *Hollywood Beach*, the Association purchased a condominium building from a developer. *Id.* The building contained a fire suppression system which was installed during construction. *Id.* A portion of the fittings used for the fire suppression system eventually began to leak and the Association filed suit against several parties involved in the construction, including Nibco, the manufactured of the fittings. *Id.* The Association sought damages for future repairs and replacement of the fire suppression system. *Id.* In affirming the trial court, the appellate court applied the object of the bargain rule articulated in *Casa Clara*. *Id.* The court found that since the Association "bargained for, purchased and received a building" which included Nibco's fittings as "an integral part" of the building, the fittings did not injure other property. *Id.* The court held that the economic loss rule barred "the Association's recovery as to Nibco to the extent that it sought damages to replace the [fire suppression system] and repair damage to the building. *Id.*

Applying the object of the bargain rule to the present case prevents Plaintiffs from seeking damages from MGC for negligent construction. Plaintiffs bargained for, purchased and received a completed building, which included the master bathroom tiles as well as the downstairs floors, subfloors, walls, baseboards, and wall studs. These components were an integral part of the finished product, the building itself. Damage to these components would not constitute damage to other property. *See Hollywood Beach*, 45 Fla. L. Weekly D2179a; *Casa Clara*, 620 So. 2d at 1247). The economic loss rule therefore bars Plaintiffs' recovery as to MGC to the extent that they seek damages to replace the master bathroom tiles and repair the downstairs floors, subfloors, walls, baseboards, and wall studs of the building.

Accordingly, Count IV of Plaintiffs' Amended Complaint seeking damages for negligent construction is barred by the economic loss rule as set forth in *Casa Clara* and *Hollywood Beach*.

Therefore, it is ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss Count IV of the Amended Complaint is GRANTED.

2. Plaintiffs may file an Amended Complaint within 20 days of this Order or this case will be dismissed without prejudice.

* * *

Injunctions—Enforcement of foreign judgments—Motion to dismiss case and dissolve temporary injunction enforcing freeze order issued by Cypriot court against defendant's assets is denied—Florida courts give full faith and credit to foreign courts' non-final orders, and recognizing freeze order would not offend some paramount public policy of state

GORSOAN LIMITED, Plaintiff, v. JANNA BULLOCK, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-020803-CA-01, Section CA43. February 17, 2021. Michael Hanzman, Judge. Counsel: John Chapman, Holland & Knight LLP, Fort Lauderdale, for Plaintiff. Jonathan P. Bach, Shapiro Arato Bach, LLP, New York, NY; and Henry P. Bell, Bell Rosquete Reyes Esteban, PLLC, Coral Gables, for Defendant.

ORDER

I. **Introduction**

Before the Court is Defendant Janna Bullock's ("Bullock") "Motion to Dissolve the Temporary Injunction and Dismiss the Case" (Docket entry "DE" 27), filed pursuant to Florida Rules of Civil Procedure 1.1610(d) and 1.140(b)(6) ("Motion). Bullock seeks an Order dissolving the Court's temporary injunction entered *ex parte* on October 8, 2020 (DE 8), and dismissing this case with prejudice. In support of the motion, Bullock submitted a supporting memorandum of law (DE 28), Plaintiff Gorsoan Limited ("Gorsoan") responded in opposition (DE 34), and Bullock filed a reply in further support of the Motion (DE 37). The Court entertained oral argument on February 17, 2021. Upon careful consideration of the record, and applicable legal authorities, the Court **DENIES** the Motion.

II. **Background**

This case arises from Gorsoan's request that the Court give full faith and credit to an interim global asset freeze order entered by a Cypriot Court against Bullock's assets. Gorsoan is before this Court as the assignee of the rights of Gazprombank OJSC, a Russian bank (the "Bank"), that invested approximately $23 million in certain municipal bonds issued by entities affiliated with the Moscow Region government in Russia. The complaint alleges that those funds were diverted by Bullock and her then-husband, Alexey Kuznetsov, then-Minister of Finance in the Moscow Region government. (DE 2, Complaint at ¶¶ 6-7.) Bullock does not challenge Gorsoan's standing or the validity of the Bank's assignment of rights and claims to Gorsoan.

In August 2012, Gorsoan initiated proceedings in the District Court of Limassol, Cyprus, seeking damages against Bullock and her alleged co-conspirators in excess of $20 million. On August 14, 2012, the Cyprus Court, upon an *ex parte* application by Gorsoan, issued interim orders against Bullock and her co-defendants, ordering that their assets anywhere in the world be frozen, up to the amount of $26 million (the "Interim Injunction Order"). (*Id.* at ¶10.)[1] Bullock was personally served in New York with a copy of the Interim Injunction Order on September 17, 2012. (*Id.* at ¶ 11.) That Interim Injunction Order was converted into what appears to be the Cypriot equivalent of a non-final, preliminary injunction in March 2013 (the "Preliminary Injunction Order"), and the Preliminary Injunction Order was served on Bullock in New York on April 24, 2013. (*Id.* at ¶13.) In October 2013, Bullock and her co-defendants appeared before the Cyprus Court and moved to stay or set aside the Cyprus Proceeding arguing, *inter alia*, lack of jurisdiction and improper service. (*Id.* at ¶14.) That motion was denied on November 5, 2013. (*Id.*)

On September 25, 2020, Gorsoan filed a Verified Complaint for Recognition of Foreign Injunction before this Court, seeking recognition of the Cyprus Court's Preliminary Injunction Order and a freeze of all of Bullock's assets in the State of Florida. Gorsoan appears to be concerned about the risk of dissipation of one asset in particular: a condominium on Miami Beach's Fisher Island that a Bullock-owned entity purchased in 2017 for $7,000,000.

III. **Analysis**

The Motion presents two issues. First, whether Florida courts give full faith and credit to a foreign court's non-final orders. Second, whether recognizing a foreign freeze order would offend "some paramount public policy" of our state. *Belle Island Inv. Co., Ltd. v. Feingold*, 453 So. 2d 1143, 1145 (Fla. 3d DCA 1984) ("[i]n Florida, the rules of comity may not be departed from except to protect the citizens of our state or some paramount public policy"). The answer to the first question is yes. The answer to the second question is no.

1. *Florida Courts Recognize Foreign Interim Injunctions.*

As our appellate court pointed out just last month, recognizing "[t]he extraterritorial effect of a foreign decree 'depends upon what our greatest jurists have been content to call 'the comity of nations,' " *Amezcua v. Cortez*, No. 3D20-1649, at 6 (Fla. 3d DCA Jan. 13, 2021) [46 Fla. L. Weekly D161a] (quoting *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895)), and comity dictates that:

> [A]ny foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida.

No. 3D20-1649, at 6 (Fla. 3d DCA Jan. 13, 2021) (quoting *Nahar v. Nahar*, 656 So. 2d 225, 229 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1356a]). The *Amezcua* court also approved of—and adopted—the standard set forth under the Restatement (Second) of Conflict of Laws:

> [A] decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further that in the view of the American court the decree is consistent with fundamental principles of justice and of good morals.

Id. at 5 (quoting Restatement (Second) of Conflict of Laws § 102 cmt. g (Am. Law Inst. 1971)). In this case, the parties do not dispute that Bullock was given notice and an opportunity to be heard, or that the Cyprus Court had original jurisdiction. Indeed, Bullock appeared before the Cyprus Court, challenged jurisdiction, and lost.

Bullock nevertheless insists that the Court cannot recognize a foreign interim injunction, arguing that Florida courts are ***only*** permitted to give full faith and credit to foreign interim injunctions in domestic relations cases or creditors rights cases. (DE 28 at 7) (citing *Cardenas v. Solis*, 570 So. 2d 996, 999 (Fla. 3d DCA 1990)). What Bullock fails to recognize is that the Third District has expressly "recede[d] from *Cardenas* to the extent that it conflicts with" the more permissive standard set forth in "the Restatement (Second), Conflict of Laws, § 98 (1988)." *Nahar v. Nahar*, 656 So. 2d 225, 229 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1356a]. That standard, recently applied in *Amezcua*, dispenses with the narrow exceptions to the general rule against recognizing foreign interim injunctions and focuses on notice by, and the jurisdiction of, the foreign tribunal, and consistency with Florida's public policy. In the decades since *Cardenas* and *Nahar* were decided, the Third District has "repeatedly approved the enforcement in Florida of temporary injunctions issued by foreign courts as a matter of international comity," *Cermesoni v. Maneiro*, 144 So. 3d 627, 629 (Fla. 3d DCA 2014), most recently in *Amezcua*, a "red cow" which forecloses Bullock's argument.[2,3]

1. *Recognizing the Foreign Injunction Is Consistent with Florida's Public Policy.*

Florida has an affirmative and "obviously [ ] strong public policy in favor of enforcing, where practicable, foreign court decrees, final or interlocutory . . . ." *Cardenas*, 570 So. 2d 996 (Fla. 3d DCA 1990) *abrogated on other grounds by Nahar*, 656 So. 2d 225, 229 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1356a]. In *Amezcua*, the Third District approved recognition of a foreign interim injunction because of the

> weighty need to preserve assets, along with the pervasive sentiment that debtors ought 'not be able to walk away from their foreign court-imposed obligations by spiriting away their money or assets; in the United States, the foreign decree neither offends the public policy of our State nor emburdens our courts.

Amezcua at 6 (citing *de Pacanins v. Pacanins*, 650 So. 2d 1028, 1029-30 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D284a] (citation omitted)). Despite these compelling reasons to give full faith and credit to foreign injunction/freeze orders, Bullock argues that it would offend Florida's public policy to recognize a foreign injunction in the absence of a showing of irreparable harm as required by Florida common law. (DE 28 at 9.) The Court disagrees. Enforcement of a foreign injunction is not against Florida public policy simply because a Florida court would have applied a different legal standard and *may* not have granted similar relief. *See, e.g., Konover Realty Associates, Ltd. v. Mladen*, 511 So. 2d 705, 706 (Fla. 3d DCA 1987) ("[i]t is entirely settled by a long and unbroken line of Florida cases that in an action at law for money damages, there is simply no judicial authority for an order requiring the deposit of the amount in controversy into the registry of the court").

As *Amezcua* makes clear, a recognizing court's duty is to ensure that the foreign proceedings were "under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment . . . ." *Amezcua* at 5 (citation omitted). *Amezcua* specifically acknowledged that the foreign judgment shall be recognized in accordance with "the system of laws under which [the foreign tribunal] was sitting"—*not* the system of laws under which the recognizing tribunal sits. *Id.* There is no claim of impartiality or other impropriety in the Cyprus proceedings and the Court declines Bullock's invitation to revisit the threshold injunction question that was before the Cyrus Court, as "the merits of the case should not . . . be tried afresh." *Id.* To the contrary, "[c]omity is meant to solve the dilemma that no law has any effect of its own force, beyond the limits of the sovereignty from which its authority derived." *Amezcua* at 4 (citation and alterations omitted). Indeed the very purpose of comity is to give effect to the foreign laws of a separate sovereign.

None of the cases cited by the parties that recognized foreign injunctions sought to supplant the legal standards of the foreign tribunal with Florida's own injunction standard. On the contrary, and consistent with the fundamentals of comity, the Florida courts *deferred* to the legal standards of the foreign tribunals. In *Nahar*, the Third District squarely addressed this question when it rejected an argument that "Florida law was controlling" over questions of survivorship and instead deferred to the finding of a Dutch court that the estate in question "was governed by Dutch law." 656 So. 2d 225, 228. If comity principles supersede Florida's public policy interest in the administration of a deceased's Florida property, then, *a fortiori*, Florida's general irreparable harm standard in this commercial case can yield to the determination of a Cyprus Court. Similarly, in *Intrinsic Values Corp. v. Superintendencia de Administracion Tributaria*, 806 So.2d 616 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D340b], the Third District approved an order recognizing a Guatemalan court's injunction against payment on a letter of credit with nary a mention of irreparable harm. On the contrary, *Intrinsic Values* rested on "principles of comity" finding that *Id.* because "Florida's jurisdiction and due process requirements had been met, the Guatemala injunction [was] entitled to comity." *Id.* at 619. And in *Amezcua,* which like this case involved a claim for money damages in the foreign jurisdiction, the Third District did not concern itself with whether the foreign order prohibiting the alienation of the Aventura Condominium could have been secured here applying ***our*** law. What this authority teaches is that crediting, and giving deference to, foreign legal standards is the very point of comity. Put another way, comity is not limited to orders/judgments that could have been secured in a Florida court, applying Florida law.

Finally, Florida's irreparable harm standard, while an element that must be satisfied to secure common law injunctive relief ***in Florida,*** is not enshrined in the state's overall public policy. For example, Florida Statute § 78.068(2), applicable to replevin actions, expressly provides that a "prejudgment writ of replevin may issue if the court finds . . . that the defendant is engaging in, or is about to engage in, conduct that may place the claimed property in danger of" dissipation. The statute makes no mention of irreparable harm. But even if Florida did ***categorically*** bar all equitable relief in the form of pre-judgment attachment (*i.e.*, injunction/freeze orders) absent a showing of irreparable harm (which it does not), Bullock's argument would still fail. Gorsoan is not asking the Court to enter an injunction in the first instance. There is no injunction hearing to be had or evidence of

irreparable harm to be considered. The injunction proceedings already took place in Cyprus and the asset freeze was already issued. The task at hand for the Court is purely ancillary and limited to the comity inquiry. And if Bullock's position were correct, then a Florida court could not recognize another sovereign's judgment unless that foreign court applied an equivalent to Florida law. That turns comity, and respect for foreign tribunals, on its head. The bottom line is that recognizing a foreign injunction/freeze order does not offend a "paramount public policy" of the state merely because the threshold showing needed to secure such relief may be lower in the foreign jurisdiction that entered the order/judgment. *Feingold, supra.*

IV. **Conclusion**

For the foregoing reasons, the Court **DENIES** the Motion. The Court does, however, **STRIKE** the words "and/or anywhere else in the world" from paragraph 11 of its October 8, 2020 temporary injunction.

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[1]Such injunctions are commonly referred to as "Mareva" injunctions. Named after the second English case to issue one, a Mareva injunction is a freezing order "designed to prevent a defendant from dissipating or hiding his assets at the outset of a case thus making any judgment subsequently rendered against him either worthless or difficult to enforce." *Guinness PLC v. Ward*, 955 F. 2d 875, 900 (4th Cir. 1992) (citing *Mareva Compani Naviera, S.A. v. Int'l Bulk Carriers, S.A.*, 2 Lloyd's Rep. 509 (Eng. C.A. 1975)).

[2]At oral argument, Bullock's counsel attempted to distinguish this proverbial "red cow," pointing out that the Mexican freeze order at issue in *Amezcua* was directed at "certain assets, including a condominium in Aventura, Florida," whereas the Mareva injunction here attached to all of Bullock's assets up to a specified dollar value. This is an irrelevant distinction for purposes of comity/full faith and credit. Assuming the foreign decree was issued by a court of competent jurisdiction, after notice and an opportunity to be heard, it is entitled to recognition unless offensive to our public policy. And it matters not whether that foreign decree freezes assets in general or specific assets.

[3]*See Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993) ("[a] red cow is a term proverbially used to describe a case directly on point, a commanding precedent").

* * *

Insurance—Automobile—Coverage—Covered vehicle—Where vehicle involved in accident was not covered vehicle under terms of policy and was not substitute auto for insured vehicle, there was no coverage for claims arising from accident

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. JACK VINCENT ROSALES, VII, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-002286-CA-01, Section CA27. January 20, 2021. Oscar Rodriguez-Fonts, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jack Vincent Rosales, VII, Pro se, Lutz, Defendant.

ORDER ON PLAINTIFF, INTEGON PREFERRED INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, JACK VINCENT ROSALES VII

THIS CAUSE having come before this Court on January 4, 2021, via Zoom Video Conference on the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment as to Defendant, JACK VINCENT ROSALES VII, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

The Plaintiff determined that the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) involved in the subject motor vehicle accident was not a "covered auto" being operated by the owner/Defendant, Jack Vincent Rosales VII, and the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) was not a substitute auto for the insured vehicle due to breakdown, servicing, loss or destruction. Therefore, since the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) does not constitute a "covered auto" and the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) is not a substitute auto for the insured vehicle(s) pursuant to the terms and definitions of the subject policy of insurance, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Jack Vincent Rosales VII, the insurance policy reads in pertinent part as follows:

G. "**Covered auto**" means:

1. Any auto described on the **Declarations Page** for which a premium charge is shown unless **you** have asked us to delete that auto from the policy

2. A **newly acquired auto**.

3. Any **auto not owned by you** which is: driven by you or a listed driver; and**used on a temporary basis as a substitute for any auto described in this definition which is out of service no longer than 30 days because of its**:

breakdown;
repair;
servicing; loss; or
destruction

The **auto** being used as a temporary substitute must be eligible for coverage pursuant to our underwriting criteria."

See page 2 of the Integon Preferred Insurance Company policy.

Conclusion

This Court considered the Affidavit of Angela Valliere in its findings. This Court hereby finds that the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) involved in the subject motor vehicle accident does not constitute a "covered auto" pursuant to the terms and definitions of the insurance policy. In addition, this Court hereby finds that the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) was not a substitute auto for the insured vehicle(s) pursuant to the terms and definitions of the subject insurance policy. Therefore, there is no coverage for any claim arising from the motor vehicle accident on March 1, 2019, under the insurance policy issued by Integon Preferred Insurance Company.

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

a. Based upon the properly filed affidavit(s) and other evidence relied upon by the Plaintiff, there are no genuine issues of material fact in dispute, and thus, the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, and against the Defendant, JACK VINCENT ROSALES VII;

c. The undersigned counsel for Plaintiff, INTEGON PREFERRED INSURANCE COMPANY appeared on behalf of the Plaintiff at the January 4, 2021 hearing via Zoom Video Conference;

d. The Defendant, JACK VINCENT ROSALES VII, was properly noticed for the January 4, 2021 hearing via Zoom Video Conference;

e. The Defendant, JACK VINCENT ROSALES VII, failed to appear for the January 4, 2021 hearing via Zoom Video Conference;

f. The Defendant, HAROLD ANTHONY MILLER, was dismissed from this case without prejudice;

g. The Defendant, SEI HOLDING GROUP, INC., was dismissed from this case without prejudice;

h. This Court hereby resolves the coverage issue in this Action in favor of the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY;

i. This Court hereby reserves jurisdiction to consider any claim for attorney's fees and costs;

j. The Court finds that the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) involved in the March 1, 2019 accident does

not constitute a "covered auto" pursuant to the terms and definitions of the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980;

k. The Court finds that the 1995 Ford F450 (VIN: 1FDLF47F0SEA63968) involved in the March 1, 2019 accident does not constitute a substitute auto for the insured vehicle(s) pursuant to the terms and definitions of the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980;

l. There is no insurance coverage for the named insured, JACK VINCENT ROSALES VII for any property damage liability, personal injury protection benefits, custom equipment coverage, comprehensive coverage or collision coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

m. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JACK VINCENT ROSALES VII for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

n. There is no insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

o. There is no personal injury protection ("PIP") insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

p. There is no property damage liability insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

q. There is no collision insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

r. There is no comprehensive insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident;

s. There is no custom equipment insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX2980, for the March 1, 2019 accident.

* * *

Municipal corporations—Zoning—Gambling establishments—Mayor's veto of city commission resolution approving settlement agreement resolving litigation regarding permits for gambling establishment is enforceable, and defendants are enjoined from proceeding with settlement agreement—City charter that grants mayor veto authority over any land use decision of city commission grants mayor authority to veto decision to allow developer to secure permit to use its land for purposes of operating gambling establishment—Fact that land use decision is made within context of agreement settling litigation does not affect mayor's veto authority

ERNESTO CUESTA, et al., Plaintiffs, v. CITY OF MIAMI, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-006298-CA-01, Section CA43. January 19, 2021. Michael A. Hanzman, Judge. Counsel: Eugene E. Sterns, Grace L. Mead, Jenea M. Reed, and Joseph J. Onorati, Sterns Weaver Miller Wessler Alhadeff & Sitterson, P.A., Miami, for Plaintiffs. Brian J. Shack, Assistant General Counsel, Braman Management Association, Miami, for Plaintiffs 2020 Biscayne Boulevard, LLC, 2060 Biscayne Boulevard, LLC, 2060 NE 2nd Ave., LLC, and 246 NE 20th Terrace, LLC. Raquel A. Rodriguez, Buchanan Ingersoll & Rooney, PC, Miami; and S. Carey Villeneuve, Buchanan Ingersoll & Rooney, PC, Ft. Lauderdale, for Defendant City of Miami.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. **INTRODUCTION**

Before the Court are the parties' cross-motions for summary judgment directed at Count 4 of Plaintiffs' Amended Complaint. The motions present one legal issue: Did Mayor Francis X. Suarez have the authority to veto the City Commission's decision to approve a Settlement Agreement resolving litigation between the City of Miami ("City") and West Flagler Associates, Ltd. ("West Flagler")? The settlement enables West Flagler to secure a permit to conduct gaming operations on its property without obtaining the four fifths (4/5ths) affirmative vote of the City Commission otherwise required by Ordinance No. 13791. More specifically, the Settlement Agreement permits West Flagler to secure approval of its "application for a building permit for a jai alai fronton . . . and any related permits, licenses and approvals . . ." without being "subject to the requirements of [this] Ordinance." DE 57, Ex. 27, ¶ 2(i).

On February 21, 2020, Mayor Suarez vetoed Resolution R-20-0048 (passed by a 3 to 2 vote) approving the settlement because, in his view: (a) "the Commission approval of the settlement agreement was premature and limited public participation and consideration;" and (b) "[t]he proposed settlement agreement permits [West Flagler] to circumvent the democratic process by permitting gambling use without the requirement of obtaining . . . a 4/5th vote of the Commission and public input and consideration." DE 57, Ex. 24. Mayor Suarez issued his veto "[p]ursuant to the authority vested in [him] under the provisions of 4(g)(5) of the Charter of Miami . . . ." *Id.* That provision, which enumerates the "Powers and duties of mayor," provides that:

> The Mayor shall, within ten days of final adoption by the City Commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decisions of the city Commission . . .

Section 4(g)(5) then affords the Commission "somewhat of a review mechanism" by giving it override power by a 4/5ths vote. *Miami-Dade County v. City of Miami*, 2020 WL 7636006, at *6 (Fla. 3d DCA, December 23, 2020) [46 Fla. L. Weekly D19a]; City of Miami Charter § 4(g)(5). The Commission did not utilize that "override power" here.

Through their "Motion for Summary Judgment Enforcing the Mayoral Veto and Voiding the Settlement Agreement" ("Motion"), Plaintiffs insist that "[t]he City Commission's decision to authorize the 'Settlement Agreement' falls squarely within the Mayor's authority to veto any 'zoning,' 'land use,' 'master plan,' 'legislative,' or 'quasi-judicial' decision," and ask the Court to declare "the Mayoral veto enforceable and the 'Settlement Agreement' void." Motion pp. 17, 30. Defendants disagree and, through their "Joint Cross-Motion for Partial Summary Judgment Regarding Count 4 and the Invalidity of the Mayoral Veto" ("Cross-Motion"), they ask the Court to declare Mayor Suarez's veto a nullity and "dismiss Count 4 with prejudice." Cross-Motion p. 3. Defendants point out that the City Attorney is empowered to negotiate settlement agreements, subject only to the Commission's direction. This—according to Defendants—means that the Mayor plays no role, and has no say in, the process of settling litigation. Defendants also correctly note that the decision to "Settle Litigation" is not one of the enumerated actions subject to the Mayor's veto power. Cross-Motion p. 13. As the Mayor's veto power "expressly extends only to 'legislative, quasi-judicial, zoning master plan or land use decision of the City Commission,' " and a decision to approve an agreement resolving litigation is not listed among these "finite categories," Defendants insist that any decision approving a settlement falls outside the "unequivocal boundaries of the Mayor's veto powers . . ." Cross-Motion p. 14. In the alternative, Defendants argue that the Commission's decision to

approve the Settlement Agreement "is not a 'legislative,' 'quasi-judicial,' 'zoning, 'master plan' or 'land use decision.' " Cross-Motion p. 16.

On November 16, 2020, the Court entertained oral argument on the parties' cross-motions. At the Court's urging, the parties, perhaps begrudgingly, then agreed to participate in mediation. The Court also permitted limited additional briefing on § 4(g)(5)'s legislative history. On January 12, 2021 the parties notified the Court that mediation had reached an impasse.

While the issue presented is reasonably debatable (some might even say a close call), after careful consideration of the parties' outstanding presentations (both written and oral), the Court concludes that the City Commission's decision to enter into the Settlement Agreement—which cleared the path for West Flagler to secure a permit to operate pari-mutuel facilities without navigating the process otherwise required by law—is, at its core, a "land use decision" that Mayor Suarez had a legal right to veto.[1] The Court, for the reasons elaborated upon herein, therefore grants Plaintiffs' Motion and denies Defendants' Joint Cross-Motion.

II. **RELEVANT FACTS AND PROCEDURAL HISTORY**

The history of this case, and the specifics of the claims Plaintiffs advance, are discussed in the Court's "Corrected Order on Motions to Dismiss" and need not be exhaustively repeated here. *See Cuesta v. City of Miami*, 28 Fla. L. Weekly Supp. 602a (11th Jud. Cir., August 24, 2020); Order, DE 53. The Court will, however, provide a brief recap, focusing on the facts most pertinent to the issue framed by the parties' cross-motions.

A. **West Flagler Secures Opinion Letters from City Zoning Administrators**

Defendant West Flagler (and/or its affiliates) owns and operates the Magic City Casino. In 2012 it secured from a City Zoning Administrator a letter which opined that the then existing City of Miami Zoning Code permitted gambling/pari-mutuel wagering in any area zoned for "entertainment establishments" (the "2012 Gambling letter"). West Flagler then entered into a Memorandum of Understanding ("MOU") granting it the right to acquire eighteen (18) abutting or adjoining parcels of real estate totaling 11.70 acres located in Miami's Edgewater neighborhood which, at the time, was zoned for "entertainment establishments." West Flagler then applied to the State of Florida, Division of Pari-mutuel Wagering, for a license to conduct pari-mutuel wagering and card room gaming on that property.

In its application to the State, West Flagler offered the 2012 Gambling Letter as evidence that the applicable City of Miami land development regulations, including the then extant zoning code (Miami 21), permitted pari-mutuel wagering on the property. The State, however, demanded more current evidence and, in response to that demand, West Flagler requested supplemental letters for each of the eighteen (18) parcels re-affirming the opinion issued in 2012. Another City Zoning Administrator then issued eighteen (18) separate letters (the 2018 Gambling Letters) wherein he opined (consistent with and based solely upon the 2012 Gambling Letter) that "pari-mutuel and other gaming operation uses are allowed and considered Entertainment uses," and that a "permit issued by Florida Division of Pari-mutuel Wagering for a new summer jai alai permit [would] also allow cardroom operations" to be conducted "on this location." DE 57, Ex. 13.

B. **Public Reaction**

In July 2018, the State issued the requested permit authorizing West Flagler to engage in pari-mutuel wagering at the MOU property. The issuance of that permit prompted news media coverage which, according to Plaintiffs, first alerted the public that City Zoning Administrators had privately, and allegedly without authority, interpreted Miami 21 to open large swaths of the City to gambling. Certain of the Plaintiffs then urged city leaders to enact an ordinance that would: (a) clarify that gambling differed from existing, permitted uses under the Zoning Code; and (b) preclude the issuance of any permit authorizing gambling/pari-mutuel activity in any part of the City absent an affirmative vote of 4/5ths of the City Commissioners. On September 27, 2018, following notice and extensive debate at multiple public hearings, the City Commission accommodated that request and adopted Ordinance 13791, clarifying that gambling was different from existing permitted uses, and requiring that any gambling/pari-mutuel use be subject to review at a publicly noticed hearing and approved by a 4/5ths vote of the City Commission. DE 57, Ex. 15. The City then rejected West Flagler's building permit application.[2]

C. **The Federal Litigation and Settlement Agreement**

In response to the City's passage of Ordinance 13791, and its refusal to issue a building permit, West Flagler brought suit in the United States District Court for the Southern District of Florida alleging, among other things, that the 2012 and 2018 Gambling Letters conferred upon it a vested right to develop the property and operate its proposed jai alai/card room facility. *See West Flagler Associates, Ltd. v. City of Miami*, Case Number 19-CV-21670 (S.D. Fla.). West Flagler alleged that, in reliance on those letters, it incurred substantial expenditures and obligations acquiring and developing the project, and that "it would be wrongful and unjust to destroy the rights West Flagler acquired." DE 57, Ex. 18. West Flagler also alleged that Ordinance 13791 was intended to apply retroactively, and that forcing it to adhere to the requirements of that ordinance would impair its vested rights. *Id.* West Flagler's Complaint sought injunctive relief, declaratory relief, damages and attorney's fees.

The District Court denied the City's Motion to Dismiss and the parties proceeded with discovery. Eventually, the City and West Flagler decided to amicably resolve the case. In a memorandum presented to the Commission, the City Attorney advised that the contemplated settlement would: (a) allow West Flagler to apply for a permit to build a summer jai alai facility without the need to obtain an exception approved by a 4/5ths vote of the Commission; (b) that if in the future West Flagler sought to open a cardroom, it could secure approval by a simple majority vote of the City Commission; (c) that West Flagler agreed it would never operate slot machines; and (d) each side would bear its own attorney's fees and costs. DE 57, Ex. 21. The City Attorney then delivered to the Commission a proposed Resolution authorizing the City Manager to execute "any and all settlement documents" necessary to effectuate a "complete settlement of [West Flagler's] claims . . . ." DE 57, Ex. 23.

On February 13, 2020, the City Commission by a 3-2 vote adopted Resolution R-20-0048 authorizing the settlement as recommended by the City Attorney. On February 21, 2020, Mayor Suarez vetoed that Resolution. Three days later, at the first scheduled meeting following the veto, the Commission did not override that veto.

Notwithstanding the Mayor's veto, on March 12, 2020 West Flagler, the City Attorney, and the City Manager executed the Settlement Agreement and submitted it to the District Court as part of a "Joint Motion for Dismissal without Prejudice." DE 57, Ex. 27. The "Settlement Agreement" and "Mutual Limited Releases" acknowledged the Mayor's veto, and provided that if the agreement were reversed or set aside for any reason, the releases would be null and void and the parties would be restored to their pre-settlement posture. Based upon the parties' representation that their dispute had been resolved, the District Court dismissed the case without prejudice.

D. **This Case**

On May 21, 2020, Plaintiffs (nine Miami based businesses, Miami homeowners, and Miami homeowners associations)[3] filed their Amended Complaint for "Declaratory and Injunctive Relief" alleging that the 2012 and 2018 Gambling Letters were secured unlawfully and are incorrect, and that these letters—as well as the Settlement

Agreement—violate the Miami Comprehensive Neighborhood Plan (Count 1); the City of Miami Zoning Code (Count 2); Florida's Municipal Home Rule Powers Act (Count 3); and the Miami City Charter (Count 4). The Court dismissed Plaintiffs' claims challenging the 2012 and 2018 Gambling Letters, concluding that whether those letters were issued unlawfully and/or are legally correct is of no moment, as the City had the unfettered discretion to assess its litigation risk and, *absent illegality*, settle the dispute with West Flagler on any terms it deemed acceptable—a decision this Court may not second guess. *See, e.g., Detournay v. City of Coral Gables*, 127 So. 3d 869, 874 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2552a] (". . . we must defer to the City's right to exercise its discretion to seek a settlement . . ." and "[t]o the extent that the Homeowners seek to have the City . . . instead vigorously prosecute the enforcement actions, they need to knock on the doors of city hall, not the courthouse"). Thus, the only justiciable issue presented here is whether the Settlement Agreement itself "is legal, nothing more." *Cuesta, supra*. And if it was entered into over a lawful veto it is not "legal."

At a status conference held on August 24, 2020, the Court questioned whether the discrete issue raised by Count 4 (whether Mayor Suarez had the authority to veto the decision to enter into the Settlement Agreement) was one of pure law that could be decided at the outset on cross-motions for summary judgment. The parties agreed that it was, and the Court—wanting to first pick low hanging fruit—ordered briefing on that legal question, as a ruling that Mayor Suarez had the authority to veto the settlement would effectively end the case and obviate the need to address Plaintiffs' numerous other challenges. The Court then entered an order setting a timetable for briefing, scheduling oral argument, and staying discovery.

III. **ANALYSIS**

Before proceeding further the Court wants to make something perfectly clear: this Court is not concerned with, nor empowered to second guess, the City's decision to settle its case with West Flagler, or the terms of the settlement. As this Court explained previously, the issue before it is not "the wisdom of the parties' private settlement." *Cuesta, supra*. The Court said before, and says here again, that: (a) both the City and West Flagler faced litigation risk; (b) the Settlement Agreement was a reasonable and good faith compromise of the dispute between the City and West Flagler; and (c) the Settlement Agreement was negotiated at arm's length and was not in any way collusive. The Court has no doubt that the City Attorney exercised sound judgment and acted in good faith in negotiating this compromise and in recommending it to her client. The Court also has no doubt that the City Commission acted in good faith in deciding to accept the settlement, thereby eliminating the City's exposure.

Similarly, the Court is not concerned with, nor empowered to second-guess, the wisdom of Mayor Suarez's veto. The Mayor decided, for good or ill, that the settlement was "not in the best interest of the City of Miami or its residents . . .," DE 57, Ex. 24, and it makes no difference whether others (including this Court) may disagree. The City may (or may not) end up in a far worse position as a result of the Mayor's decision. But that also is of no concern to the Court.

Rather, the only issue to be adjudicated here is whether the Mayor had the legal right to veto the Commission's decision. The answer to that question turns *solely* upon whether the Commission made a "legislative, quasi-judicial, zoning, master plan or land use decision." Charter § 4(g)(5). Nothing else matters, including whether he is a "strong" mayor, a "weak" mayor, or something in between. While the Court appreciates, and has been educated by, the academic feast served on this interesting topic, *see, e.g.,* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 Yale L. J. 2542 (2006), it makes no difference whether—as Defendants' posit—the City has enacted "a 'weak mayor' form of government." Cross-Motion p. 10. Section 4(g)(5) of the Charter grants the Mayor specific "veto authority" regardless of how "weak" he may (or may not) be, subject *only* to the Commission's "override power." *See* 2020 WL 7636006.

Turning to the substantive issue presented, the Court must begin its analysis by looking at the language of the Charter itself. *See, e.g., Martinez v. Hernandez*, 227 So. 3d 1257, 1259 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2061a] (City Charters "are subject to the same rules of construction as state statutes"); *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) [37 Fla. L. Weekly S439a] ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning"); *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 317 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1615a] ("[t]he Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself . . . is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms")(internal citations omitted).

Section 4(g)(5) is, on its face, direct and expansive. This provision first covers *all* legislative or quasi-judicial decisions of *any* nature. This, by itself, is a broad grant of veto power. But the Charter then adds to this list *all* decisions involving the regulation of real property, even if such decisions are not legislative or quasi-judicial. Thus, *any* decision involving the regulation of land is subject to the Mayor's veto, regardless of whether it is "legislative," "quasi-judicial" or "executive."

The Charter then goes a step further by making it clear that the Mayor's veto power is not limited to conventional land use decisions such as zoning, re-zoning, or changes to the Master Plan. Section 4(g)(5) instead covers any "land use decision" whatsoever. While that phrase is not defined in the Charter, common sense and ordinary usage leads this Court to conclude, without difficulty, that a "land use decision" is one that authorizes, prohibits, or in any way regulates the use of land. There is simply no reason to interpret this phrase any other way, or circumscribe it through judicial hair-splitting or over-analysis. *See, e.g., Dudley v. State*, 139 So. 3d 273 (Fla. 2014) [39 Fla. L. Weekly S335a] (when terms are not statutorily defined, a court should apply ordinary definition and common usage). If a decision pertains or relates to the use of land it is, by definition, a "land use decision" that falls comfortably within §4(g)(5), and a "faithful application of the plain and ordinary meaning" of this Charter language "should not be subordinated to conjecture about the possible purposes for which the [Charter language] might have been enacted." *Riverside Heights Development, LLC v. City of Tampa*, 2020 WL 7768520, at *3 (Fla. 2d DCA, December 30, 2020) [46 Fla. L. Weekly D35a].

Even if the Court were to venture beyond the ordinary/common sense meaning of the phrase "land use decision," the result here would be the same applying well settled rules of statutory construction. The Court would first consider, and give great weight to, the purpose designed to be accomplished by the legislation. *See, e.g., Badaraco v. Suncoast Towers V Associates*, 676 So. 2d 502, 503 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1546g] ("[c]ourts determine legislative intent by considering a variety of factors, including the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters"). There are few matters more critical to the general welfare and well-being of a community than the regulation of the land within its borders. That is precisely why land-use is so heavily regulated at both the State and local level.

Given the importance of "land use decisions," it is hardly surprising that the Charter affords the Mayor, as the "head of City government," the right to veto those decisions, particularly when one considers the fact that this veto power is far from absolute. Charter § 4(g)(5). It merely permits the Mayor to insist on super-majority (*i.e.*, 4/5ths) approval when s/he believes that a "land use decision" is

contrary to the best interests of his/her constituents. There is nothing the least bit irrational or inconceivable about the Charter ceding such authority, thereby affording the Mayor a say in decisions of such magnitude. And contrary to Defendants' suggestion, the decision to permit a landowner to operate pari-mutuel facilities—unshackled from the burdens imposed by law on all other property owners—is not one that "tangentially implicates the use of land." Cross-Motion p. 18. It is a decision that will undoubtedly have a material impact on the surrounding community.

Applying yet another rule of statutory construction, an examination of §4(g)(5) as a "cohesive whole," *see Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287-88 (Fla. 2000) [25 Fla. L. Weekly S1126a], confirms that the Charter's drafters were committed to ensuring that the Mayor had broad veto authority over decisions involving the use of land, as the Charter could have, but does not, cabin that power by limiting it to only specified types of land use decisions. The drafters instead chose to make it clear that *all* "land use decisions" were subject to veto by: (a) including within the scope of § 4(g)(5) decisions involving land even if they were "executive," as opposed to "legislative" or "quasi-judicial;" and (b) specifying that the Mayor's veto power is not limited to "zoning" and "master plan" decisions, but rather attaches to *any* "land use decision." Put simply, nothing in the Charter suggests that the phrase "land use decision" should be narrowly construed.

Finally, the Court notes that unlike state legislation, § 4(g)(5) was added to the Charter only after being voted upon by the electorate. In circumstances such as this, where legislative enactments are presented to—and approved by—the voters, it is even more important that the language used be interpreted as it would be understood by the common man. *See City of Jacksonville v. Cont'l Can Co.*, 151 So. 488, 489-90 (Fla. 1933) ("[t]he words and terms of a Constitution are to be interpreted in their most usual and obvious meaning . . ."); *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 800 (Fla. 2014) [39 Fla. L. Weekly S45a] (["i]n construing terms used in the constitution and presented to the voters . . . this Court looks to dictionary definitions of the terms because we recognize that, 'in general, a dictionary may provide the popular and common-sense meaning of terms presented to the voters' "); *see also, State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1845a] (the court's duty is to apply the terms of an insurance contract as they would be understood by the "man-on-the-street") (internal citations omitted).

The question, then, is whether the City Commission's decision to enter into *this particular settlement* is a "land use decision." Viewing it outside the context of a settlement agreement the answer is obvious, as the decision permits West Flagler to secure a permit that will enable it to "use" its "land" for purposes of operating a pari-mutuel facility without having to traverse the obstacle course (*i.e.*, Ordinance 13791) faced by all other owners of property zoned for "entertainment establishments." The decision is therefore a "land use decision," as it directly and materially pertains/relates to the "use" of "land" within the City. So if this decision had been made in the routine course of the Commission's deliberative process, pursuant to a garden variety application submitted by West Flagler (*i.e.*, outside the context of an agreement settling litigation) it would undoubtedly be subject to the Mayor's veto.

Defendants, however, forcefully argue that because this particular decision was made in order to settle litigation, the Court should view it as no more than a decision to settle a case, ignoring the underlying subject matter and the consequences of the decision itself. Defendants first point out that "[u]nder the Charter the City Attorney is primarily responsible for prosecuting and defending cases involving the City, as well as negotiating and recommending settlement agreements." Cross-Motion p. 11, citing City Charter §21; *see also* Section 18-232 of the City Code, delegating to the City Attorney the authority to "perform or supervise the performance of all legal services," including "the defense or prosecution of settlements agreements of all classes or sorts . . ." This, in Defendants' view, means that the Mayor never has veto power over a decision to settle litigation. The Court disagrees.

The relevant powers afforded the City Commission, City Attorney, and Mayor are not mutually exclusive nor in conflict. The City Attorney has the authority to negotiate the settlement of any litigation, the Commission has the authority to accept or reject the City Attorney's recommendation to settle (or not settle) a case, and the Mayor has the authority to veto the Commission's decision to settle if—and *only* if—that decision is legislative, quasi-judicial, or relates to zoning, the master plan, or the use of real property. These allocated powers are not repugnant, but rather work hand in glove. Put another way, the Charter's provisions allocating authority among the City Attorney, Commission, and Mayor are easily harmonized. *See, e.g., Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 455 (Fla. 1992) ("[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another"); *Martinez v. Hernandez,* 227 So. 3d 1257, 1259 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2061a] ("[t]he rules of statutory construction are applicable to the interpretation of municipal charters.")

Defendants next make much of the fact that the decision to "settle a lawsuit' is not enumerated in §4(g)(5) of the Charter, and claim that application of the principle of statutory construction *expressio unius est exclusio alterius* compels the conclusion that a decision to settle a lawsuit is therefore never subject to a mayoral veto. The Court again disagrees.

Section 4(g)(5) of the Charter is concerned with the *type* of decision made by the Commission, not the package it arrives in. Commission decisions are implemented by ordinance, resolution, contracts, and other means. The Charter, however, focuses exclusively on the nature of the decision, and if the Commission renders a "zoning," "master plan" or "land use" decision, it matters not whether that decision is memorialized via ordinance, resolution, a private contract, or a litigation settlement agreement. It is the nature of the decision that dictates whether the Mayor's veto power is implicated, and a decision is not insulated from the Mayor's veto power merely because it is embedded within a settlement agreement.

Aside from being unfaithful to the text of § 4(g)(5), acceptance of Defendants' argument also would thwart the purpose underlying this legislation. The Mayor, as a matter of public policy, is given veto power over "land use decisions" because those decisions materially impact the quality of life and cohesiveness of a community. That public policy is implicated regardless of whether the Commission makes its "decision" in the routine course of its business, for purposes of setting a lawsuit, or in any other context, as the resulting impact on the community is exactly the same. *See, e.g., Bretherick v. State,* 170 So. 3d 766, 773 (Fla. 2015) [40 Fla. L. Weekly S411a] (". . . statutory enactments 'are to be interpreted so as to accomplish rather than defeat their purpose' "). Furthermore, treating a decision differently depending upon the context in which it is made would place property owners who secure land use concessions by suing (or threatening to sue) the City in a stronger position vis-à-vis the Mayor's veto power than those who simply ask for such concessions using ordinary process. That would be an absurd result. *See, e.g., Florida Dept. of Envtl. Prot. v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008) [33 Fla. L. Weekly S493a] ("the Court should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences").

In sum, the Court rejects the argument that a decision falling within the scope of §4(g)(5) is immune from the Mayor's veto power any time it is enshrined by a settlement agreement. *See, e.g., Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996) [22 Fla. L.

Weekly D107b] (holding that a settlement agreement obligating the county to rezone property and bypassing the strict requirements of the rezoning process amounted to an *ultra vires* act). And the fact that §4(g)(5) does not list the decision to "settle a lawsuit" as one that the Mayor may veto is of no legal consequence, particularly since the Charter refers to *only* the nature of the decision (*i.e.*, legislative, quasi-judicial, zoning, master plan, land use), never mentioning *any* of the mechanisms that might be employed to implement the decision (*i.e.,* ordinances, resolutions, settlement agreements, private contracts, etc.). *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003) [16 Fla. L. Weekly Fed. S35a] (the negative implication canon—expressing one item of an associated group or series excludes another left unmentioned—does not assist in ascertaining legislative intent "unless an item unmentioned would normally be associated with items listed"); *State of Ill., Dept. of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) ("[n]ot every silence is pregnant"); *Burns v. United States*, 501 U.S. 129, 136 (1991) (in many cases "silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective").

IV. **CONCLUSION**

The drafters of the City of Miami Charter, and the citizens who voted to approve it, granted the Mayor a right to veto any "land use decision." This expansive, all-inclusive authority was not handed out willy-nilly and without forethought. The decision to give the Mayor this broad veto power was carefully considered and enacted into law because—as the Court said earlier—"land use decisions" can dramatically impact the health and well-being of a community. For that reason, the Charter deliberately (and rationally) gives the Mayor a say in all "land use decisions," permitting a veto when s/he believes that the action taken by the Commission might negatively impact the general welfare of the City. The Charter then permits the Commission, by a 4/5ths vote, to override any veto. This thoughtful allocation of power, effectuated through a protocol of checks and balances, cannot be judicially disrupted, as the Court is not at liberty to stick its nose under the legislative tent. *See, e.g., State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) [22 Fla. L. Weekly S682a] (". . . the making of social policy is a matter within the purview of the legislature . . .").

The Charter says what it means and means what it says. The Mayor has the power to veto any "land use decision," and the Court concludes that the Commission's decision to enter into this Settlement Agreement was a "land use decision" as that phrase would be understood by the average citizen. *See, e.g., Black's Law Dictionary*, (11th ed. 2019) (defining a "land use regulation" as "[a]n ordinance or other legislative enactment governing the development or use of real estate . . ."); Fla. Stat. §167.3164(27) (defining "land use" to include "the development that is proposed by a developer . . . or use that is permitted . . . on the land . . ."); *D.R. Horton, Inc. - Jacksonville v. Peyton*, 959 So. 2d 390 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1496c] (upholding the Mayor's veto of a resolution authorizing a contract for private development). Mayor Suarez, therefore, acted within his lawful authority in vetoing this land use decision in "Settlement Agreement" form.[4,5]

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

1. Plaintiffs' "Motion for Summary Judgment Enforcing the Mayoral Veto and Voiding the Settlement Agreement" is **GRANTED**. The Court declares that the Mayor had authority to veto the Settlement Agreement between the City and West Flagler and enjoins Defendants from proceeding forward with that settlement.

2. Defendants' "Joint Cross-Motion for Partial Judgment Regarding Count 4 and the Invalidity of the Mayoral Veto" is **DENIED**.

[1]Mayor Suarez has not sought permission to intervene (or otherwise participate) in this case. He has, however, conveyed his "official position." Not surprisingly, the Mayor believes his "February 21, 2020 Veto of Resolution R-20-0048 was a valid and lawful veto under Section 4(g)(5) of the City of Miami Charter . . . ." *See* January 8, 2020 correspondence from Francisco R. Maderal, Esquire to Grace L. Mead, Esquire, DE 77, Ex. 1.

[2]Ordinance 13791 applies to "Gambling Facilities," defined as "any facility that offers gambling including, but not limited to, facilities regulated by Chapters 550 and 551 and section 849.086 Florida Statutes as each may be amended from time to time." DE 57, Ex. 15. West Flagler's proposed operations undeniably fit within this definition.

[3]Ernesto Cuesta, Brickell Homeowners Association, Inc., Ronald M. Friedman, 2020 Biscayne Boulevard, LLC, 2060 Biscayne Boulevard, LLC, 2060 NE 2nd Ave., LLC, 246 NE 20th Terrace, LLC, Morningside Civic Association, and Paraiso Beachclub Operator, LLC.

[4]Not willing to abandon any argument, no matter how tenuous it may be, Plaintiffs claim that the Commission's decision to enter into the Settlement Agreement was a "zoning decision," a "land use decision," a "master plan decision," a "quasi-judicial decision" and, in the alternative, a "legislative decision." Motion pp. 19-26. Because the Court concludes that the Commission's approval of the Settlement Agreement is a "land use decision," it need not decide whether the decision is also a "quasi-judicial," "legislative," "zoning," or "master plan" decision. The Court will instead adhere to the "cardinal principle of judicial restraint" and "go no further" than necessary. *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring).

[5]Plaintiffs represent that to carry out the Settlement Agreement state law requires the Commission to approve amendments to "both the City's zoning code and its Master Plan." Motion p. 1. Both the "Legislative Resolution" proposed by the City Attorney (DE 57, Ex. 21) and the "Resolution" authorizing the City Manager to execute "any and all documents" necessary to "complete [the] settlement" (DE 57, Ex. 23) do in fact recite that "the Miami 21 Code will be amended to reflect this settlement." *Id.* It appears, however, that there have "been no amendments made to Miami 21 as a result of the City Commission passing Resolution R-20-0048," and the record does not establish whether any such amendment(s) are in fact required. *See* Affidavit of City Clerk Todd B. Hannon. While the need to amend the zoning code to reflect this settlement would no doubt bolster the argument that it constitutes a "land use decision," the fact that such an amendment (though obviously contemplated) may turn out not to be necessary does not alter the Court's conclusion.

* * *

Insurance—Automobile liability—Declaratory action— Coverage—Exclusions—Damage that occurs while using insured vehicle in commission of crime—Under policy exclusion, there is no bodily injury or property damage liability coverage arising from incident in which employee of towing company stole vehicle using insured tow truck—Insurer has no duty to defend or indemnify towing company or its employee for any claim arising from incident, including subrogation suit filed by insurer of owner of stolen vehicle

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. NU-WAY TOWING SERVICE INC., et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-000636-CA-01, Section CA32. February 9, 2021. Mark Blumstein, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Marlin S. Muller, Hidalgo Law Firm, P.A., Miami, for Defendants Nu-Way Towing Service, Inc. and Rafael Cruz.

ORDER ON PLAINTIFF, INTEGON PREFERRED INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANTS, NU-WAY TOWING SERVICE, INC. AND RAFAEL CRUZ

THIS CAUSE having come before this Court on February 4, 2021 via Zoom Video Conference on the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment as to Defendants, NU-WAY TOWING SERVICE, INC. and RAFAEL CRUZ, after hearing argument of counsel, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Integon Preferred Insurance Company brought the instant Action for Declaratory Judgment against the insureds, Nu-Way Service, Inc., Rafael Cruz and Juan Alberto Cruz, and the ancillary Defendants, regarding the liability coverage denial as a result of the insured vehicle being used in the commission of a crime.

On or about May 19, 2017, Juan Alberto Cruz was operating one of the insured vehicles on the insurance policy issued by Integon Preferred Insurance Company to Nu-Way Towing Service, Inc., when

Juan Alberto Cruz committed a crime (grand theft) by stealing a 2016 Honda Accord, owned by Jose Aguilar, and insured by The Responsive Auto Insurance Company. During the investigation of the claim, it was determined that the 2016 Honda Accord was found approximately two days later at [Editor's note: address redacted.], Miami, FL 33127, completely stripped with only the engine, transmission, and chassis left.

During the investigation of the facts and circumstances surrounding the motor vehicle incident, it was determined that Defendant, Juan Alberto Cruz, was arrested on May 26, 2017 for third degree felony/grand theft (Fla. Stat. § 812.014(2)(c)6), which was related to the incident which occurred on May 19, 2017 with the insured vehicle.

Further, it is undisputed that the insured driver, Juan Alberto Cruz, is subject to the exclusions listed under the Liability Coverage section of the subject insurance policy. Pursuant to paragraph # 14 of the Exclusions listed under the Liability Coverage section of the subject policy, Integon Preferred Insurance Company may deny coverage as follows:

> **Bodily injury** or **property damage** to any person that results from an **accident** or **loss** that occurs while the **insured** is committing a **crime**.
>
> *See page 7 of the insurance policy, attached to the Complaint and Motion for Summary Judgment as Exhibit "B" (emphasis in original).*

Additionally, pursuant to the policy of insurance, "Crime" is defined in the policy as:

> Any act or omission that is:
> 1. A state or federal felony in the United States;
> 2. An attempt to flee or elude law enforcement or a crime scene; or
> 3. An illegal activity, trade or transportation; whether or not there is an arrest, charge or conviction.
>
> *See page 2 of the insurance policy, attached to the Complaint and Motion for Summary Judgment as Exhibit "B."*

Under the "**EXCLUSIONS**" section for liability coverage it states that:

> A **We** do not provide Liability Coverage for, nor do **we** have a duty to defend for:
>
> 1. **Bodily injury** or **property damage**: Caused intentionally by, or at the direction of, an **insured**; orThat is, or should be, reasonably expected to result from an intentional act of an **insured**;
>
> even if the actual **bodily injury** or **property damage** that results is different than that which was intended
>
> 2. **Property damage** to property: Owned by;Rented to;Used by;Transported by; orin the care, custody, or control of;
>
> **you**, a **family member** or an **insured**, including damage to **autos** being towed by the **insured**
>
> *See pages 6-7 of the insurance policy, attached to the Complaint and Motion for Summary Judgment as Exhibit "B" (emphasis in the original).*

Claims were presented under the subject insurance policy arising from the incident on May 19, 2019, including but not limited to the property damage claim by Jose Aguilar for damage for the 2016 Honda Accord. However, liability coverage was denied by the Carrier, Integon Preferred Insurance Company based on the Exclusion #14 under the Liability Coverage section of the subject insurance policy. Applying the facts of the loss to the policy language, there is no properly damage coverage for this matter because Juan Alberto Cruz was using the insured vehicle in the commission of a crime.

Analysis Regarding the Duty to Defend and/or Indemnify

Counsel for the Defendants, Nu-Way Towing Service, Inc. and Rafael Cruz, represented to the Court that it set forth Affirmative Defenses regarding the issue on the duty to defend. Specifically, the Defendants' Response to the Plaintiff's Motion for Summary Judgment included a copy of the Defendants' Affirmative Defenses. The Defendants, Nu-Way Towing Service, Inc. and Rafael Cruz, set forth the following Affirmative Defenses:

> Integon's duty to defend Nu-Way is based solely on the allegations of the Complaint filed by Responsive Auto Insurance Company ("Responsive"). *Nat. Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 535 (Fla. 1977). Responsive's Complaint alleges, in part, as follows:
>
> A. On May 19, 2019, Juan Cruz, was operating a tow truck provide to him and owned by Nu-Way in Miami-Dade County. On that date, Juan Cruz, while acting within the course and scope of his employment, used the Nu-Way tow truck to improperly remove and steal a 2016 Honda Accord motor vehicle owned by Jose Aguilar. The subject 2016 Honda Accord was recovered several days later completely striped and was declared a total loss.
>
> B. Nu-Way, as the owner of the tow-truck and employer of Juan Cruz is vicariously responsible for the acts of its employees in improperly towing the subject 2016 Honda Accord. Alternatively, Nu-Way negligently entrusted its tow-truck, either in ignorance or in complete disregard to the fact that Juan Cruz had a prior history of auto theft.
>
> Under Florida law, the duty to defend is 'distinct from and broader than' the duty to indemnify. If a complaint alleges some claims which are within coverage and some claims outside of coverage, the question of defense must be resolved in favor of the insured, and the insurer must provide a defense for the entire action. *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299. 1307 (Fla. 1 Dist. Ct. App. 1992); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 811 (Fla. 1 Dist. Ct. App. 1985); *Tropical Park v. United States Fid. & Guar. Co.*, 357 So. 2d 253, 256 (Fla. 3 Dist. Ct. App. 1978).
>
> Responsive's Complaint does not affirmatively allege criminal conduct, a crime, or an attempted crime. Rather, Responsive alleges an improper tow purportedly caused by negligent entrustment. While Responsive does use words such as "steal" and "theft", the use of such words is expressly alternative to the allegations of an improper tow and negligent entrustment. In the instant action, Integon does not allege that negligent entrustment or improper tow defeat is duty to defend or its duty to indemnify. As such, Nu-Way is entitled to a defense and indemnification by Integon.

Counsel for the Defendants argued that duty to defend in this coverage Action is based on the separate related lawsuit filed by The Responsive Auto Insurance Company against Nu-Way Towing Service, Inc. Specifically, counsel for the Defendants argued that the duty to defend is limited to the four-corners of the complaint in the "underlying action" filed by The Responsive Auto Insurance Company. Therefore, the Defendants, Nu-Way Towing Service, Inc. and Rafael Cruz, requested that the Court determine that Integon Preferred Insurance Company had a duty to defend and/or indemnify them under the subject insurance policy.

Counsel for the Plaintiff, Integon Preferred Insurance Company, argued that the separate related subrogation lawsuit filed by The Responsive Auto Insurance Company does not prohibit the Carrier at this time from seeking a declaration of its rights under the policy through an Action for Declaratory Judgment regarding the coverage denial and its duty to defend and/or indemnity its insureds as a result of the facts giving rise to a coverage denial. Counsel for the Plaintiff argued that the duty to defend and the "four-corners test" as to the other non-relevant complaint (the Responsive complaint) does not apply in this coverage Action, and that the only relevant complaint is the instant Complaint for Declaratory Judgment before this Court.

The Court agrees with the Plaintiff's argument and rules that the other complaint filed in the separate subrogation lawsuit does not preclude this Court from determining whether there is insurance coverage under a policy of insurance based on the terms and conditions of the policy, and whether the Carrier has a duty to defend and/or indemnify its insured(s), as alleged in the instant Complaint for Declaratory Judgment. The Carrier does not need to wait for the subrogation lawsuit to conclude for it to seek a determination of whether the Carrier owes a duty to defend and/or indemnify. There-

fore, the Court finds that the Liability Exclusion #14 applies based on the facts giving rise to the loss, and thus, the insurance policy bearing policy # 2004730004 does not provide bodily injury liability or property damage liability coverage to Nu-Way Towing Service, Inc., Rafael Cruz, and/or Juan Alberto Cruz, for any claims arising from the motor vehicle incident which occurred on May 19, 2017.

This Court hereby finds that Integon Preferred Insurance Company has no duty to defend and/or indemnify Nu-Way Towing Service, Inc., Rafael Cruz and/or Juan Alberto Cruz for any bodily injury or property damage liability insurance claim arising from the motor vehicle incident which occurred on May 19, 2017. Specifically, Integon Preferred Insurance Company, has no duty to defend and/or indemnify Nu-Way Towing Service, Inc., in the lawsuit filed by The Responsive Auto Insurance Company, as Subrogee of Jose Aguilar (*The Responsive Auto Insurance Company, a/s/o Jose Aguilar v. Nu-Way Towing Service, inc.* - Case No.: 18-009351-CA-01).

Conclusion

This Court hereby finds that the Liability Exclusion #14 applies and thus, the insurance policy bearing policy # 2004730004, does not provide bodily injury liability or property damage liability coverage to Nu-Way Towing Service, Inc., Rafael Cruz, and/or Juan Alberto Cruz, for any liability claims arising from the motor vehicle incident which occurred on May 19, 2017. Thus, the Plaintiff owes no duty to defend and/or indemnify Nu-Way Towing Service, Inc., Rafael Cruz, and/or Juan Alberto Cruz for any claims brought by any claimants under the policy of insurance issued by Integon Preferred Insurance Company, under policy # 2004730004, arising from the motor vehicle incident which occurred on May 19, 2017. Therefore, there is no coverage for any bodily injury and/or property damage liability claim arising from the motor vehicle incident on May 19, 2017, under the insurance policy issued by Integon Preferred Insurance Company.

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

a. Based upon the properly filed Affidavit of Michael Pearce, and other evidence relied upon by the Plaintiff as set forth in its Complaint for Declaratory Judgment and Motion for Final Summary Judgment, there are no genuine issues of material fact in dispute, and thus, the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, and against the Defendants, NU-WAY TOWING SERVICE, INC. and RAFAEL CRUZ;

c. This Court hereby resolves the coverage issue in this Action in favor of the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY;

d. This Court hereby reserves jurisdiction to consider any claim for attorneys' fees and costs;

e. JUAN ALBERTO CRUZ is an insured under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, and subject to the exclusions listed under the Liability Coverage section of the policy;

f. There is no insurance coverage for the named insured, NU-WAY TOWING SERVICE, INC. for any bodily injury liability or property damage liability coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

g. There is no insurance coverage for RAFAEL CRUZ for any bodily injury liability or property damage liability coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

h. There is no insurance coverage for JUAN ALBERTO CRUZ for any bodily injury liability or property damage liability coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

i. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify NU-WAY TOWING SERVICE, INC. for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

j. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify RAFAEL CRUZ for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

k. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JUAN ALBERTO CRUZ for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

l. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify NU-WAY TOWING SERVICE, INC. for the property damage liability claim for JOSE AGUILAR arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

m. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify RAFAEL CRUZ for the property damage liability claim for JOSE AGUILAR arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

n. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JUAN ALBERTO CRUZ for the property damage liability claim for JOSE AGUILAR arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

o. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify NU-WAY TOWING SERVICE, INC. for the property damage liability claim for THE RESPONSIVE AUTO INSURANCE COMPANY, as subrogee of JOSE AGUILAR, in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, under Case No.: 18-009351-CA-01, arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

p. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify RAFAEL CRUZ for the property damage liability claim for THE RESPONSIVE AUTO INSURANCE COMPANY, as subrogee of JOSE AGUILAR, in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, under Case No.: 18-009351-CA-01, arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

q. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify JUAN ALBERTO CRUZ for the property damage liability claim for the property damage liability claim for THE RESPONSIVE AUTO INSURANCE COMPANY, as subrogee of JOSE AGUILAR, in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, under Case No.: 18-009351-CA-01, arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

r. There is no property damage liability insurance coverage for THE RESPONSIVE AUTO INSURANCE COMPANY, arising from the May 19, 2017 incident, under the policy of insurance issued by

INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

s. There is no property damage liability insurance coverage for JOSE AGUILAR arising from the May 19, 2017 incident, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004;

t. The Defendant, NU-WAY TOWING SERVICE, INC., is excluded from any bodily injury liability insurance coverage and property damage liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

u. The Defendant, RAFAEL CRUZ, is excluded from any bodily injury liability insurance coverage and property damage liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

v. The Defendant, JUAN ALBERTO CRUZ, is excluded from any bodily injury liability insurance coverage and property damage liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

w. The Defendant, JOSE AGUILAR, is excluded from any bodily injury liability insurance coverage and property damage liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

x. The Defendant, THE RESPONSIVE AUTO INSURANCE COMPANY, is excluded from any property damage liability insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

y. There is no bodily injury liability insurance under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident;

z. There is no property damage liability insurance coverage under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX0004, for the May 19, 2017 incident.

* * *

Insurance—Automobile—Application—Misrepresentations—Failure to disclose felony criminal history within past 10 years—Rescission of policy

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. JENNIFER DOMINGUEZ BASULTO, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012991-CA-01, Section CA08. January 21, 2021. Lourdes Simon, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jennifer Dominguez Basulto and Jose Dominguez, Pro se, Miami, Defendants.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANTS, JENNIFER DOMINGUEZ BASULTO, A/K/A JENIFFER DOMINGUEZ BASULTO AND JOSE DOMINGUEZ

THIS CAUSE having come before this Court at the hearing on January 19, 2021, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, JENNIFER DOMINGUEZ BASULTO, a/k/a JENIFFER DOMINGUEZ BASULTO (referred hereinafter as "JENNIFER DOMINGUEZ BASULTO") and JOSE DOMINGUEZ, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Imperial Fire and Casualty Insurance Company brought the instant Action for Declaratory Judgment and an Action for Breach of Insurance Contract against the Defendants, Jennifer Dominguez Basulto and Jose Dominguez, regarding the policy rescission as a result of the named insured's material misrepresentation on the application for insurance dated June 14, 2019. Plaintiff rescinded the policy of insurance on the basis that Jennifer Dominguez Basulto failed to disclose her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019. Had Jennifer Dominguez Basulto disclosed her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019, Plaintiff, Imperial Fire and Casualty Insurance Company would not have assumed the risk nor issued the insurance policy.

Specifically, Jennifer Dominguez Basulto answered "No" on the pertinent page of the Applicant Questionnaire on the application for insurance, which provides in pertinent part as follows:

> "Has the applicant or any listed driver been convicted, pleaded guilty, nolo contendere, or no contest to any felony, other than alcohol-related driving offenses during the last 10 years (whether adjudication was withheld or not)?"

In addition, Jennifer Dominguez Basulto signed the application for insurance, which provides in pertinent part as follows:

> "I understand and agree that a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract policy if (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by Imperial Fire & Casualty; or (b) If the true facts had been known by Imperial Fire & Casualty pursuant to a policy requirement or other requirement, Imperial Fire & Casualty would not have issued the policy, would not have issued it at the same premium rate, would not have issued a policy in as large an amount, or would have provided coverage with respect to the hazard resulting in the loss."

Following the November 7, 2019 motor vehicle accident, an Examination Under Oath (EUO) was taken of the Defendant, Jennifer Dominguez Basulto, on February 19, 2020, wherein Jennifer Dominguez Basulto disclosed under oath to Plaintiff that she was arrested for Grand Theft approximately 2-3 years preceding the Examination Under Oath. In addition, an investigation of the facts and circumstances surrounding the motor vehicle accident revealed that under Case No.: 17000410CFAXMX (In the Circuit Court of the First Judicial Circuit in and for Walton County), Defendant, Jennifer Dominguez Basulto's adjudication was withheld and she pleaded nolo contendere for Grand Theft (Third Degree Felony) in November 2017.

Plaintiff determined that had Jennifer Dominguez Basulto provided the proper information at the time of the insurance application dated June 14, 2019, then Plaintiff would not have assumed the risk nor issued the insurance policy. Had Jennifer Dominguez Basulto disclosed her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019, Plaintiff, Imperial Fire and Casualty Insurance Company would not have assumed the risk nor issued the insurance policy. Therefore, Imperial Fire and Casualty Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Jennifer Dominguez Basulto. Due to the policy being declared void *ab initio*,

the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Jennifer Dominguez Basulto, Imperial Fire and Casualty Insurance Company may void the insurance policy as follows:

> **Misrepresentation and Fraud**
>
> This policy was issued in reliance on the information provided on **"your"** insurance application. **"We"** may void coverage under this policy if "you" or an insured person have made incorrect statements or representations to **"us"** with regard to any material fact or circumstance, or concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, at the time application was made or at any time during the policy period.
>
> **"We"** may void this policy or deny coverage for an accident or loss if **"you"** or any other person making a claim under this policy has concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.
>
> **"We"** may void this policy for fraud or misrepresentation even after the occurrence of an accident or loss. This means that **"we"** will not be liable for any claims or damages, which would otherwise be covered.
>
> *See page 21 of the Imperial Fire and Casualty Insurance Company insurance policy.*

Further, Florida Statute § 627.409(1) provides:

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate***, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Analysis Regarding Whether the Undisclosed Felony Criminal History was Material

The Court finds that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court finds that the named insured's failure to disclose her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019, which would have resulted in a denial of the application for insurance, is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court finds that as Defendants, Jennifer Dominguez Basulto and Jose Dominguez, failed to provide testimony to contradict Plaintiff's claim that the disclosure would have resulted in a denial of the application for insurance, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court hereby finds that the affiant, Sharon Dowell, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Jennifer Dominguez Basulto, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Dowell, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Ms. Dowell.

Conclusion

This Court hereby finds that the Plaintiff, Imperial Fire and Casualty Insurance Company's application for insurance unambiguously required Jennifer Dominguez Basulto to disclose her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019. Plaintiff provided the required testimony to establish that Defendant, Jennifer Dominguez Basulto's failure to disclose her felony criminal history within the past 10 years on the application for insurance dated June 14, 2019 was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the insurance policy, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED.** This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendants, JENNIFER DOMINGUEZ BASULTO and JOSE DOMINGUEZ. Court hereby reserves jurisdiction to consider any claims for attorney's fees and costs;

* * *

Insurance—Homeowners—Bad faith—Legislature did not create independent cause of action for breach of section 627.70131, which establishes insurer's duty to acknowledge communications regarding claims—Claim for prejudgment interest under section 627.70131(5)(a) is denied where underlying claim for benefits had been merged into final judgment, was satisfied by payments, and no longer existed by time plaintiffs made claim for interest in amended complaint—Torts—Violation of statutory duty—Count alleging breach of statutes is dismissed where civil remedy notices failed to satisfy specificity requirements of statute, and insurer cured alleged violations within 60 days of receipt of 2018 CRN—No merit to argument that insurer's payment did not effectuate cure because it was made more than 60 days after initial CRN sent in 2015 where 2015 CRN was defective, and plaintiff reopened cure period by sending successive 2018 CRN alleging same violations as 2015 CRN—2020 CRN sent after insurer had cured alleged violations was legal nullity—Punitive damages claim is dismissed where plaintiffs failed to follow requirements of section 768.72

JOSHUA FONOLLOSA and ALEXANDRA VELEZ FONOLLOSA, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-021984-CA-01, Section CA 13. February 4, 2021. Gina Beovides, Judge. Counsel: David Neblett and James Mahaffey, Perry & Neblett, P.A., Miami, for Plaintiffs. Thomas Hunker and Virginia Paxton, Cole, Scott & Kissane, P.A., Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDAN'TS MOTION TO DISMISS

THIS CAUSE came before the Court on Defendant AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA (Defendant)'s Motion to Dismiss Counts II, III, and IV of Plaintiffs JOSHUA FONOLLOSA and ALEXANDRA VELEZ FONOLLOSA (Plaintiffs)' November 18, 2020 Amended Complaint ("Complaint"). The Court, after reviewing the Motion to Dismiss, Plaintiffs' Response

and Defendants' Reply, and after hearing argument of counsel at hearing on December 14, 2020, it is

ORDERED AND ADJUGED: Defendant's Motion to Dismiss Counts II, III, and IV of Plaintiffs' Complaint with prejudice is GRANTED for the reasons stated below.

BACKGROUND

Plaintiffs' original complaint dated August 25, 2014 and first amended complaint dated October 21, 2014 asserted three counts: Count I (Breach of Contract); Count II (Breach of § 627.70131(1)(a), Fla. Stat.) and Count III (Breach of § 624.155, Fla. Stat.). Count I of the November 18, 2020 Amended Complaint realleges the claim for breach of contract from the two prior versions of Plaintiffs' complaint but acknowledges that Count I was resolved by jury verdict on September 29, 2017. On June 2, 2018, the Court entered Final Judgment on Count I in the amount of $15,000 after reducing the jury's $17,500 verdict by the $2500 policy deductible. By agreement of the parties, Count II (Breach of § 627.70131(1)(a), Fla. Stat.) and Count III (Breach of § 624.155, Fla. Stat.) of Plaintiffs October 21, 2014 Amended Complaint were abated pending the outcome of Count I. This Court entered an order lifting the abatement on December 19, 2018. At a hearing on October 15, 2020, the Court granted Defendant's motion to dismiss the 2014 Amended Complaint and subsequently entered a written order to this effect on November 6, 2020, granting Plaintiffs leave to amend.

Plaintiffs' 2020 Amended Complaint alleges the following: Count II (Breach of F.S.627.70131), Count III (Breach of Florida Statutes) and Count IV (Claim for Punitive Damages).

Plaintiffs allege that Defendant violated section 627.70131(1)(a) by "failing to timely communicate with Plaintiffs with respect to the claim" and also allege that Defendant violated section 627.70131(5)(a) by "failing to pay or deny Plaintiffs' claim within 90 days" and "failing to timely pay interest on Plaintiffs' claim."

As to Count IV, Plaintiffs include a separate count asserting a claim for punitive damages. However, Plaintiffs neither moved for nor were granted leave of court to assert a claim for punitive damages. Further, Plaintiffs changed the title of Count III from "Breach of Section 624.155, Florida Statutes" to "Breach of Florida Statutes" and allege violations of section sections 624.155, 627.70131, 626.9541, 627.427, and 627.428, Florida Statutes. The prior versions of Count III solely alleged violations of section 624.155.

II. The Three Civil Remedy Notices.

Plaintiff Joshua Fonollosa sent three Civil Remedy Notices (CRNs) to Defendant. The first was sent on June 29, 2015 while Counts II and III of the 2014 Amended Complaint were abated. The second was sent on November 2, 2018 after the final judgment was entered. The third was sent on February 25, 2020. The 2015, 2018, and 2020 CRNs did not cite to section 627.70131, Florida Statutes, or demand payment of prejudgment interest. Plaintiff Alexandra Velez Fonollosa never served a CRN.

A. **The 2015 CRN**

The 2015 CRN asserted four reasons for the notice: (1) "Claim Denial"; (2) "Claim Delay"; (3) "Unsatisfactory Settlement Offer"; and (4) "Unfair Trade Practice[.]" The 2015 CRN further alleged that Defendant violated a litany of statutes by refusing to cover water damages to their property and demanded (among other things) payment of $50,450.48 in damages plus attorneys' fees, costs, and "interest" to "cure" the violations. Defendant timely responded in writing to the 2015, objecting that it did not comply with section 624.155(3)(b), Florida Statutes, which requires CRNs to "state with specificity": (1) "The facts and circumstances giving rise to the violation[s]"; (2) "The name of any individual involved in the violation," (3) "The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated"; and (4) "The specific policy language that is relevant to the violation, if any." *See* § 624.155(3)(b), Fla. Stat.

B. **The 2018 CRN**

The 2018 CRN realleged the same four violations as the 2015 CRN, (1) "Claim Denial"; (2) "Claim Delay"; (3) "Unsatisfactory Settlement Offer"; and (4) "Unfair Trade Practice"—but also alleged: (5) "Breach of Contract"; (6) "Violation of Statutes"; and (7) "Failure to pay Judgment[.]" The 2018 CRN incorporated the same alleged statutory violations that were alleged in the 2015 CRN, but also claimed that defendant violated the "Loss Payment" provision of the policy by failing pay the Final Judgment within 20 days of its entry pursuant to Section 627.427, Florida Statutes. As quoted in the 2018 CRN, the Loss Provision provides that:

> Loss will be payable 60 days after we receive your proof of loss and:
> a. Reach an agreement with you;
> b. There is entry of a final judgment; or
> c. There is a filing of an appraisal award with us.

According to the 2018 CRN, the Loss Payment provision "specifically outlines the time period in which [Defendant] must pay its insureds for a covered loss." The 2018 CRN further asserted that "[a]ccording to section 627.427, Florida Statutes, the last day for [Defendant] to comply and satisfy the Final Judgment against it was August 1, 2018." To "cure" these alleged violations, the 2018 CRN demanded that Defendant pay the insurance proceeds "plus the statutorily accruing interest" and "costs and attorneys' fees with a 5.0 multiplier[.]" However, the only interest provision mentioned in the 2018 CRN was section 627.4265, Florida Statutes ("Payment of settlement"). According to the 2018 CRN, Defendant "violated Florida Statute 627.4265, and must issue an interest payment according to the statues calculations" which was "12 percent per year from the date of the [settlement] agreement." Neither the 2018 CRN nor the 2020 Amended Complaint allege the existence of a settlement between Plaintiffs and Defendant and the parties agree that no such settlement ever existed.

On November 26, 2018 (within the 60-day safe harbor period following the 2018 CRN), Defendant hand-delivered a check payable to Plaintiffs' attorney ("Perry & Neblett, P.A. Trust") for $15,396.03 (the full amount of damages awarded in the final judgment and post-judgment interest). With the check, Defendant delivered an attached letter signed by defense counsel Evelyn M. Merchant, Esq., listing the insureds names, claim number, this case number, and further stating: "Enclosed please find [Defendant]'s draft in the amount of $15,396.06 for payment of the Final Judgment entered on June 2, 2018 including interest up to November 26, 2018." The letter further stated that it was "[h]and delivered by Elizabeth Jimenez to David Neblett @ 4:52 p[m] on 11/26/18." Defendant also filed a written response to the 2018 CRN objecting to the sufficiency of the information contained therein and advising of its cure. Defendant also advised that it was not electronically served with the Final Judgment and did not know it had been entered until it received the 2018 CRN.

Following Defendant's payment, the Court entered an order dated December 19, 2018 lifting the abatement of the Bad Faith Counts. On December 20, 2018, the Court "Denied" Plaintiffs' motion to compel payment of final judgment and **prejudgment** interest "as moot" and ordered Defendant to reissue the check for "the judgment amount with post judgment interest up to the date of delivery to Plaintiff's counsel before December 31, 2018." On December 20, 2018, Defendant complied with the order. By complying with the order, Defendant reissued check within 60 days of the 2018 CRN. Nearly eight months later, in a letter to Defendant's attorney dated August 12, 2019, Plaintiff's attorney acknowledged receipt of the reissued check

pursuant to the December 20, 2018 order, but complained that it did not include prejudgment interest. Plaintiffs however, did not appeal or seek rehearing of the Court's December 20, 2018 order denying their motion to compel prejudgment interest.

C. **The 2020 CRN**

The 2020 CRN alleged the many of the same violations as the 2015 and 2018 CRNs but also listed the following reasons for the notice: "Failure to Pay Interest"; Failure to Pay RCV; Improper Coverage Determination; Failure to Comply with Demands of the FDFS and Service Request Number 1-957126798; Failure to Conduct a Proper Inspection; Failure to Reinspect when requested and/or need; and Failure to Timely Inspect. However, the 2020 CRN did not mention "prejudgment" interest or cite any contractual or statutory provisions requiring payment of interest.

LEGAL STANDARD

To withstand a motion to dismiss, "[t]he complaint. . . must set forth factual assertions that can be supported by evidence which gives rise to legal liability." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla 4th DCA 1999) [24 Fla. L. Weekly D2398a]. "It is insufficient to plead opinions, theories, legal conclusions, or argument." *Id.* Legal conclusions in a pleading are not deemed admitted for prurposes of determining a motion that attacks the legal sufficiency of a pleading. *Paradise Pools Inc. v. Genauer*, 104 So. 2d 860 (Fla. 3d DCA 1958)). In any event, "[a] trial court is not bound by the four corners of the complaint where the facts are undisputed and the motion to dismiss raises only a pure question of law." *Metro. Cas. Ins. Co. v. Tepper*, 969 So. 2d 403, 405 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2509e] (citation omitted).

ANALYSIS

Count II—Breach of Section 627.70131, Florida Statutes

The Court finds that Plaintiffs cannot state a cause of action for breach of section 627.70131. Unlike section 624.155 ("Civil remedy"), the Legislature did not create an independent cause of action for violations of section 627.70131. While Plaintiff concedes that a violation of 627.70131(5)(a) cannot be the sole basis for a separate cause of action, Plaintiff argues that their claim for statutory interest under section 627.70131(5)(a) survives because they combined it with a claim for violations of section 627.70131(1)(a) alleging failure to timely communicate. This court rejects Plaintiffs argument.

While not binding, this court follows a number of federal decisions which have dismissed identical counts on the ground that neither subsection (1)(a) nor subsection (5)(a) create a private cause of action. *See Perez v. Scottsdale Ins. Co.*, CV 19-22761-CIV, 2019 WL 5457746, at *4 (S.D. Fla. Oct. 24, 2019) ("The statute does not create an independent cause of action to enforce [section 627.70131(1)(a)], nor is the Plaintiff able to point to one."); *Hinds v. Am. Security Ins. Co.*, No. 16-cv-20780, 2016 WL 8677863, at *5 (S.D. Fla. Sept. 9, 2016) (dismissing count for breach of Section 627.70131(1)(a) because plaintiff "does not cite any express remedial provision in subsection (1) that could possibly qualify as a cause of action."); *Berkower v. USAA Cas. Ins. Co*., 15-23947-CIV, 2016 WL 4574919, at *4 (S.D. Fla. Sept. 1, 2016).

In *Berkower*, the court reasoned:

> . . . Plaintiffs have not cited one case holding that any part of Florida Statute § 627.70131 creates an independent cause of action. Moreover, applicable case law authority seems to preclude all private claims under the statute. *See e.g*., *QBE Ins. Corp. v. Dome Condo Ass'n, Inc*., 577 F. Supp. 2d 1256, 1261 (S.D. Fla. 2008) ("based on the plain language of the statute, Dome is precluded from bringing a claim that only seeks recovery based on section 627.70131"). Significantly, the Dome Court did not limit its holding to only those claims brought specifically pursuant to (5)(a).

Berkower, 2016 WL 4574919, at *4. The *Berkower* court concluded that "the statute applies when a claimant raises a bad faith claim against an insurer" and followed the analysis of *Buckley Towers Condo, Inc. v. QBE Ins. Corp*., No. 07-22988-CIV, 2008 WL 2490450 at *11 (S.D. Fla. June 18, 2008), *report and recommendation adopted*, No. 07-22988-CIV, 2008 WL 2856457 (S.D. Fla. July 24, 2008) explaining that "the Legislature intended for Florida Statute § 627.70131 to bind the insurer to its provisions in response to a Department of Insurance review or a bad faith claim." *Id.* "In such situations . . . the insured may rely upon Florida Statute § 627.70131 to support its argument that the insurer failed to timely process its claim." *Berkower*, 2016 WL 4574919, at *4. In explaining that Florida Statute § 627.70131 does not provide for an independent remedy, the *Buckley* Court explained, "[w]hat the face of the statute also provides, however, is that the legislature did not intend to create any private cause of action against the insurer that is based merely upon a violation of the statute." *Id.* at *12. This Court further notes that Plaintiff's three CRNs did not cite section 627.70131 or demand payment of statutory or prejudgment interest.

Further, Plaintiffs did not attempt to assert a claim for prejudgment interest under section 627.70131(5)(a) until they filed their November 18, 2020 Amended Complaint. By this time, the underlying claim for benefits no longer existed because it merged into the final judgment and was satisfied by Defendant's December 2018 payments. *See Weston Orlando Park, Inc. v. Fairwinds Credit Union*, 86 So. 3d 1186, 1187 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1017a] ("The doctrine of merger provides that when a valid and final judgment is rendered in favor of a plaintiff, the original debt or cause of action upon which an adjudication is predicated merges into the final judgment, and, consequently, the cause's independent existence terminates."); *State Farm Fla. Ins. Co. v. Silber*, 72 So. 3d 286, 290 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2298a] ("[T]he statute closes the door on any insured unless there is a viable independent cause of action.").

Lastly, the Court, through a predecessor judge, already denied Plaintiffs' 2018 motion to compel payment of prejudgment interest. Specifically, on December 20, 2018, this Court expressly denied Plaintiffs' motion as "moot" and only required Defendant to reissue the check for the Final Judgment amount plus "post judgment" (not prejudgment) interest. While this Court does not comment and no record exists as to the reasons by which said Motion was denied, the Order denying the award of prejudgment interest constituted a final order subject to appeal. As noted by the Defendant, Plaintiff failed to move for rehearing or appeal of the Order. As such, Plaintiffs' claim for prejudgment interest was therefore abandoned. *See Roberts v. Int'l Speedway Corp*., 542 So. 2d 446, 447 (Fla. 5th DCA 1989) (holding that an order denying a "motion to assess interest" is a "final order" because "there remained nothing else to be done in the cause [and] judicial labor was at an end" and that appellant's untimely motion for rehearing).

Accordingly, Count II must be dismissed with prejudice.

Count III—Breach of Florida Statutes

The Court further concludes that Count III must be dismissed with prejudice for the following reasons.

1. **The CRNs failed to satisfy the "specificity" requirements of section 624.155.**

First, the CRNs do not satisfy the requirements of section 624.155(3)(b) because they do not state with specificity the facts and circumstances giving rise the alleged violations, names of individuals involved, statutory provisions and specific language of the statutes allegedly violated, or the specific policy language relevant to the alleged violations. The failure to properly allege a violation in the

CRN is a failure to comply with 624.155, Florida Statute. "Because the statute is in derogation of the common law, [courts] strictly construe the statutory requirements." *Julien v. United Property & Casualty Ins. Co.*, No. 4D19-2763, 2020 WL 5652364 (Fla. 4th DCA Sept. 23, 2020) [45 Fla. L. Weekly D2199a] (citing *Talat*, 753 So. 2d at 1283). Courts strictly construe the notice requirements because "the CRN is designed to prevent insurers from playing a guessing game as to what, and how, to cure within the sixty-day window." *King v. Gov't Employees Ins. Co.*, No. 8:10-CV-977-T-30AEP, 2012 WL 4052271, at *7 (M.D. Fla. Sept. 13, 2012) (citation and internal quotation marks omitted).

Recently, the Fourth District Court of Appeal addressed the specificity required in a civil remedy notice in *Julien v. United Property & Casualty Ins. Co.*, No. 4D19-2763, 2020 WL 5652364 (Fla. 4th DCA Sept. 23, 2020) [45 Fla. L. Weekly D2199a]. There, the Court affirmed a trial court order dismissing a bad faith claim based on lack of specificity in the CRN. In doing so, the Court held that the plain language of section 624.155(3)(b) requires the policyholder to state with specific information in the notice adn to reference specific policy language that is relevant to the violation. Notably, the CRN in *Julien* contained the same list of statutes and the same language in the "facts" section of the form as the CRNs at issue in this case. In reviewing this language, the Fourth District opined that "Julien's civil remedy notice, it seems, listed every statutory provision and every policy provision available to him as the insured." *Julien*, 2020 WL 5652364 at *2. Accordingly, the Court held that "Julien failed to satisfy the requirement that the insured identify the specific statute and specific policy provision relevant to Universal Property's alleged violation." *See id.* at *3.

The *Julien* Court also rejected the plaintiff's argument that the CRN was per-se sufficient because the Department Financial Services did not return it as deficient. As noted by the Court, the Department of Financial Services' discretionary grant of authority does not determine the legality of the notice. It is the responsibility of the trial court to make such a determination independent of the Department's action. *See id.*

In this case, the CRNs did not provide the requisite notice because they: (1) failed to reference the specific policy language relevant to the alleged violation; and (2) failed to state the facts and circumstances giving rise to the alleged violations with sufficient specificity to allow Defendant to cure the alleged violations within the 60-day cure period. As explained above, the CRN contained a list of statutes followed by a statement of "facts" that consisted entirely of conclusory statements that merely paraphrased language from the statutes. The CRNs contained no specifics as to dates, persons involved, correspondences and documents referred to, etc. As such, the notice fails to satisfy the statutory requirements.

2. **Defendant cured the violations alleged in the 2018 CRN which incorporated the violations of the 2015 CRN.**

Under Florida law, "[i]f the insurer pays the damages during the cure period, then there is no remedy." *Talat Enters. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283-84 (Fla. 2000) [25 Fla. L. Weekly S172a] *Galante v. USAA Cas. Ins. Co.*, 895 So. 2d 1189, 1191 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D804a] ("Here, the insurer took advantage of the statutory cure provided by section 624.155(3)(d), Florida Statutes (2002). It paid the contractual amount due the insured within sixty days of receipt of the notice. The trial court therefore properly granted the motion to dismiss."); § 624.155(3)(c), Fla. Stat. ("No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected."). "The insurer's ability to cure any grievances exists to avoid unnecessary bad faith litigation." *Galante*, 895 So. 2d at 1191 (quoting *Talat*, 753 So. 2d at 1282).

In this case, the parties do not dispute that the 2018 CRN included all of the violations of the 2015 CRN and invited Defendant to cure them. Within 60 days of the 2018 CRN, Defendant paid the contractual obligation liquidated in the final judgment plus post-judgment interest. Plaintiffs claim that the payment was insufficient because it did not include prejudgment interest. However, the 2018 CRN did not demand payment of prejudgment interest as a cure. At the time Defendant paid, the Final Judgment was not amended to include a calculated amount of prejudgment interest. Moreover, for the reasons previously addressed, , Plaintiffs were not entitled to prejudgment interest.

Plaintiffs further claim that Defendant's payment did not effectuate a cure because it was made more than 60 days after the 2015 CRN. However, the 2015 CRN was defective and Plaintiffs waived their right to rely on the 2015 CRN because Joshua re-opened the cure period by sending the 2018 CRN re-asserting the same violations as the 2015 CRN and providing American Integrity another opportunity to cure them within 60 days. American Integrity complied and timely cured the alleged violations by paying the contractual obligation within the 60-day safe harbor period following the 2018 CRN. *Cf. USAA Cas. Ins. Co. v. American MRI, LLC*, Case No. 10-308 AP, 19 Fla. L. Weekly Supp. 534a (Fla. 11th Cir. Ct. App. 2012) (holding that PIP insurer cured its previous denial of plaintiff's claim by paying the claim within the 30-day safe harbor period in response to plaintiff's *second* demand letter that plaintiff sent during the litigation). Notably, Joshua seems to have recognized this in his 2020 CRN where he includes a disclaimer that "[c]uring the violations addressed herein does not cure the violations raised in the [2015 and 2018] Civil Remedy Notices[.]"Assuming for the sake of argument that such a disclaimer is legally effective, the 2018 CRN contains no such disclaimer or other language to put American Integrity on notice that curing the alleged claims handling violations asserted in the 2018 CRN would prevent a bad faith suit on those alleged violations.

In support of their argument, Plaintiffs rely on *Halpern v. CIGNA Prop. & Cas. Ins. Co.*, 8:02-CV-811-T-17MAP, 2006 WL 8439784, at *5 (M.D. Fla. Sept. 25, 2006). In *Halpern*, the plaintiff sent a total of five CRNs. Each CRN was directed to separate conduct by separate persons concerning separate portions of the claim, litigation, and post-litigation, and the subsequent CRNs did not re-allege or incorporate the same alleged violations as the prior CRNs. The insurer responded to the first three CRNs but did not pay the contractual obligation within 60 days. Thereafter, the insured sent the fourth and fifth CRNs. In response to the fourth and fifth CRNs, the insurer elected to cure by paying the state court judgments within 60 days.

The *Halpern* court noted that the first two CRNs asserted claims handling violations, including "failure to settle" and "failure to investigate diligently" and the third CRN was directed to specific "post-litigation conduct" including failure to "investigate the merits of the prior S. 624.155 claim." *See id.* at *3-4. By contrast, the fourth and fifth CRNs alleged that the insurer "continued its pattern and practice of bad faith claims practices" by "firing" its prior counsel, "substitut[ing] a firm with less familiarity," and "attempt[ing] to "lowball Plaintiff on attorneys' fees." *See id.* at *4. Unlike this case, the fourth and fifth CRNs in *Halpern* did not reallege the violations asserted in the first three CRNs. Accordingly, the *Halpern* court concluded: "Since the Civil Remedy Notices in this case are directed to **different** conduct by **different** participants at **various** times, the Court concludes that the bad faith claims associated with the final Notices did not necessarily extinguish the claims of the first three Notices." *See id.* at *5 (emphasis added). Here, the facts are unlike Halpern in that the 2018 CRN incorporates the same alleged violations contained in the 2015 CRN. Had Plaintiffs limited the 2018 CRN to different alleged violations without incorporating the violations alleged in the 2015 CRN, Plaintiffs' reliance upon *Halpern* and might be well-taken. The fact that the 2018 CRN incorporated the same

alleged violations of the 2015 CRN and Defendant cured them within 60 days, then there is no remedy.

3. **The 2020 CRN was filed over two years after Defendant cured the alleged violations in 2018.**

As noted above, *Talat* establishes that an insurer cures a first-party bad faith claim under section 624.155 by paying the "contractual amount due"—not extracontractual damages, attorneys' fees with a 5.0 multiplier, etc. *See Talat*, 753 So. 2d at 1283-84 ("In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled.") (emphasis added). "The purpose of the civil remedy notice is to give the insurer one last chance to settle a claim with its insured and avoid unnecessary bad faith litigation—not to give the insured a right of action to proceed against the insurer even after the insured's claim has been paid or resolved." *Lane v. Westfield Ins. Co.*, 862 So. 2d 774, 779 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2547c]. Accordingly, the 2020 CRN that was sent after American Integrity cured the alleged violations was a legal nullity.

Because the above stated reasons are dispositive as to dismissal of Count III, this Court need not reach additional arguments raised by the Defendant regarding whether Plaintiff Alexandra Fonollosa's alleged failure to send a CRN bars her bad-faith claim, whether the litigation privilege bars the bad faith claim based on alleged litigation conduct, or whether Plaintiffs' allegations regarding Mediation violate the Mediation Confidentiality Statutes.

As such, Count III is dismissed with prejudice.

Count IV—Punitive Damages

Lastly, Plaintiffs' punitive damages claim must be dismissed because Plaintiffs failed to follow the requirements of section 768.72, Florida Statutes. "Under Florida law, the procedural aspect of Fla. Stat. § 768.72 applies to a claim for punitive damages under Fla. Stat. § 624.155." *Gerlach v. Cincinnati Ins. Co.*, 2:12-CV-322-FTM-29, 2012 WL 5507463, at *2 (M.D. Fla. Nov. 14, 2012). "Section 624.155 does not delineate the procedure by which a claim for punitive damages is to be pled, section 768.72 provides that procedure." *State Capital Ins. Co. v. Mattey*, 689 So. 2d 1295, 1297 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D786c]. Under section 768.72, "no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." § 768.72(1), Fla. Stat. The plaintiff must make this showing before pleading a claim for punitive damages and must obtain leave of court to file an amended complaint seeking punitive damages. "The insurance company has a substantive right not to be subjected to financial worth discovery until the court makes an affirmative finding that there is a reasonable evidentiary basis for a punitive damages claim." *See Mattey*, 689 So. 2d at 1297 (citing *Potter v. S.A.K. Dev. Corp.*, 678 So.2d 472 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1873c] (holding what section 768.72 requires is that a plaintiff who has pleaded punitive damages must offer a reasonable evidentiary basis for punitive damages and obtain an order authorizing the maintenance of the punitive damage claim as a predicate to conducting discovery of a defendant's financial worth.)); *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995) [20 Fla. L. Weekly S317a]. A trial court must strike a claim for punitive damages where the plaintiff failed to comply with section 768.72. *See Walt Disney World Co. v. Noordhoek*, 672 So.2d 98 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D980b] (holding punitive damages claims must be stricken absent a reasonable evidentiary basis for their award); *Norwegian Cruise Lines v. Zareno*, 712 So. 2d 791, 794-95 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1525a] (quashing order of trial court with directions to strike punitive damages claim for failure to follow requirements of section 768.72); *Leavins v. Crystal*, 3 So. 3d 1270, 1273 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D523c]. Accordingly, Count IV of the Complaint is dismissed as well as the portion of Plaintiffs' prayer for relief seeking punitive damages.

CONCLUSION

Pursuant to the foregoing points and authorities, it is hereby ORDERED AND ADJUDGED that Defendant's Motion is hereby GRANTED and Counts II, III, and IV are hereby dismissed WITH PREJUDICE.

* * *

Municipal corporations—Deannexation—Injunctions—Developers' motion for temporary injunction to stop statutory process that may lead to deannexation of development area from city is denied where developers have not shown likelihood of success on merits or that injunction is in public interest in view of long-standing public policy in favor of contraction of municipal boundaries—Principles of equitable estoppel are not applicable to deannexation process where potential for deannexation was possibility known to developers at time they began investment in development, and applying equitable estoppel would be contrary to public policy in favor of deannexation—Fact that proponents of deannexation may be using process for incorrect purpose of protesting perceived excessive taxation and wasteful municipal spending is immaterial

WELLEN PARK, LLLP, et al., Plaintiffs, v. WEST VILLAGERS FOR RESPONSIBLE GOVERNMENT, INC., et al., Defendants. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020-CA-3838-SC. January 25, 2021. Hunter W. Carroll, Judge. Counsel: David Smolker and McLane E. Evans, Tampa; and Jeff Boone, Boone Law Firm, P.A., Venice, for Plaintiffs. Luke Lirot, Luke Charles Lirot, P.A., Clearwater; and Nikki C. Day and Alan S. Zimmet, Bryant Miller Olive, P.A., Tampa, for Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Developers who have invested almost $370 million into the development of the Wellen Park area of the City of North Port seek to have the Court stop an on-going statutory process that may or may not lead to the deannexation of Wellen Park from the City. For more than 150 years, the public policy of Florida as expressed through statutes has authorized contraction of municipal boundaries. Contraction is also known as deannexation. Because of that well-established public policy, Developers have not shown a likelihood of success on the merits as to Count 1 or that a temporary injunction is in the public interest. The Court denies Developers' motion for temporary injunction.

The Court reminds all parties and intervenors that a denial of this temporary injunction motion is not a final determination.

The parties, operative pleading, and temporary injunction motion

Plaintiffs are Wellen Park, LLLP; Mattamy Tampa Sarasota, LLC; Neal Communities of Southwest Florida, LLC; and GB WV, LLC (collectively, "Developers"). Defendants are West Villagers For Responsible Government, Inc. ("West Villagers") and the City of North Port ("City"). The Court permitted John Meisel and David Fernstrum to become intervention defendants. The Court will refer to West Villagers, Mr. Meisel, and Mr. Fernstrum collectively as "Contraction Proponents." The Court acknowledges that the City has not taken a position on the motion for temporary injunction other than to agree the Court has authority to grant a temporary injunction on Count 1. Nothing in this Order should be construed as suggesting that the City has taken any position on either the temporary injunction or the merits of the contraction petition.

Developers' operative complaint is their eight-count Second Amended Complaint [DIN 41]. In Count 1, Developers seek a

declaratory judgment and injunctive relief providing that the City is equitably estopped from proceeding further with the contraction petition because Developers have vested rights relating to development of the Annexed Area. The other counts attack various aspects of the contraction process; however, those counts have not been addressed in the pending temporary injunction motion, so the Court will not address them further.

The specific motion before the Court is Developers' / Plaintiffs' Amended Verified Motion for Temporary Injunction Enjoining Defendants from Proceeding Further Under the Contraction Petition and Supporting Memorandum of Law [DIN 42]. Following the hearing, the parties filed various legal memoranda [DINs 66, 67, 70, 73].[1]

Facts

The Court makes multiple findings of fact. Unless otherwise specified, each factual finding is to the preponderance of evidence standard.

1. The City of North Port is entirely within Sarasota County. The City primarily lies to the east of the Myakka River, both in terms of land size and population. Prior to 2001, the City limits included some land west of the Myakka River, which primarily was the former Myakka Estates area, now the Myakka State Forest.

2. In a series of 9 separate annexations in the 2001-2003 timeframe, the City of North Port annexed into the City approximately 8,488.6 acres of mostly undeveloped land that lie on the west-side of the Myakka River ("the Annexed Area"). The Annexed Area is north and northwest of the Myakka State Forest. The lettered/ shaded areas on Exhibit 1 depict the Annexed Area. The nonlettered/nonshaded areas depicted on Exhibit 1 are outside the Annexed Area, are associated with an independent special district, and the Court will discuss that district later in this Order.

3. With the addition of the Annexed Area, today, the City contains substantial land west of the Myakka River. The gray areas on Exhibit 2 depict the City's boundary that is west of the Myakka River.

4. The annexations of the Annexed Area were deliberate and designed to allow for a principled development of that land. Those who were to develop the Annexed Area had to agree to a basic tenant required by the City to allow the annexation: growth must pay for itself. This mantra has been the foundational pillar of development of the Annexed Area for nearly two decades.

5. To accomplish this goal, and working with the City, the Legislature in 2004 by special act established the West Villages Improvement District ("District"). *See* ch. 2004-456, Laws of Fla. Established as an independent special district, this was the entity through which infrastructure and all other aspects of development would be paid for by the property owners within the District and not City residents on the east side of the river. True to the words of those who planned to develop the area, substantial infrastructure has been financed and constructed.

6. Today, the District spans approximately 11,000 acres, and it lies entirely to the west of the Myakka River. The District includes all of the Annexed Area as well as some lands to the west of the Annexed Area as well as lands to the south of the Annexed Area. Most of the District is within the City; however, some of the District is outside of the City limits and is within unincorporated Sarasota County. Exhibit 1 contains a sketch of the District's boundary—along with the Annexed Area.

7. The City and the District created a long-term development plan for the area. In 2006, the City and the District finalized a general principles agreement. The City adopted site specific comprehensive planning policies, future land use map designations, zoning regulations, and land development code regulations to govern the development of this area. Florida's Department of Community Affairs approved these as well. Based on a "villages" concept, this development regulatory scheme is unique within the City and was the result of substantial planning, negotiation, and compromise.

8. The approved Index Map shows 12 proposed, separate villages—labelled Village "A" through Village "L"—with approximate sites for parks, schools, utilities, and a medical facility. Under the City's development regulations applicable to this area, the City will have to approve the plans associated with the development of each village. Exhibit 3 depicts the 12 proposed villages. As shown on Exhibit 3, a couple of villages already have roads built with homes out of the ground. Most of the villages, though, have not been developed.

9. The above discussion on development approval process of this area is by no means an exhaustive list of governmental approvals necessary for development. The take-away, though, is the Annexed Area has been the subject of a long-term planned development process, with substantial planning and expenditures of funds in furtherance of development that has occurred over the past two decades.

10. The Court is a little unclear concerning the derivation of the name "Wellen Park" and its exact boundary. Wellen Park appears to be a corporate rebranding of the area that is co-terminus with the District boundaries. Whether it is or is not is of no moment for this motion, though. The generic name Wellen Park includes the Annexed Area, which is the primary focus of the motion. The Court's uncertainly of the exact boundaries of "Wellen Park" has no impact on the substantive issues before the Court.

11. The Plaintiffs bringing this motion, Wellen Park, LLLP and Mattamy Tampa/Sarasota, LLC, have made long-term financial commitments to the development of Wellen Park. They have incurred numerous contractual obligations with the expectation of stability associated with the existing development regulations imposed by the City for Wellen Park.

12. To that end, since 2014, Plaintiff Wellen Park, LLLP has invested $290,417,910 towards the development of Wellen Park, including its acquisition of approximately 5,000 acres within the Annexed Area. The peach area on Exhibit 4 depict lands currently owned or controlled by Wellen Park, LLLP.

13. To date, Wellen Park, LLLP has: conveyed more than 174 acres of land to the City for parks and other recreational purposes; conveyed land to the City for the now existing wastewater treatment plant Wellen Park, LLLP completed for $48 million; and is obligated to convey land to the City where a potable water facility currently is being constructed by Wellen Park, LLLP for $7 million. It currently has pending agreements to sell portions of its lands within the Annexed Area to numerous third parties in excess of $86 million. Wellen Park, LLLP has deficit-funded infrastructure in the amount of $42 million (perhaps through the use of the District), as there are insufficient residents to fund infrastructure at present.

14. Plaintiff Mattamy Tampa/Sarasota, LLC has invested at least $79,044,230 in development costs separate and apart from Plaintiff Wellen Park, LLLP.

15. On October 28, 2020 residents within Wellen Park submitted a contraction petition to the City ("the October Petition"), as permitted by section 171.051(2), Florida Statutes (2020). The Supervisor of Elections for Sarasota County has confirmed that enough qualified voters signed the October Petition for the contraction process to continue.

16. The area identified for contraction in the October Petition generally are the lands west of the Myakka River that are currently within the City. Included in the proposed contraction area are both the Annexed Area as well as an additional approximate 8,000 acres, including the Myakka State Forest.

17. In July 2020, these petitioners previously submitted, and then

later withdrew, a contraction petition that sought to contract only the Annexed Area ("the July Petition"). Because there was a noncontiguous concern with the July Petition, *see* § 171.052(1), Fla. Stat. (2020), the petitioners revised the petition by including in the October Petition the Myakka State Forest and surrounding City areas that are west of the Myakka River.

18. Intervenor Defendant John Meisel is the Chairman of the West Villagers for Responsible Government, which Mr. Meisel styled is an unincorporated political action committee ("Political Committee"). He is also president of Defendant West Villagers for Responsible Government, Inc., a corporate entity that is the financing arm of the Political Committee. Mr. Meisel is a strong proponent of contraction, and he pursued obtaining the required signatures on the October Petition as well as the prior—now withdrawn—July Petition.

19. Mr. Meisel believes strongly that the City is mismanaging its finances and is concerned about the City's long-term financial health. He believes that the City is raising taxes excessively which has a disproportionate effect on Wellen Park, presumably due to the District's existence. He testified without elaboration that that the City desires "to raise the equitable tax by 30 percent." He also testified that the City is investing in a water park that is projected to lose money, and the City is spending millions of dollars on capital improvement projects with which he disagrees.

20. The Court pauses to note that the financial characterizations by Mr. Meisel are his; the Court in Developers' motion was not asked to, does not need to, and will not express an opinion concerning the level of taxes and assessments imposed on the landowners and residents in Wellen Park area of the City. That is a quintessential political question, and nothing in this Order should be construed as any comment on the tax burden. The Court identifies Mr. Meisel's strongly-held beliefs to provide context as to why he feels compelled to champion the deannexation process.

21. Developers filed this lawsuit on September 8, 2020 during the life of the July Petition. After that petition was withdrawn and Mr. Meisel and the Political Committee submitted the October Petition to the City, the Developers amended their lawsuit to address the operative petition.

22. The Annexed Area, if it were in unincorporated Sarasota County today, would be outside the County's existing urban service boundary. According to attorney Jeff Boone, for further development to occur in the Annexed Area, the County Commission unanimously would have to move that boundary line. A comprehensive plan amendment and all property would have to be designated on the future land use map, the property rezoned, and all plats and site and development plans would have to be recognized by the County. The County does not currently have a comparable Village Index Map like the City.

23. The Court pauses again to note that while the Court accepts Mr. Boone's testimony as to the existing Sarasota County Code, the Court makes no comment as to the correctness or completeness of such testimony, as the Court makes no statement towards the issue of feasibility. As explained below, the Court will not comment either way as to the feasibility of the proposed deannexation of Wellen Park. The Court details Plaintiffs' concerns to help explain Developers' position.

24. The existence of the October Petition and the on-going section 171.051 process has created substantial uncertainty for pending and future development in Wellen Park. This uncertainty is already adversely affecting the Developers.

25. The City is currently performing the feasibility study contemplated by section 171.051(2), Florida Statutes (2020). The City has not yet determined whether the contraction proposed in the October 2020 is feasible.

Analysis

Florida law establishes a statutory process that could result in the contraction of a municipality's boundary. Section 171.051, Florida Statutes (2020), contains the present-day statutory requirements. Contraction—also known as deannexation—is not a new concept. More than 150 years ago, the Florida Legislature established a process to contract the boundaries of a municipality. *See* ch. 1688, §29, Laws of Fla. (1869), approved Feb. 4, 1869. Over the years, the Legislature has amended the deannexation process.[2] While the details of the process have changed, the potential for deannexation has been a constant since at least 1869, if not prior.

In their motion, Developers contend they have vested rights under the City of North Port's various development regulations applicable to the Wellen Park area of the City. Because of those vested rights, Developers further contend that they are able entitled to equitably estop the City from continuing to follow Florida law regarding the certified October Petition. Developers are mistaken.

"The primary purpose of a temporary injunction is to preserve the status quo while the merits of the underlying dispute are litigated." *Manatee County v. 1187 Upper James of Florida, LLC,* 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2656a]. It must be remembered that Sarasota's Supervisor of Elections previously certified enough qualified voters within Wellen Park signed the October Petition. Pursuant to section 171.051(2), the City has begun the statutorily required feasibility study. To the Court's knowledge, that feasibility study has not been completed. Certainly, the City has not yet determined whether to commence contraction proceedings or reject the October Petition. *See* §171.051(2), Fla. Stat. The status quo right now is performance under the statutory contraction process. The effect of granting the temporary injunction would halt this legislatively required process midstream. Granting a temporary injunction ***would not preserve*** the status quo but instead would ***change*** the status quo.

Even if granting this temporary injunction would preserve the status quo pending resolution of the case—which it would not—Developers have not shown each of the four elements necessary to qualify for a temporary injunction. Developers as the movants of the temporary injunction must plead and show: (1) likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) the substantial likelihood of success on the merits; and (4) the injunction will serve the public interest. *XIP Techs., LLC v. Ascend Glob. Services, LLC,* 253 So. 3d 1183, 1185 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1850a].

The Court reminds that its role here is limited: whether to grant a temporary injunction. The Court agrees with Developers that the Court has the authority to issue a declaratory judgment relating to their equitable estoppel claim in Count 1. *See Angelo's Aggregate Materials, Ltd. v. Pasco County,* 118 So. 3d 971 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1715b] (permitting applicant's declaratory judgment action to proceed contending county was equitably estopped from altering the comprehensive plan after application made under earlier, less-restrictive process). Adjudicating the equitable estopped claim is uniquely within the province of the Court.

The Court, however, must respect its role in the on-going deannexation process. Pursuant to section 171.051(2), the City of North Port—not the Court—is statutorily required to undertake a feasibility study of the proposed deannexation. Certain of the testimony at the temporary injunction hearing could be considered as evidence that the proposed deannexation is not feasible. Because the Court should not impact the City's feasibility analysis, the Court carefully and deliberately has chosen not to make any factual finding, statement, or opinion as to feasibility. To be clear, ***nothing in this Order is intended to suggest either way whether the proposed deannexation is or is not feasible.*** The Court can resolve the temporary injunction motion without wading into a feasibility discussion.

The Court now returns to the four elements Developers must show

to qualify for a temporary injunction. The Court concludes that Developers failed to demonstrate a substantial likelihood of success on the merits and that the injunction will serve the public interest. Because neither of these elements are found in Developers' favor, the Court does not need to address—and does not address—the first two elements.

A. No substantial likelihood of success on the merits.

"The doctrine of equitable estoppel may be invoked against a governmental body when a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired. However, estoppel should be invoked against the government only in exceptional circumstances. And, most importantly, the doctrine of estoppel does not generally apply to transactions that are forbidden by law or contrary to public policy." *Citrus County v. Halls River Dev., Inc.,* 8 So. 3d 413, 421-22 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D613a] (internal citations omitted).

To show a substantial likelihood of success Developers cite section 163.3194(1)(a), Florida Statutes (2020), and numerous equitable estoppel cases. That statute mandates compliance with the comprehensive plan: "After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted." *Id.* Adherence to the comprehensive plan is a foundational tenant of Florida law.

The City has an established comprehensive plan that addresses Wellen Park. Developers suggest that a successful contraction will eliminate the applicability of the City's development regulations over Wellen Park. This elimination of the City's development regulations, according to Developers, is the violation of their existing "vested rights" to develop their property under those existing codes.

The legal effect of contraction appears to result in the immediate elimination of the development regulations upon a successful contraction. Certainly, section 171.062(3) provides:

> An area excluded from a municipality shall no longer be subject to any laws, ordinances, or regulations in force in the municipality from which it was excluded and shall no longer be entitled to the privileges and benefits accruing to the area within the municipal boundaries upon the effective date of the exclusion. It shall be subject to all laws, ordinances, and regulations in force in that county.

For purposes of this temporary injunction order only, the Court will assume without deciding that a successful contraction will result in the elimination of the applicability of the City of North Port's currently existing development regulations that govern the development of property within Wellen Park.[3] Against that backdrop, though, the Court cannot conclude that Developers have a likelihood of success on the merits.

Developers cite cases that preclude a government change that adversely impacts vested rights. They analogize the government changes that occurred in those cases—for which a court applied equitable estoppel—to the contraction process, which Developers contend will eliminate their development rights under the City existing development code. And without a doubt, the theme and holding of the cases cited by Developers generally provide in the situations described in those cases that the government cannot make an after-the-fact change to the detriment of one holding vested rights.

Of course, none of these cases were decided in the context of Florida's statutory municipal boundary contraction process. The Court does not believe those cases apply here because Florida's statutory contraction process was well-established in Florida law before Developers began their investment in Wellen Park. In other words, the potential for deannexation was a known possibility at the time Developers began their investment in the development of Wellen Park. *See Franz Tractor Company v. J.I. Case Company,* 566 So. 2d 524, 526 (Fla. 2d DCA 1990) ("The law existing at the time and place of making a contract forms part of the contract as if it had been incorporated into it.").

A court may not apply equitable estoppel when it is contrary to public policy. *Halls River Dev.,* 8 So. 3d at 422. Florida public policy establishes a contraction process. The existence of this public policy for a contraction process precludes the Court from applying the equitable estoppel doctrine to halt the City of North Port's performance under the contraction statute.

To avoid this public policy, Developers contend that the Contraction Proponents are using the contraction process for an incorrect purpose—to protest a perceived excessive taxation level and wasteful municipal spending. Developers also obliquely contend that the deannexation process was not designed to address a not-yet-developed urban area. Sections 171.051 and 171.052—which cross-references section 171.043—provide for the criteria for contraction petitions. There is no motivation criterion for a petition signer to meet in order to sign a contraction petition. In other words, the Contraction Proponents' motivation is not legally relevant to Developers' Count 1. Further, the Legislature in the current iteration of the contraction process has not precluded its use in a developing area.

Taking Developers' argument to their logical conclusion, there never could be a municipal contraction where a landowner contends that the landowner has vested rights in that municipality's existing development scheme. This would make the contraction statute meaningless. This position, then, is legally untenable. Developers have not avoided Florida's public policy to permit the performance of the municipal contraction process, and they have not shown a likelihood of success on their equitable estoppel claim in Count 1.

B. The injunction does not serve the public interest.

For the same reasons that the Court cannot apply the equitable estoppel doctrine because it is contrary to Florida's public policy, Developers have not shown the issuance of the temporary injunction would serve the public interest.

Conclusion

The Contraction Proponents have begun the process that may or may not lead to Wellen Park's deannexation from the City of North Port. That the Contraction Proponents believe their taxes are too high or that the City is mismanaging its finances is a political question, not a legal question for the Court. Those motivations are not relevant to whether the Court should grant a temporary injunction that would stop the deannexation process.

The Developers have shown an investment of more than $370 million in developing Wellen Park. Without a doubt, this is a substantial investment, and the existence of uncertainty whether deannexation will occur is adversely impacting Developers. Despite that real, current harm—or their perceived future harm should deannexation occur—Developers' attempt to obtain a temporary injunction on their Count 1 must fail because to stop the contraction process would violate Florida's public policy.

Developers have failed to show a likelihood of success on Count 1 of the Second Amended Complaint, and similarly they have failed to show that the issuance of a temporary injunction is in the public interest. The Court denies Developers' temporary injunction motion.

IT IS THEREFORE ORDERED:

1. The Court denies Plaintiffs' Amended Verified Motion for Temporary Injunction Enjoining Defendants from Proceeding Further Under the Contraction Petition and Supporting Memorandum of Law [DIN 42].

2. The Court denies as moot the Contraction Proponents' Motion

to Strike [DIN 74].

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[1]After the closing arguments were submitted, Developers submitted a Response to the Contraction Proponents' memorandum [DIN 73]. The Contraction Proponents filed a motion to strike [DIN 74]. The Developers filed a response to that motion [DIN 75]. The Court denies that motion to strike as moot.

[2]*See* ch. 3163, §2, Laws of Fla. (1874); ch. 3024, Laws of Fla. (1877), approved March 8, 1877; ch. 4601, Laws of Fla. (1897), approved June 5, 1897; ch. 5197, Laws of Fla. (1903), approved June 4, 1903; recodified as section 171.01, Florida Statutes through 1973; substantial reworking of chapter 171 by ch. 74-190, Laws of Fla. (1974); and ch. 90-279, §17, Laws of Fla. (1974). Note, this listing does not appear complete but includes those references the Court could verify given the Court's limited access to older statute books.

[3]Interestingly, the Legislature specifically provided in section 171.062 that a county's land use regulations remain in force in an area ***annexed into a municipality*** until the municipality adopts a comprehensive plan amendment that includes the annexed area. *See* § 171.062(2), Fla. Stat. (2020). That statute, however, does not have a reciprocal provision retaining a municipality's land use regulations until the county adopts a comprehensive plan amendment to include the contracted area. Ordinary principles of statutory construction mandate this omission to be intentional on the part of the Legislature. If the Legislature wishes to provide a different direction on the applicability of development regulations after deannexation, that is a question for the Legislature.

Exhibit 1
Order Denying Plaintiffs' Motion for Temporary Injunction
2020-CA-003838-SC

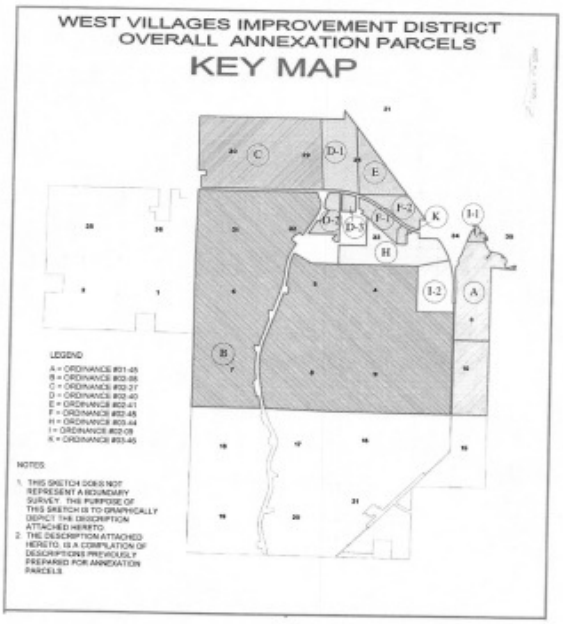


Exhibit 2
Order Denying Plaintiffs' Motion for Temporary Injunction
2020-CA-003838-SC

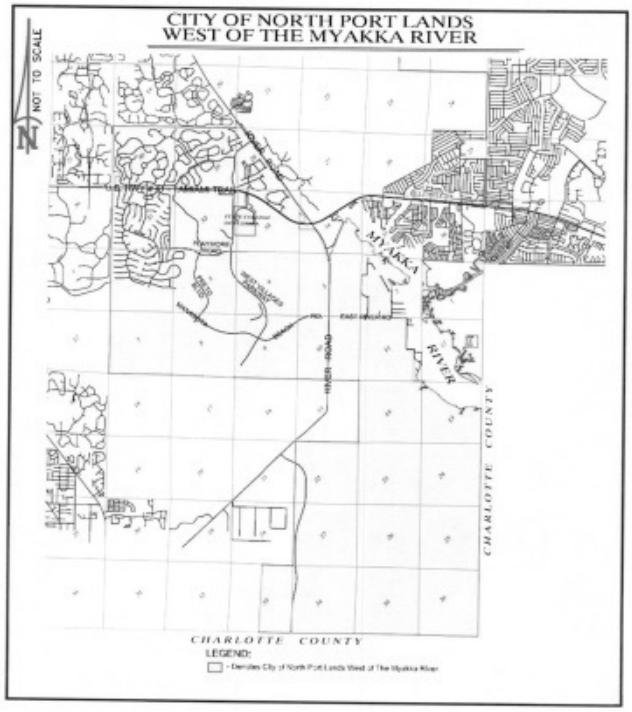
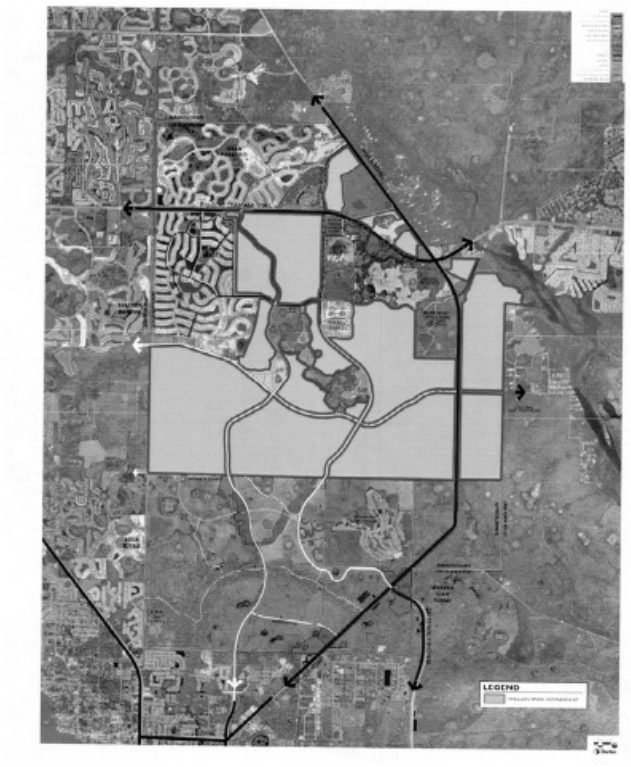


Exhibit 3
Order Denying Plaintiffs' Motion for Temporary Injunction
2020-CA-003838-SC

Exhibit 4
Order Denying Plaintiffs' Motion for Temporary Injunction
2020-CA-003838-SC



* * *

Dissolution of marriage—Alimony—Child support—Due process—General magistrate violated petitioner's fundamental right to procedural due process by not allowing her to testify about her current income—Court rejects magistrate's findings on amounts petitioner must pay in alimony and child support where findings do not reflect petitioner's current income

RENEE BOUER, Petitioner, v. ELIZABETH BOUER, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE19-012590 (36). January 13, 2021. Peter Holden, Judge. Counsel: Harry M. Hipler, Dania Beach, for Petitioner. Sandy T. Fox, Aventura, for Respondent.

ORDER ON THE PETITIONER'S EXCEPTIONS TO THE REPORT OF THE GENERAL MAGISTRATE DATED SEPTEMBER 9,2020

THIS CAUSE, came on to be heard by the Court on Petitioner's Exceptions to the Report of the General Magistrate dated September 9, 2020. The Petitioner was represented by Attorney, Harry Hipler, Esq. (hereinafter "Petitioner"). Attorney, Sandy Fox, Esq. (hereinafter Respondent"), represented the Respondent. After a review of the motions filed. Hearing arguments by each party on December 4, 2020, the Court has reviewed the transcript from the hearing on June 30, 2020, the case law and proposed orders provided by each party, and the Court being otherwise fully advised in the premises:

FINDS as follows:

1. The Petitioner filed a timely Exceptions and Motion to Vacate General Magistrate's Report dated September 9, 2020, and filed and served their motion to vacate the General Magistrates report on September 11, 2020.

2. The General Magistrate's (hereinafter "GM") Temporary Support hearing was held on June 3, 2020 and a transcript of that hearing has been provided.

3. The Petitioner's Exceptions to General Magistrate Report and Motion to Vacate General Magistrate Report states that the General Magistrate's Report is in error and contrary to the record and evidence because there is insufficient evidence to support an alimony award to the wife in the amount of $3,537.34 (Three Thousand Five Hundred Thirty Seven Dollars and Thirty Four Cents) per month for temporary alimony and $1,778.00 (One Thousand Seven Hundred Seventy Eight Dollars) per month for child support. Petitioner does not have the ability to pay this alimony and child support award based on what she earns.

4. The Petitioner alleges that there was an error in determining the taxes.

5. The Petitioner alleges that there was an error in failing to grant credit for partial payments of support and maintenance.

6. The Petitioner alleges that there was an error in failing to consider un-refuted evidence of Petitioner's Covid-19 Publix income, even though updated financial disclosure had been provided. In essence, the Petitioner alleges that her fundamental due process right was violated and she was not afforded the right to testify and preset evidence on her own behalf. *Julia v. Julia*, 146 So. 3d 516 [(Fla. 4th DCA 2014) [Fla. L. Weekly D1792b]]; *Bahl v. Bahl*, 220 So. 3d 1214 (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D2727b].

7. This Court set the exceptions hearing to the General Magistrate's Report for December 4, 2020. This Court heard arguments from both counsel for the Petitioner and the Respondent. It is well accepted that a General Magistrate findings of fact and conclusions of law come to the trial court clothed with a presumption of correctness, and the trial court may only reject these findings and conclusions if they are clearly erroneous, of if the General Magistrate misconceived the legal effect of the evidence presented. *De Clements v. De Clements,* 662 So. 2d 1276 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2207b]. See also, *Edwards v. Edwards,* 24 FLW D236 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D236a], *Zdravkovic v. Zdravkovic,* 684 So. 2d (Fla. 4th DCA 1996) [21 Fla. L. Weekly D718a]. Moreover, if there is substantial competent evidence to support the findings of the General Magistrate then the trial court sitting in its appellate capacity must approve the general magistrate's findings. See, *Boyd v. Boyd,* 168 So. 3d 302, 304 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1530a]; *Linn v. Linn*, 523 So. 2d 642 (Fla 4th DCA 1988).

8. During arguments, the parties agreed (due to time constraints) to focus on the issue of fundamental due process, all of the Petitioners other exceptions would relate back to this fundamental principal. The Petitioner asserts that her due process rights were violated when she was not allowed to testify concerning her current financial situation as it related to her employment at Publix Super Market. The Petitioner did have financial income from working at her catering business that was considered by the GM, but the catering business was no longer viable due to Covid-19 (see Transcript page 71-81).

9. The Petitioner attempted to preset testimonial evidence relating to her current income, when the Respondent objected by claiming that the Petitioner (Page 73 Line 5)

Line 5: Court: So you picked up a job at Publix

Line 7: Petitioner, Ms. Bauer: Yes, and I have ten weeks that I've been working there.

Line 9: Court: Publix

Line 10: Petitioner, Ms. Bauer. Pardon me?

Line 11: Court: When did you start working at Publix?

Line 13: Petitioner, Ms. Bauer: I started . . . . . pardon me. So the first . . . 4-11 was the first week.

Line 15: Court: How much do you make at Publix? What do you do?

Line 17: Petitioner, Ms. Bauer. So. . . . .

Line 18: Mr. Fox: Your honor, I'm going to object regarding

Line 20: Petitioner, Ms. Bauer: No, your. . . . why?

Line 21: Court: Hold on, hold on, what's your objection Mr. Fox?

Line 23: Mr. Fox: Your Honor, she's not provided additional updated financial records.

Line 25: Petitioner, Ms. Bauer: Yes I have sir, I sent it to your office and so has . . .

Page 74, Line 1

Page 74, Line 9: Court: What's your objection?

Line 10: Mr. Fox: My objection is she failed to provide the documents, updated financial documents and she cannot now testify regarding. . . . . .

Line 14: Petitioner, Ms. Bauer: That's not true. My attorneys sent . . . . . .

Line 16: Court: Okay.

Line 17: Petitioner, Ms. Bauer: I've done everything, I've given them all my money.

Line 19: Court: Listen, I'm going to stop everything right now and just rule right now if you don't conduct yourself accordingly. . . . . .

Line 24: Continued the Court: Here's the issue. Mr. Fox doesn't have your financial documents . . . . . .

Page 75 Line 3: Court: As evidence, but you can't . . . I can't admit these documents if you don't provide them to Mr. Fox first.

Line 6: Petitioner, Ms. Bauer: We did. I'll show you the email. Clarabelle send them to his office, everything, that's all he's been saying they've gotten it. All the monies spent, I have everything. I signed it, I have my affidavit he said . . .

Page 85, Line 1: Mr. Fox: . . . discovery regarding any updated information that's her problem. I tried for months to get her discovery and she . . .

Line 4: Court: That's why I'm telling all parties preset I do not have any testimony, it was not elicited through any other person about Ms. Elizabeth Bauer's . . . I mean Renee Bauer's current income. I'm saying that for all the parties here. I have no records of her current income so . . .

Line 11: Petitioner, Ms. Bauer: At this time, I don't have any funds to be able to pay anything.

Line 13: Court: Let's move forward. I asked a question, do you have any follow up Mr. Fox?

Line 15: Mr. Fox: No, I don't.

Line 16: Court: All right, closings.....?

10. A complete review of the hearing transcript reveals that the Petitioner was not allowed to testify about her current income from Publix during the GM hearing of June 30, 2020. The Petitioner's catering business she testified to was no longer viable do to Covid-19.

11. The Petitioner attempted to testify about her current income, but the Respondent objected claiming that the Petitioner failed to provide updated financial records. A review of the Court's file indicates that the Clerk of Courts shows updated financial records were provided on May 27, 2020, along with a certificate of compliance with mandatory disclosure to counsel for the Respondent. The Petitioner's former attorney, (Mr. Forrest) served this, according to the service of documents from the Clerk of Court electronically to attorney Sandy T. Fox, Esquire, 2750 Northeast 185th Street, Suite 302, Aventura, Florida 33180, courtdocs@sandyfox.com.

12. The GM hearing held on June 30, 2020. Update financial discovery was served on counsel for the Respondent on May 27, 2020. That's over thirty (30) days prior to the GM hearing. The Petitioner was not allowed to testify to items contained in this updated financial disclosure that contained her current income from Publix, due process is violated when a party is not allowed the right to testify and preset evidence on their behalf. *Julia v. Julia,* 146 So. 3d 516 [(Fla. 4th DCA 2014) [Fla. L. Weekly D1792b]]. Due process requires that a party be given the opportunity to be heard and to testify . . . on the party's behalf . . . and the denial of this right is fundamental error . . . *Bahl v. Bahl,* 220 So. 3d 1214 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2727b]. When a court fails to give one party an opportunity to testify on his or her own behalf, the court has violated the party's fundamental right to procedural due process.

13. This Court, after a complete reading of the transcript from the June 30, 2020 GM hearing, rejects the GM's findings on amounts that the Petitioner has been ordered to pay as it does not reflect the Petitioners current income. The Petitioner consistent with her filing, and providing financial records should be allowed to testify and the GM to consider such evidence in order to ascertain the Petitioner's current financial situation. Moreover, if there is a failure of evidentiary support, exceptions must be granted where there is no competent substantial evidence to support the findings of the GM. *Wilson v. Smith*, 126 So.3d 413 (Fla. 2DCA 2013) [38 Fla. L. Weekly D2328a]. Therefore, this Court must grant the exceptions to the GM report and/or motion to vacate GM report. The Petitioner should have been allowed to testify as to her current income that would be consistent with her updated certificate of compliance with mandatory discovery that was provided to the Respondent on May 27, 2020.

14. The GM Report found that the Petitioner's monthly income from December 4, 2019 to March 2020 was gross income per month and then reduced that amount after March 10, 2020 as her income, this the reduced amount of income per month as of March 10, 2020 forwarded is not supported by competent evidence because Petitioner was not allowed to testify about her current earnings from Publix. So, the award of the GM from March 10, 020 moving forward is vacated pending additional evidentiary hearing consistent with this order.

15. The Petitioner also has taken exceptions to the GM ruling of temporary alimony and child support retroactive to the date of filing (December 4, 2014 up to March 10, 2020). As noted earlier in this Order, the parties mainly concentrated on the due process issue of the Petitioner's exceptions, however, the Court does recognize that each party should be afforded an opportunity to address temporary alimony and child support. This did not occur during the December 4, 2020 hearing. The Court would instruct both parties to try to readdress this issue and if the parties are unable to come to an agreement, then the matter of tax deductions will be considered at a future hearing.

16. As to the Petitioner's concerns of temporary attorney's fees and suit money. Due to time constraints, the parties were not able to address this issue. However, the amount awarded to Respondent's counsel from date of filling, December 4, 2019 to March 10, 2020 as per the GM Report shall remain unchanged. The sum assessed from March 10, 2020 to June 26, 2020. The Court will need to consider Petitioner's current income from March 10, 2020 moving forward, for the court to determine a need an ability to pay. This will have to occur at a future hearing if the parties can no reach an agreement, based on a violation of the Petitioner's due process rights.

17. The Petitioner also objected to the prospective amount of attorney's fees and suit money awarded by the GM. Due to time constraints, the parties were not able to address this issue. However, the Court would be remised not to note that any award that was determined based upon incomes from March 10, 2020 moving forward would most likely have to be readdressed for the same reasoning based on this Court's above findings of the Petitioner's due process violations. The parties have requested that they try to work out this issue on their own, and if not, future court hearings will be needed.

18. The issue of arrears was not addressed during the December 4, 2020 hearing, due to time constraints. The parties are directed to attempt to determine the arrearages, if any, in good faith and, if they cannot, they will need to set a future hearing for such a determination.

ORDERS AS FOLLOWS:

1. The GM award of monies to be paid by the Petitioner for alimony and child support is **VACATED.**

2. The issue of tax deductions was not heard during the December 4, 2020 hearing. The parties are urged to try to work out this issue. If unable to do so, a future hearing will have to be scheduled.

3. The issue of temporary attorney's fees and suit money was not heard during the December 4, 2020 hearing. The parties are urged to try to work out this issue. If unable to do so, a future hearing will have to be scheduled. The General Magistrate's award of attorney's fees and suit money from the date of filling, (November 5, 2019), to March 10, 2020 shall remain unaffected by this Order.

4. The issue of prospective attorney's fees and suit money was not heard during the December 4, 2020 hearing. The parties are urged to try to work out this issue if unable to do so a future hearing will have to be scheduled.

5. The issue of arrearages was not heard during the December 4, 2020 hearing. The parties are urged to try to work out this issue. If unable to do so, a future hearing will have to be scheduled.

This Court retains and reserves jurisdiction of this case for the purpose of enforcing and modifying the terms of this Order and entering further Orders as may be necessary.

* * *

Civil procedure—Discovery—Compulsory medical examination—Defendant's CME ordered to take place before plaintiff's surgery

LISA MULLINS, Plaintiff, v. PAMELA SUE FOUST, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE20008255, Division 21. October 20, 2020. Michele Towbin Singer, Judge. Counsel: Michael Devon Beharry, Beharry Law Firm, PLLC, Miami, for Plaintiff. Emilio Cacace, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER / PRESERVATION OF EVIDENCE AND TO COMPEL /SHORTEN TIME TO COMPEL COMPULSORY MEDICAL EXAMINATION

THIS CAUSE having come on to be heard on October 20, 2020 on Defendant's Motion for Protective Order/Preservation of Evidence and to Compel/Shorten Time to Compel Compulsory Medical Examination, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Defendant's medical examination pursuant to F.R.C.P. 1.360 shall take place before Plaintiff's surgery.

* * *

Insurance—Appraisal—Waiver—Failure to respond to plaintiff's pre-suit appraisal invocation within 20 days as required by policy—Insurer's motion to dismiss and compel appraisal denied

ORC SERVICES, INC., a/a/o Jean Maureen Doran, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE HOMEOWNERS INSURANCE, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019-CA-000956-15-G. October 15, 2019. Michael Rudisill, Judge. Counsel: Jordan T. Mejeur, Cohen Law Group, Maitland, for Plaintiff. Karen D. Fultz, Sheehe & Associates, P.A., Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL APPRAISAL AND STAY

THIS CAUSE having come before the Court on October 15, 2019 at 9:30 A.M. for the hearing on Defendant's Motion to Dismiss and Compel Appraisal and Stay, and after review of the record and hearing counsels' arguments it is:

ORDERED AND ADJUDGED:

Defendant's failure to respond to Plaintiff's pre-suit appraisal invocation within the twenty days required by the policy resulted in a waiver of Defendant's ability to compel appraisal when it got sued by Plaintiff for breach of contract. Accordingly, Defendant's Motion to Dismiss and Compel Appraisal and Stay is hereby DENIED. Defendant shall file its answer to Plaintiff's complaint within twenty (20) days and its responses to Plaintiff's discovery within thirty (30) days.

* * *

Public records—School boards—Failure to comply with request—Attorney's fees—Injunction—Email request and notice—School district violated policies established by Florida Legislature under Public Records Act by establishing an automated anti-SPAM system that quarantined plaintiff's legitimate email public records request and allowed it to be deleted and purged a week later where district failed to establish any procedural safeguards to ensure that legitimate public records requests were not inadvertently sent to spam—Plaintiff had no obligation to call district before filing suit under Act—Failure to acknowledge request—District violated statute by failing to promptly acknowledge plaintiff's legitimate public records request—Defense that plaintiff's e-mail was never "received" by district is rejected, as facts clearly showed that records request and written notice were received by district's servers, thereafter quarantined as spam based on district's "Custom Spam" settings, and subsequently permanently purged—Argument that records request and written notice were never received to the "inbox" of district's account, and therefore district had no duty to acknowledge plaintiff's request is similarly without merit—Act does not require plaintiff to make multiple requests to ensure request was actually received before receiving acknowledgment—Moreover, court is not legally authorized to grant district a "good faith" free pass simply because plaintiff's request was "inadvertently" quarantined as spam—Failure to provide records within reasonable time and to respond to records request in "good faith"—Allowing plaintiff's email request and notice to be identified and quarantined as spam and purged is not statutorily authorized basis for delaying district's response to plaintiff's public records request—Further, district failed to cooperate in good faith to determine whether various records requested by plaintiff existed; failed to provide records requested until after the need for them had passed; failed to provide plaintiff with log showing that request and written notice had been received; and took an unreasonable amount of time to provide plaintiff with access to requested records—Delays not cured by playing "catch-up" on eve of enforcement hearing—Failure to provide records in medium requested—District violated statute by failing to provide requested records in electronic medium requested by plaintiff, and none of the arguments raised by district as defense to this violation have merit—Attorney's fees—Plaintiff entitled to attorney's fees where district unlawfully refused to provide records and plaintiff provided written notice identifying the public record request to district's custodian of public records at least five days prior to filing civil action—For limited purpose of preliminarily scanning incoming records request e-mails, the district's IT department was the "designee" of district's custodian of public records—Five-day notice period commenced when plaintiff's written notice e-mail was received by district's in-coming servers, and fact that e-mail did not reach inbox monitored by public records manager due to district's own staff ineptitude in allowing legitimate request to become quarantined by automated anti-SPAM system without any procedural safeguards did not prevent notice period from commencing—Enforcement—Injunctive relief is appropriate where pattern of noncompliance with public records law and likelihood of future violations were demonstrated—Mandamus, which addresses past harm, is not appropriate to prevent future harm

STEVEN J. BRACCI, P.A., a Florida Professional Association, Plaintiff, v. THE SCHOOL BOARD OF LEE COUNTY, Defendant. Circuit Court, 20th Judicial Circuit

in and for Lee County, Civil Division. Case No. 20-CA-5205. January 12, 2021. Joseph Fuller, Judge.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER THEREON

THIS CAUSE, coming before the Court on November 13 and 20, 2020, for an accelerated evidentiary hearing pursuant to Sec. 119.11, Fla. Stat. (2020), on the Complaint of Plaintiff, STEVEN J. BRACCI, PA (the "Plaintiff"), whose address is [editor's note: address omitted], to enforce the Public Records Act against the Defendant, THE SCHOOL BOARD OF LEE COUNTY (the "District") whose address is 2855 Colonial Boulevard, Fort Myers, Florida 33966, the Court having heard the testimony, reviewed the evidence, and heard argument of the parties, the Court hereby finds:

I. FINDINGS OF FACT

The Court makes the following findings of fact based on the evidence presented in the record:

Plaintiff's Records Request, the District's Receipt Thereof, and the District's Anti-Spam Quarantine System

1. Plaintiff sent the public records request on July 16.[1] (Exh. A.)

2. The records request was e-mailed to the PublicRecords@LeeSchools.net address listed on the District's official website. (Exh. A, B.)

3. Plaintiff's name, phone number and e-mail address were listed on the records request. The District had received other e-mails from this same e-mail address without incident. (Exh. A, M)

4. The "subject" line of the records request was clearly labeled "Public Records Request, Chapter 119, Florida Statutes." (Exh. A).

5. After receiving no acknowledgment from the District, on July 28, Plaintiff sent another "written notice" e-mail to PublicRecords@LeeSchools.net, identifying the e-mail to the records custodian, consistent with the pre-suit procedure as established by the Legislature in Section 119.12(1)(b), Florida Statutes. (Exh. C)

6. As described by expert witness Deborah Onderko, the records request and written notice were received by one or both of the District's incoming servers that are named "Elmer" and "Fudd," respectively. Thereafter, they arrived at the District's e-mail security gateway system. (T. 234:23-235:2; 358:7-359:4; Exh. UUU)[2]

7. The custodian of public records failed to acknowledge Plaintiff's records request until August 11, 2020, after Plaintiff filed this lawsuit and the District was served with process. (Exh. F)

8. By the District's own admission, there was nothing malicious about Plaintiff's records request, nor the "written notice" e-mail. Rather, according to the District, there were simply certain "key words" in the body of Plaintiff's records request that caused it to be quarantined by the District's anti-SPAM filter. (Exh. UUU)

9. One week after quarantine, Plaintiff's records request and written notice were permanently purged from the District's records. (T. 344:24-345:9; Exh. UUU)

10. Dennis Osterhouse, the District's 22 year veteran Information Technology (IT) employee who works closely with the Public Records Manager, admits that a member of the public might use just about any "key words" in making a public records request. (T. 361:2-6)

11. Despite this, the District failed to create any procedural safeguard to ensure that legitimate records requests that were inadvertently quarantined due to certain unknown "key words" were subject to a second check before being purged. (T. 386:21-387:2)

12. Mr. Osterhouse also testified that the District does not keep a change log of what "key words" are added from time to time to its "custom spam" settings. Therefore, it is impossible for the District—or the Public—to know what key words the District might be adding to automatically quarantine and purge certain public records requests. In fact, even the key words steve@braccilaw.com or "Alfie Oakes" or "Oakes Farms" could be added to the custom spam settings to cause incoming public records requests containing any such words, as set by the District, to be quarantined and purged, and there would be no record of it. (T. 387:3-20; 388:11-13)

13. The District established no procedural safeguard such as a simple message digest system which could have periodically logged all quarantined items sent to the PublicRecords@LeeSchools.net address listed on the District's official website, and then sent that log to someone for review to ensure that legitimate records requests had not been inadvertently quarantined. (T. 350:19-23; 385:10-12)

14. Ms. Onderko explained that "a message digest simply is, when you're using third-party tools, is it's a summary that typically is provided on a daily basis during the overnight that is sent to the individual recipients that identifies mail that is not delivered." (T. 229:2-6).

15. Ms. Onderko further testified that if a message digest system had been established, then despite the fact that Plaintiff's records request and written notice had been quarantined, a log would have been sent to the message digest recipient containing the "To", "From" and "Subject" lines, thereby identifying that the Plaintiff had made a "Public Records Request" (the stated Subject) before it was purged. (T. 246:3-7; 249:22-250:15)

16. The District chose not to do this because its own "best practices" for cyber security suggest that sending a message digest to an "untrained" individual (such as Public Records Manager Melissa Mickey) would be too great a risk. (T.2 343:4-11; 372:1-4)

17. Mr. Osterhouse admits that a message digest system that is reviewed periodically would have made it more likely that Plaintiff's records request was discovered to have been accidentally quarantined. (T. 344:13-21; 362:22-363:1)

18. The District could have trained the records manager to review the message digest for legitimate records request that were inadvertently quarantined, and to then contact the IT department for discussion prior to releasing it. However, Mr. Osterhouse testified that this was still too great of a security risk. (T. 384:2-11)

19. Alternatively, the District could have created a message digest that was reviewed by the IT Department itself, thereby avoiding any issues of insecurity for a non-IT professional to review a message digest, for that one particular e-mail address that is used for the Public to initiate its constitutional and statutory right of access to public records. (T. 384:12-385:12)

20. The District chose not to implement such a simple safeguard, or any other safeguard. (T. 350:19-23; 385:10-12)

21. A procedural safeguard in the form of a message digest would not have been onerous to the District. Ms. Osterhouse testified that the District has 13,000 e-mails on its system, but receives only 7,000 potentially malicious e-mails on a daily basis. That amounts to less than one potentially malicious e-mail per e-mail address. (T. 385:13-387:2)

22. For this one particular PublicRecords@LeeSchools.net e-mail address that has such obvious legal important, the District should have balanced the public's interest in the creation of a procedural safeguard for incoming public records, against the District's own interest in protecting itself from potentially malicious SPAM.

23. The District set its anti-SPAM system to purge and delete public records request e-mails (which are themselves public records) a week after they are quarantined. Therefore, not only is the District "purging" legitimate public records requests, such as Plaintiff's, without any procedural safeguard or "second look" by anyone, but is also then permanently deleting (purging) those legitimate records requests within a short one-week time period. (T. 344:24-345:9; Exh. UUU)

24. Ms. Onderko testified that typically a 30 day purge setting is set by the manufacturer, rather than the one-week purge period established by the District.

25. By failing to establish any basic procedural safeguard against legitimate records requests being inadvertently sent to SPAM based only on unknown "key words," the District allowed the automation of its anti-SPAM system to erode Plaintiff's right of access to public records.

The District's Concealment of Its Receipt of Plaintiff's Records Request and Written Notice

26. After being informed on August 11 by the District's Chief Legal Counsel that the District has "no record" of having received Plaintiff's July 16 and July 28 e-mails, Plaintiff made an additional records requests for the search conducted by the District to determine whether it ever received its emails sent on July 16 and July 28, and for any spam log. (Exh. G, O)

27. The District actually had two reports and/or logs based on searches that it had run. One of them showed a list of all e-mails received by Plaintiff over the past 60 days, but did not show the e-mails sent on July 16 and July 28. (Exh. M) The other report was a log that did in fact show the District's receipt of Plaintiff's July 16 and July 28 e-mails. On August 17, that log was e-mailed by Mr. Osterhouse to both the Public Records Manager Ms. Mickey, as well as District Chief Legal Counsel Brian Williams. (Exh . UUU)

28. However, the Public Records Manager only provided Plaintiff the one report that showed a complete absence of Plaintiff's July 16 and July 28 e-mails. (Exh. M)

29. The Public Records Manager and the District withheld the other log showing the District's actual receipt and quarantining of Plaintiff's July 16 and July 28 e-mails due to the District's "custom spam" settings. Despite the existence of this spam log, the District's Public Records Manager informed Plaintiff that "[a] spam log no longer exists for the dates specified." (Exh. R)

30. It was only during the District's deposition of Steven Bracci on November 4, 2020, that the Plaintiff first became aware of this log showed Plaintiff's July 16 and July 28 e-mails having been received by the District And then, only a portion of the explanation of Mr. Osterhouse was included in the exhibit displayed by Defendant's counsel to Mr. Bracci during his deposition. Compare Exh. XX (the truncated version displayed during Mr. Bracci's deposition) with Exh. UUU (the full version showing Mr. Osterhouse's complete explanation as to why Plaintiff's e-mails were quarantined due to unknown "key words"). (Exh. XX, UUU)

District Staff's Failure to Cooperate in Providing Records When Plaintiff Had a Need for Them

31. Plaintiff's July 16 records request included a request for records evidencing the "fact-finding" and "decision-making" process that resulted in the District's cancellation of the Oakes Farms contract on June 11, 2020. (Exh. A, ¶1)

32. The Public Records Manager testified that on August 11 or 12, she forwarded the records request to other staff, and in fact sent it repeatedly. She then followed up repeatedly but in some instances staff simply did not respond. (T. 422:16-25)

33. The Public Records Manager testified that she is not the District's "custodian of public records." Rather, her testimony is that every person throughout the District who has possession of records is the District's custodian of public records. This includes the aforementioned department and individuals. (T. 425:19-426:5; 427:5-20)

34. The Public Records Manager testified that as of October 30 when her deposition was taken, Chief Financial Officer Ami Desamour had not yet responded or provided any records responsive to Plaintiff's request for records showing the "fact-finding" and "decision-making" process as to why the Oakes Farms contract was cancelled. However, on September 3, Ms. Desamour signed a sworn affidavit in which she explained the District's fact-finding and decision-making process for terminating the Oakes Farms contract, to which she attached District records that supported her explanation on the very same subject of Plaintiff's records request. The District then filed that affidavit in federal district court in support of a motion to dismiss the Oakes Farms Complaint that had been filed by Plaintiff as counsel to Oakes Farms. (T. 429:6-431:8; 433:4-16; Exh. S)

35. Superintendent Gregory Adkins also signed an affidavit dated September 3, 2020, in which he explained the District's fact-finding and decision-making process for terminating the Oakes Farms contract, and to which was attached District records that supported his explanation on the very same subject of Plaintiff's records request. That affidavit was also filed in federal district court in support of the District's motion to dismiss the Oakes Farms complaint. However, as of October 30 when the Public Records Manager's deposition was taken, the Public Records Manager testified that she did not know whether the Superintendent or his office had responded in any way. In fact, as of the eve of the trial in this action on November 13, 2020, Superintendent Adkins and the District had provided no such records. (T. 427:16-428:1; Exh. S)

36. The Public Records Manager also testified that the Procurement Department, which is the department that authored the Oakes Farms termination letter, had not yet responded to Plaintiff's request as of October 30 when her deposition was taken. (T. 426:16-19)

The Public Records Manager's Slow-Walking of Plaintiff's Requested Records

37. On September 22, 2020, the Public Records Manager notified Plaintiff that responsive e-mail records had been compiled consisting of approximately 4,100 e-mails, and that it would cost Plaintiff $2,180 for the 70 hours of staff time necessary to review them for redactions, and to provide them to Plaintiff. (Exh. FF)

38. On September 23, 2020, the Plaintiff made payment to the District. (Exh. II; T. 411:1-3)

39. As of seven weeks later, on the eve of the November 13 enforcement hearing, the Plaintiff had only received 283 e-mails from the District, each of which consisted only of the "body" of each such e-mail, without any e-mail attachments. (T. 71:9-18; 84:7-85:1)

40. The Public Records Manager testified that she averages 1 minute per e-mail for review. Thus, the 283 e-mails amount to 283 minutes, or 4.7 hours of review time. (T. 411:8-24)

41. The 283 e-mails were provided to Plaintiff in separate batches over a 7 week period between September 23 and November 12. This amounts to a pace of approximately 40 e-mails provided to Plaintiff per week, or about 40 minutes of review time per week (8 minutes per day based on a 5-day work week). (T. 84:7-85:1; Exh. QQ, RR, TT, UU, VV)

42. At that pace, applied to the total 4,100 e-mails that need to be processed, the Public Records Manager would not complete this portion of Plaintiff's records request for 102.5 weeks (4100 / 40 = 102.5), or almost 2 years. This pace would place the completion time for Plaintiff's records request around September 2022.

43. On September 23, Plaintiff also paid $60 for 45 official text messages that had already been compiled the District. As of the end of trial on November 20, Plaintiff had not yet received any of these text messages. (T. 74:25-75:6; 76:1-5; Exh. EE, II)

44. Other portions of Plaintiff's public records request also remain unfulfilled as of the start of the enforcement hearing.

The District's Document Production on the Eve of the Enforcement Hearing

45. On November 12, 2020, the literal eve of the start of the

enforcement hearing, the Public Records Manager made a bulk document production upon Plaintiff. On that date, the Public Records Manager sent 6 separate e-mails to Plaintiff containing records responsive to Plaintiff's records request. (T. 108:25-109:21)

46. Nevertheless, the Plaintiff's request remained unfulfilled, and thousands of already-compiled e-mail records remained outstanding. (T. 84:7-85:1; Exh. XXX (Item 6))

The District's Refusal to Provide Records in the Electronic Medium Requested

47. Plaintiff's records request expressly stated: "In accordance with Fla. Stat. 119.01(2)(f), if the District maintains the requested records in an electronic medium, please provide them in that medium. For all e-mails, please provide them as (.pst) files if stored in that format." (Exh. A)

48. Expert witness Deborah Onderko testified that the original electronic format of an e-mail is a .pst file:

> when you have an exchange e-mail server, your e-mail is co-located on your PC in a file that is called an OSE. When you want to create an archive, create a backup, create a repository where you can place copies of e-mails, ***the native Outlook document format is the .pst file. And in that .pst file, when you open it, it acts and behaves just like Outlook that you're accustomed to using on your regular desktop.***

(T. 252:6-14) (emphasis added).

49. Ms. Onderko also described the substantial functional difference between an e-mail in .pst format as compared to just a PDF:

> [I]f I have a .pst file and I add it into my Outlook to open that file, I then can look at the physical e-mail. And that physical e-mail gives me the ability to decode the friendly name. So instead of in your e-mail address, as it's up on the screen now—it says "From: Steve Bracci."
>
> If I had the physical e-mail, I could click on that and find out that Steve Bracci's e-mail address is steve@braccilaw.com. I could also. . .do the same on any of the "To's." I would also be able to see if there was anybody that was blind carbon copied that may not appear. Those blind carbon copies typically are on the e-mails that originate from a "sent items" mailbox. It would allow me to view any PDF attachments, any Word attachments, any Excel document attachments, any images, be they JPEGs, PNG files. Anything that you can attach to an e-mail, I would have the ability to view in its original format

(T. 252:19-253:15)

50. Ms. Onderko also testified about the ability of the Outlook program to export e-mail and calendar files in an electronic native medium:

> [W]hen you have Outlook open and you want to create an export, you have the ability to export e-mail. You have the ability to export calendar items.

(T. 254:18-21)

51. District IT professional Dennis Osterhouse also admitted that "Yes, it's possible for the District to provide calendars in native format, in .pst format, for example." (T. 334:5-7)

52. In fact, Mr. Osterhouse testified that the District does in fact provide e-mail records as .pst files. "We could provide it in .pst, ***which we do***. It could be provided in .msg. It could be provided in .eml. And it could be provided in, you know, the .pst." (T. 379:21-24) (emphasis added)

53. Mr. Osterhouse testified that he instead provided the requested calendars in PDF format because "I believed it would be in the best interest of the requester to print in a detailed format in PDF." (T. 334:16-17)

54. However, Mr. Osterhouse admits that "a PDF format is not very close to native format, no, because it's an image format." (T. 339:16-20)

55. Despite the statutory mandate to provide the records in the electronic format requested, Mr. Osterhouse admitted that the District and its public records department routinely transforms records "into PDFs, which is our practice for everything we do. Everything else you got was in PDF." (T. 334:18-21)

56. Mr. Osterhouse testified that the e-mails he compiled responsive to Plaintiff's request were then placed in an electronic folder for access by the Public Records Manager, in a "close to their original native format." Such e-mails, in that format, "would then include all attachments to those e-mails." Mr. Osterhouse also testified that if someone looks at the e-mail folder on Mrs. Mickey's desktop, when it is in her Outlook program display, one can open each item individually and review it just like a regular e-mail. He further admitted that if Ms. Mickey reviewed e-mail files for redactions in their native format and came upon an e-mail that needed some redactions, that *one e-mail* could be converted into a PDF while the other ones remain in their original format. (T. 329:2-14; 330:10-20)

57. Ms. Onderko also testified that the District could have made PDFs of only those e-mails that needed redaction, while providing the rest in a .pst format. (T. 253:16-24)

58. Mr. Osterhouse admitted the same. (T. 330:7-20)

59. Mr. Bracci testified that he has received public records request responsive e-mails from the Collier County government in a native electronic format that can be opened in Outlook. (T. 102:2-14; 104:20-105:3; Exh. PPP)

60. Rather than providing the redacted e-mails in PDF format, it is the District's practice to first convert all e-mails to a PDF file, and only then start the redaction process. Osterhouse admitted that the reason that the Plaintiff received records as PDFs rather than other formats that would work in Outlook with full functionality, was "[b]ecause that was the point of the PDF, because we have the ability to redact using Adobe PDF." (T. 162:15-25: 337:1-3)

61. Mr. Osterhouse admitted that the e-mails in native format which he provided to Mrs. Mickey could be placed on a disc or a thumb drive of some sort for sending to someone else, and in that format, the recipient would then have the full functionality of that file. (T. 330:24-331:4)

62. Despite Mr. Osterhouse's attempt to suggest that "It's impossible to provide it in the exact medium it's in because it's stored in a server in Microsoft somewhere," Mr. Osterhouse admitted that a .pst e-mail file is "a similar medium, yes. It's simply a copy of a copy of a copy. But, yes, it would be closer [to the original electronic format stored]." (T. 335:21-24)

63. Mr. Osterhouse testified that the production of e-mails to a third party in native format could be a security risk because they contain "header" information that could reveal the names of the District's servers. (T. 367:22-368:7).

64. However, Ms. Onderko testified that every e-mail ever sent contains a header, and that even just based on the headers of Plaintiff's own e-mails to the District which she reviewed, she was able to able to identify the names of the District's incoming servers as "Elmer" and "Fudd." (T. 234-23-235:2)

65. Nothing in the evidence record shows that the District ever refused to provide the records in the electronic medium requested based on concerns over security. Section 119.07(1)(e), Florida Statutes, provides that "[i]f the person who has custody of a public record contends that all or part of the record is exempt from inspection and copying, he or she shall state the basis of the exemption that he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute."

66. It is clear that the District knows what it means to provide an e-mail in a native or electronic format. In fact, in this same action, the District made a production request to Plaintiff asking for Plaintiff own "original e-mails" sent "in their native format including all attach-

ments. . . ." (Exh. III, ¶4)

67. Public Records Manager Ms. Mickey admitted in an e-mail delivered on the eve of the enforcement hearing, that it is her intention to first send Plaintiff just the body of each e-mail in a PDF format, and then later, attempt to send the various attachments to those e-mails, with Plaintiff then needing to correlate each attachment with the body of the original e-mail. (Exh. XXX (Item 6))

68. This process described by Ms. Mickey demonstrates the significant difference between the PDF files sent by the District, and the electronic medium files that the District should have provided to Plaintiff, such as a .pst, .msg or .eml file.

II. CONCLUSIONS OF LAW

A. Failure to Ensure that Automation Does Not Erode Access to Public Records

The first two policies established by the Florida Legislature under the Public Records Act state that "Providing access to public records is a duty of each agency." Section 119.01(1), Florida Statutes. "Automation of public records must not erode the right of access to those records." Sections 119.01(1), and 119.01(2)(a), Florida Statutes.

The Court finds that the District violated these policies by establishing an automated anti-SPAM system that quarantined Plaintiff's entirely legitimate public records request, and allowed it to be deleted and purged a week later, because the District altogether failed to establish any procedural safeguards to ensure that legitimate public records requests were not inadvertently sent to SPAM. For instance, by the use of a message digest system, the Plaintiff's records request and written notice could have been reviewed either by a trained staff person such as the Public Records Manager, or by someone in the District's IT Department.

The District argues in defense that the Plaintiff is at fault for the records request being sent to SPAM and subsequently purged a week later. The District contends that the Plaintiff failed to place a phone call to the public records manager before filing suit. In essence, the District argues that while the District's automated system misplaced Plaintiff's e-mail and then permanently deleted it a week later, such misplacement and deletion was an honest mistake that could have been corrected if Plaintiff had simply called the records custodian. However, this argument fails based on the four corners of the holding in *Office of the State's Attorney for the Thirteenth Judicial Circuit v. Gonzalez,* 953 So.2d 759 (Fla. 2nd DCA 2007) [32 Fla. L. Weekly D1035a], wherein the Second District opined:

> [T]he Office of the State Attorney has argued that its failure to turn over the records was not a refusal at all but ***simply a mistake that could have been remedied had Mr. Gonzalez or his attorney called the office to request the records again.*** We would observe, in a similar vein, that the State Attorney's Office, which admittedly had prepared the records but had ***lost the letter*** requesting them, should have been able to discern from the records that they related to Mr. Gonzalez and could just have easily contacted him or his probation officer to resolve the confusion. ***The record fails to reflect any action undertaken by the State Attorney's Office to cure or mitigate its mistake.*** In any event, ***we decline to engraft upon the statute an additional obligation for a plaintiff to make repeated requests before filing suit to enforce his public records rights.*** "Should we engraft onto the term 'unlawfully refused' either a good faith or an honest mistake exception, ***the salutary effect of the 1984 amendment [providing for attorney's fees] would be seriously diluted."*** *News & Sun-Sentinel,* 517 So. 2d at 744. ***Even if the delay in providing the records can be attributed only to ineptitude of the personnel in the Office of the State Attorney, the delay in this case amounts to an unlawful refusal.***

Id. at 765 (emphasis added).

Here, as in *Gonzalez,* the Plaintiff had no obligation to call the District before filing suit. Nothing in the Public Records Act requires the Plaintiff to place a phone call, and the Court should "decline to engraft upon the statute an additional obligation" for Plaintiff "to make repeated requests," including by placing a phone call, before filing suit. Here, as in *Gonzalez,* the record also fails to reflect any action undertaken by the District to mitigate its mistake of allowing Plaintiff's legitimate public record request to get quarantined by the anti-SPAM system without a any procedural safeguard. Here, as in *Gonzalez,* the "ineptitude of the personnel" in the District's IT and Communications departments caused the Plaintiff's e-mail to be inadvertently quarantined and then deleted a week later, by failing to establish a basic message digest system or other safeguard to ensure that the District's automation of its anti-SPAM processes did not erode Plaintiff's right of access to public records.

The District's failure to create such a system caused the District to not only lose Plaintiff's legitimate records request, but to also purge and delete it a week later. Thus, the District violated Sections 119.01(1) and 119.02(2)(F), Florida Statutes.

B. Failure to Promptly Acknowledge Plaintiff's Public Records Request

Section 119.07(1)(c), Florida Statutes, provides that "A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly. . ." The Court finds that the District failed to promptly acknowledge Plaintiff's legitimate public records request addressed to the PublicRecords@LeeSchools.net e-mail address posted on the District's official website. The District did not acknowledge Plaintiff's records request until three weeks later, on August 11, 2020, after Plaintiff had filed this lawsuit and served process upon the District.

The District argues in defense that the Plaintiff's e-mail was never "received" by the District, citing to the case of *O'Boyle v. Town of Gulf Stream,* 257 So. 3d 1036, 1040 (2018) [43 Fla. L. Weekly D2386a] quoting *Grapski v. City of Alachua,* 31 So. 3d 193, 196 ("To set forth a cause of action under the Act, a party must 'prove they made a specific request for public records, the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner' ") (quoting *Grapski v. City of Alachua,* 31 So. 3d 193, 196 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D205b]. The Court rejects this argument because the facts clearly show that the Plaintiff's records request and written notice were received by the District's "Elmer" and/or "Fudd" servers, and thereafter were quarantined as SPAM based on the District's "Custom Spam" settings and subsequently purged. Moreover, the District attempted to conceal its receipt by failing to provide Plaintiff with the SPAM log that showed the District's receipt which was quarantined due to the District's "Custom Spam" settings.

Second, the District argues that the records request and written notice were never received to the "inbox" of the PublicRecords@LeeSchools.net account, and therefore it had no duty to acknowledge Plaintiff's records request. The Court rejects this argument for four reasons. First, nothing in Section 119.07(1)(c) conditions the records custodian's obligation to acknowledge Plaintiff's records request upon its actual receipt into the PublicRecords@LeeSchools.net inbox. In fact, no form of the word "receive" is contained anywhere within Section 119.07(1)(c).

Second, consistent with the holding in *Gonzalez,* the Court refuses to "engraft" onto the Public Records Act an obligation for the Plaintiff to make multiple requests before receiving an acknowledgment, for instance to make sure that the request was actually received into the records custodian's inbox. *Gonzalez* at 765.

Third, the Court is not legally authorized to grant the District a "good faith" free pass simply because the Plaintiff's records request

was "inadvertently" quarantined as SPAM. As Section 119.07(1)(c) is written, the requirement for the custodian of public records to acknowledge records request is an absolute and unconditional obligation. Indeed, Section 119.01(1)(c) provides that "custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith." As written, the "good faith" obligation in § 119.01(1)(c) applies only to the duty to "respond" to the records request, not to the duty to "promptly acknowledge" the records request, which is an absolute. The Plaintiff is not required to show bad faith by the District in order to establish a violation of the Public Records Act for failure to promptly acknowledge the request. *Compare, Bd. Of Trustees v. Lee,* 189 So.3d 120, 127 (Fla. 2016) [41 Fla. L. Weekly S146a] ("[t]he absence of any such standards in section 119.12—whether good or bad faith, reasonable, or knowingly and willfully—clearly indicates that section 119.12 is not contingent on a finding of the public agency's unreasonableness or bad faith before allowing for an award of attorney's fees under the Public Records Act").

In summary, the District violated Section 119.07(1)(c), Florida Statutes, when its custodian of public records failed to promptly acknowledge Plaintiff's public records request when it was sent to the District on July 16, 2020.

C. Violation of Section 119.07(1)(a) Requirement to Provide Records Within a "Reasonable Time;" Violation of Section 119.07(1)(c) Requirement to Respond to Public Records Requests in "Good Faith"

Section 119.07(1)(a), Florida Statutes, provides that "Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time. . . ." Section 119.07(1)(c), Florida Statutes, provides that "A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." The Court finds that the District has violated both of these subsections of the Public Record Act.

Florida courts interpret these statutory subsections to mean that public records must be provided within a "reasonable time," and that there are only a limited number of statutorily enumerated bases for delaying a response to a public records request:

> Delay in making public records available is permissible under ***very limited circumstances.*** A records custodian may delay production to determine whether the records exist, § 119.07(1)(c); if the custodian believes that some or all of the record is exempt under the Act, § 119.07(1)(d)-(e); or if the requesting party fails to remit the appropriate fees, § 119.07(4). Otherwise, "[t]he only delay permitted by the Act is the ***limited reasonable time allowed*** the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt" (emphasis added).

Promenade D'Iberville, LLC v. Sundy, 145 So. 3d 980, 983 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1829a]. As stated in *Promenade D'Iberville,* there are only three permissible statutory reasons for delay—(i) checking if the records exist; (ii) reviewing for exemptions; and (iii) delaying until the requester pays. Otherwise, the only "limited reasonable time" is the time it takes to redact the exempt portion of the records. *Id.*

The Court finds that the District violated the Public Records Act by delaying its response to Plaintiff's records request in multiple ways, and by failing to process them within a "limited reasonable time."

As a first delay, the District delayed Plaintiff's records request for three weeks when it failed to acknowledge and begin processing the request upon the District's receipt on July 16. Allowing Plaintiff's records request to be quarantined by automation, and then purged and deleted it a week later, is not a statutorily authorized basis for delaying the District's response to Plaintiff's public records request.

As a second delay, the District failed to cooperate in good faith to determine whether the various records requested by Plaintiff exist. Specifically, the various custodians of public records within the District's Procurement Department, Superintendent's office, and Chief Financial Officer's office, all failed to timely locate and/or determine whether the public records requested by Plaintiff exist.

As a third delay, the District failed to provide the records requested by Plaintiff until after the need for them had passed. "[I]n some circumstances, a delay in disclosing records can rise to the level of a refusal. For example, a trial court may properly award attorney fees under section 119.12 if there was no good reason for the delay. See *Promenade D'Iberville, LLC v. Sundy,* 145 So. 3d 980 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1829a]; *Barfield v. Town of Eatonville,* 675 So. 2d 223 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1409a]; *Weeks v. Golden,* 764 So. 2d 633 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D996a]. Likewise, it would be proper to award fees if the records were not provided until after the need for them had passed." *Consumer Rights, LLC v. Union County,* 159 So.3d 882, 885 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D533b].

As set forth above, the Plaintiff requested information about the "fact-finding" and "decision-making" process for the termination of the Oakes Farms contract. The District knew of the importance to Plaintiff of having such records, because Plaintiff is the attorney of record for Oakes Farms in other federal district court litigation pending in the U.S. District Court for the Middle District of Florida. The District's knowledge of Plaintiff's need is obvious given that the District actually filed the affidavits of Superintendent Greg Adkins and Chief Financial Officer Ami Desamour in the federal court case, in support of a motion to dismiss Oakes Farms' complaint. And yet, at the same time, these same individuals failed to provide responsive records on the same subject to Plaintiff, who had a need for all such records to determine precisely what happened with the Oakes Farms contract, and to be able to better respond to the District's own motion to dismiss which included allegations that Oakes Farms had not sufficiently pled facts to support its complaint.

The District essentially used the Public Records Act as a sword rather than a shield by delaying the District's production of records responsive to Plaintiff's records request, while simultaneously using those same records to defend itself in federal court. Under the holding of *Union County,* the District failed to provide the records until after Plaintiff's need had passed. By so doing, the District violated its obligation to provide records in good faith pursuant to Section 119.07(1)(c), Florida Statutes.

As a fourth delay, the District altogether failed to provide Plaintiff with the log showing that the District did in fact received Plaintiff's July 16 records request and July 28 written notice despite the Chief District Counsel's to the contrary. Instead, the Public Records Manager's official response was that "a spam log no longer exists."

As a fifth delay, the District failed to provide Plaintiff's records within a "reasonable time," as required by Section 119.07(1)(a), Florida Statutes. The Public Records Manager's two-year pace to provide the 4,100 compiled e-mails which Plaintiff paid $2,180 for on September 23, and the Public Manager's failure to provide any of the 45 text messages which Plaintiff paid $60 for on September 23, are simply not a reasonable time frame for the District's productive of responsive records.

The District counters this argument by arguing that the Public Records Manager has "continuously and in good faith" provided records to the Plaintiff. The Court rejects this argument, noting that the

District's continued slow dribble of records to Plaintiff is neither "continuous" nor in good faith. The undisputable facts described above, and the empirical calculation about the pace of the District's records production, demonstrate that the District is, in fact, taking an unreasonable amount of time to provide Plaintiff with access to the public records it requested. Thus, the District has violated Section 119.07(1)(a), Florida Statutes.

D. Playing "catch-up" on the eve of the enforcement hearing, or thereafter, does not cure the District's delays in providing the public records

Further evidence of the District's slow-walking of its records request is the fact that the Public Records Manager then made a bulk production of records to Plaintiff on November 12, 2020, which is the eve of the enforcement hearing. On that date, the Public Records Manager sent 6 e-mails to Plaintiff with various records attached. Florida case law provides that such a last-minute records production on the eve of the enforcement hearing does not save the District from a violation of the Public Records Act. "An agency's production of public records "on the eve of the enforcement hearing" does not cure its unjustified delay. *Promenade D'Iberville* at 984. "Rather, the caselaw is clear that unjustifiable delay to the point of forcing a requester to file an enforcement action is by itself tantamount to an unlawful refusal to provide public records in violation of the Act." *Id.* "By that point, the harm had been done; [the agency's] initial stone-walling had already forced [plaintiff] to file the enforcement action to obtain the records." *Id.* The same principle applies to the necessity of the Plaintiff's time and cost expense in preparing for and attending the enforcement hearing itself.

If anything, the District's last-minute document production on the eve of the enforcement hearing demonstrates that the District was in fact capable of providing access to the public records at an earlier date, but only did so under threat of adverse ruling by the Court for its failure to do comply with the Public Records Act. Florida case law is clear—government agencies are supposed to voluntarily comply with the Public Records Act—and the Public should not be forced to file lawsuits—and prepare for expensive trials—in order to obtain public records. "Section 119.12(1) is designed to encourage public agencies to ***voluntarily comply*** with the requirements of chapter 119, thereby ensuring that the state's general policy is followed. If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency." *Bd. Of Trustees v. Lee* at 125. (emphasis added).

E. Violation of Section 119.01(2)(f) Requirement to Provide Records in the Medium Requested

The Court finds that the District violated Section 119.01(2)(f), Florida Statutes, by faliing to provide e-mails and Outlook calendars in the electronic medium requested by Plaintiff. Section 119.01(2)(f) provides that "[e]ach agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to this chapter, a copy of any public record in that system which is not exempted by law from public disclosure. An agency ***must*** provide a copy of the record in the medium requested if the agency maintains the record in that medium." (emphasis added). This provision is mandatory, not permissive. Plaintiff, in its records request specified that "[i]n accordance with Fla. Stat. 119.01(2)(f), if the District maintains the requested records in an electronic medium, please provide them in that medium. For all e-mails, please provide them as (.pst) files if stored in that format."

The District has instead chosen to provide all e-mails and Outlook calendars in an "image-based" PDF format, rather than a .pst, .msg or .ist electronic format that would allow the Plaintiff to open those files in a computer Outlook program and view them with the same content and functionality as they have when viewed on the District's own system. In other words, the District has not provided them in the electronic medium requested. By failing to provide the records in the medium requested—which is statutorily mandated (ie, "*must* provide"), the District has violated Section 119.01(2)(f), Florida Statutes.

The District should have provided all e-mails and Outlook calendars in an electronic medium that could be opened in an electronic format on Outlook, for viewing in the same format that the District has available to it when it opens such files on its own internal system. Instead, it provided PDF records that lacked functionality, and did not even include the attachments to e-mails.

The District makes two arguments about why it did not violate Section 119.01(2)(f), by providing only static PDF documents. The Court rejects them both.

First, the District states that it needed to convert all e-mail and calendar records into PDF format in order to review them for redactions. However, the evidence and testimony shows that the Public Records Manager could have (and should have) reviewed all records in their native medium, and then isolated only those e-mails and calendar files that needed to be converted for redaction in a PDF format. By first converting all e-mails and calendars into PDF format for exemption review, the District has allowed the "exemption" to supersede the duty to provide public access to records under the Public Records Act. "The purpose of the Public Records Act is to fulfill the constitutional requirement of making public records openly accessible to the public. To accomplish the Legislature's objectives, the Public Records Act is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose." *Bd. Of Trustees v. Lee* at 125.

Second, the District belatedly suggests during the enforcement hearing that it cannot provide e-mails in .pst format for security reasons, because such records might contain embedded information such as "header" information that would allow Plaintiff to gain knowledge about the District's servers. The Court rejects this argument for four reasons.

The first reason is that the Legislature has made clear that the District *must* provide the records in an electronic format upon request. Section 119.01(2)(f), Florida Statutes. The second reason is that the Plaintiff testified how other local agencies, such as the Collier County Government, readily provide e-mails in a native medium. The third reason it that expert witness Deborah Onderko testified that *every* e-mail contains such header information. This includes all e-mails sent each and every day by the District to outside third parties. Taking the District's argument to its logical conclusion, then the District should not ever allow e-mails to be sent to recipients outside of its own system. This, of course, is an absurdity.

The fourth reason is that the District has never sent Plaintiff a claim of exemption based on security. Section 119.07(1)(e), Florida Statutes, provides: "If the person who has custody of a public record contends that all or part of the record is exempt from inspection and copying, he or she shall state the basis of the exemption that he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute." Section 119.07(1)(f), Florida Statutes, further provides: "If requested by the person seeking to inspect or copy the record, the custodian of public records shall state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential." The Plaintiff, in making its records request, included a request that all claimed exemptions be described in writing and with particularity. The District has made no

claims of exemption based on any specific statutory reference regarding security exemptions, nor by a description made in writing and with particularity. Accordingly, the District cannot make any claim of non-production based on any such statutory exemption.

For the foregoing reasons, the Court rejects the District's defensive arguments and finds that the District violated section 119.01(2)(f), Florida Statutes, by refusing the provide the requested e-mails and Outlook calendars in the electronic medium requested.

F. Attorney's Fees for Enforcement of the Public Records Act—Section 119.12, Florida Statutes - Unlawful Refusal to Provide Public Records

"The Legislature has also provided, through section 119.12 for an award of attorney's fees under the Act when a court determines that the agency 'unlawfully refused' to permit a public record to be inspected or copied. . . . . In other words, section 119.12 has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records." *Bd. Of Trustees v. Lee.* at 124-125 (internal quotations and citations omitted).

As set forth in *Lee,* the Legislature encourages individuals to seek attorney's fees as part of their efforts to enforce the Public Records Act. There are two requirements in order for a plaintiff to obtain an award of attorney's fees. First, there must have been an "unlawful refusal" to provide records by the agency. Section 119.12(1)(a), Florida Statutes. Second, the plaintiff must have "provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action."

1. The District has Unlawfully Refused to Provide Records

"[A]ttorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced." *Gonzalez* at 764. The Court finds that the District unlawfully refused to respond to Plaintiff's public records request in the following ways, all of which have already been described above in more detail.

First, the District failed to acknowledge Plaintiff's public records request, and delayed working on fulfilling it, until after Plaintiff filed its enforcement lawsuit, in violation of Section 119.07(1)(c), Florida Statutes. The ineptitude of District staff in allowing the record request to become inadvertently quarantined by an automated process, and then purged and deleted a week later, does not excuse the District's statutory. *Gonzalez* at 765; *Promenade D'Iberville* at 983. Nor does the District's argument that the Plaintiff should have first placed a phone call before filing suit. *Gonzalez* at 765.

Second, the District delayed by failing to provide the records within a reasonable time, in violation of Section 119.07(1)(a), Florida Statutes.

Third, the District and its various custodians of public records delayed by failing to respond in good faith to Plaintiff's records request, in violation of Section 119.07(1)(c), Florida Statutes. This includes, without limitation, the failure of the District's Superintendent and Chief Financial Officer to provide "fact-finding" and "decision-making" records relating to the Oakes Farms contract termination, while simultaneously using such records against Plaintiff's Oakes Farms client in the federal court litigation. This also includes, without limitation, the various statutorily unauthorized delays described hereinabove.

Fourth, the District withheld from Plaintiff the log showing that the District did in fact received Plaintiff's July 16 records request and July 28 written notice but that it was quarantined by the District's "custom spam" settings. Instead of providing that requested record to Plaintiff, the Public Records Manager's official response was that "a spam log no longer exists."

Fifth, the District failed to provide the requested e-mail and calendar records in an electronic format that was compatible with Outlook so that they could be viewed in the same format as the District enjoys on its own system, the District has proffered improper reasons as a basis for its refusal to provide the records in the medium requested, in violation of Section 119.01(2)(f), Florida Statutes.

2. Plaintiff Provided Written Notice Identifying the Public Records Request Prior to Filing Suit

The Court finds that on July 28, Plaintiff sent written notice to the District's published PublicRecords@LeeSchools.net address identifying the public records request to the District's custodian of public records, thereby satisfying the requirement of Section 119.12(1)(b), Florida Statutes.

The District presents two arguments for why it did not violate its statutory obligation to promptly Plaintiff's public records request, both of which the Court rejects. Plaintiff first points to Section 119.12(1)(b), which provides that the five business day pre-suit notice period "begins on the day the written notice of the request is received by the custodian of public records." The District argues that since the e-mail never made its way into the inbox at PublicRecords@LeeSchools.net, that it was not received by Public Records Manager Melissa Mickey, who monitors that e-mail address. However, Ms. Mickey testified that she is not the custodian of public records. Rather, according to Ms. Mickey, the District has many records custodians, being each and every individual within the District who possesses District records at any given time.

Applying the statutory definition of "custodian of public records" to the facts of this case, the Court finds that the Plaintiff's written notice identifying the public records request was in fact "received" by the "custodian of public records." Section 119.011(5), Florida Statutes, defines "custodian of public records" as "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, ***or his or her designee***." (emphasis added). Regardless of who is the District's officer charged with the responsibility of maintaining the office having public records, for the purpose of monitoring incoming e-mails to the PublicRecords@LeeSchools.net address and checking them for SPAM through the automated system, the District designated its own IT Department as the recipient of incoming e-mails, and charged the IT Department with the responsibility to safeguard the PublicRecords@LeeSchools.net account from malicious SPAM.

In other words, for that limited purpose of preliminarily scanning incoming records request e-mails, the IT department is the "designee" of the District's custodian of public records. This makes the IT department the "custodian of public records" as defined by Sectionl 119.011(5), Florida Statutes. That is, the IT department is "his or her designee."

Thus, when Plaintiff's written notice e-mail was received by the District's incoming servers named "Elmer" or "Fudd" servers (as described by expert witness Deborah Onderko), Plaintiff's written notice was then "received" by the custodian of public records for purposes of Section 119.12(1)(b), Florida Statutes, which provides that "the notice period begins on the day the written notice of the request is received by the custodian of public records, excluding Saturday, Sunday, and legal holidays, and runs until 5 business days have elapsed.

Moreover, the Court finds that under these facts where the District itself caused the e-mail not to reach the inbox monitored by the Public Records Manager due to its own staff ineptitude in allowing a legitimate public records request to become quarantined by an

automated anti-SPAM system without any procedural safeguards, the District's argument that the custodian of public records did not "receive" the e-mail by virtue of the District's own failures, is simply inconsistent with the construction of the Public Records Act which is broadly construed in favor of the public's right of access to records. *Bd. Of Trustees* at 125.

Under the facts of this case, it is clear that the Plaintiff satisfied its statutory pre-suit obligation to provide written notice identifying the records request, and that the "custodian of public records," as defined in Section 119.011(5), received that request, whereupon the five-business day clock began to tick.

Therefore, because Plaintiff has satisfied both requirements of Section 119.12, Florida Statutes, for an award of attorney's fees for its enforcement of the Public Records Act, the Court finds that Plaintiff is entitled to such an award.

G. The Court Has Enforcement Authority

This Court has the authority to issue an order or injunction directed to the Defendant Lee County School Board to enforce the Public Records Act, pursuant to Section 119.11, Florida Statutes.

The Public Records Act affords a complainant an accelerated hearing process through the courts. Section 119.11(1), Fla. Stat., provides that "[w]henever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases. Section 119.11(2), Fla. Stat., provides that "[w]henever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48-hour period."

While mandamus is an available remedy for a Public Records Act violation, "[w]e cannot subscribe to the [defendant's] contention that injunctive relief is not available in actions brought pursuant to Chapter 119, and the corollary suggestion that the exclusive remedy is mandamus. The statute in no way specifies the form of the action." *Daniels v. Bryson,* 548 So. 2d 679, 680 (Fla. 3d DCA 1989). As mandamus only addresses past harm, injunctive relief is available upon an appropriate showing of a pattern of conduct violative of Chapter 119 which is likely to continue. *Id.*

> The impermissible withholding of documents otherwise required to be disclosed constitutes, in and of itself, irreparable injury to the person making the public records request. Since the purpose of Chapter 119 is to afford disclosure of information without delay to any member of the public making a request, nondisclosure prevents access to the information and is an injury not ordinarily compensable in damages. Where a litigant satisfies the requirements for injunctive relief, such relief will lie under the Public Records Law.

Id. (citations omitted). Injunctive relief is appropriate "where there is a demonstrated pattern of noncompliance with the Public Records Law, together with a showing of likelihood of future violations. Mandamus would not be an adequate remedy, as the writ will not lie to prevent future harm." *Id.* at 680-81 (citations omitted).

ACCORDINGLY, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED as follows:

(1) The Court hereby DECLARES that the District violated the Public Records Act by:

a. Eroding the Plaintiff's and public's right of access to records through automation, by allowing a legitimate public records request to be quarantined and subsequently purged, without any procedural safeguards;

b. Failing to promptly acknowledge Plaintiff's public records request, in violation of Section 119.01(1)(c), Florida Statutes;

c. Allowing the District's automated anti-SPAM system to quarantine Plaintiff's legitimate public records request, without implementing any procedural safeguards protecting the Plaintiff and other members of the public from the inadvertent quarantine and purging of their records requests, in violation of Sections 119.01 and 119.01(2)(a), Florida Statutes;

d. Unlawfully delaying Plaintiff's public records request, and failing to provide records within a reasonable time, in violation of Section 119.07(1)(a), Florida Statutes;

e. Failing to respond in good faith to Plaintiff's records request, in violation of Section 119.07(1)(c), Florida Statutes; and

f. Failing to provide e-mails and Outlook calendars responsive to Plaintiff's request in an electronic medium that allows Plaintiff to view the records in the same way that the District is able to view them on their own computer system, in violation of Section 119.01(2)(f), Florida Statutes;

(2) Pursuant to Section 119.11, Florida Statutes, the Court hereby ENJOINS the District to provide, within 48 hours, all records responsive to Plaintiff's records request; with all responsive e-mails and calendars shall be in .pst or other electronic format that makes the records capable of being viewed in Outlook in the same manner that the District may view such records on its own systems, except for specific e-mails or calendar entries that require redactions, which may be provided in PDF format;

(3) The Plaintiff is entitled to an award of attorney's fees for its enforcement of the Public Records Act pursuant to Section 119.12, Florida Statutes, because the Plaintiff has shown that (i) the District "unlawfully refused" to provide Plaintiff with access to the requested public records, and (ii) the Plaintiff satisfied the pre-suit written notice requirement; and

(4) The Court reserves jurisdiction to ensure enforcement of the Public Records Act, and to determine the amount of attorney's fees awarded to Plaintiff

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[1]All dates references are to calendar year 2020, unless otherwise indicated.

[2]References to "T." are to the transcripts of the enforcement hearing held on November 13 and November 20, 2020. They are in 3 parts, but the pages are sequentially numbered throughout. All transcripts were filed with the Clerk on December 4, 2020.

* * *

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COUNTY COURTS

Garnishment—Exemptions—Where defendant's weekly disposable earnings are lower than 30 times federal minimum wage, defendant's entire disposable earnings are exempt from garnishment—Writ of garnishment is dissolved

SUNCOAST SCHOOLS FEDERAL CREDIT UNION, Plaintiff, v. SHALONDRIA RICKS, Defendant, and THE HOUSE OF BOSTICS, LLC, Garnishee. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2002 CC 2046. February 17, 2021. Jason L. Jones, Judge. Counsel: Jeffrey J. Mouch, Kass Shuler, P.A., Tampa, for Plaintiff. Robert G. Churchill, Jr., Churchill Law Group, PLLC, Tallahassee, for Defendant.

ORDER GRANTING CLAIM OF EXEMPTION; ORDER DISSOLVING WRIT OF GARNISHMENT

This cause, having come before the Court on Defendant SHALONDRIA RICKS' Claim of Exemption and Request for Hearing and Motion to Dissolve Garnishment, the Court having reviewed the file and received evidence and testimony and being otherwise fully advised in the premises, FINDS:

a. That the funds at issue and held by the garnishee are exempt from garnishment. The evidence before the Court demonstrates that the weekly disposable earnings of the Defendant is lower than 30 times the federal minimum wage for such a work period. Defendant's entire disposable earnings are therefore exempt from garnishment pursuant to 15 USC § 1673.

Therefore it is, ORDERED AND ADJUDGED:

1. That the Writ of Garnishment against Defendant's wages and all other monies held by garnishees is hereby Dissolved, Terminated, and of no further legal effect.

2. That Garnishee, THE HOUSE OF BOSTICS, LLC, shall immediately and without delay—and without regard to any potential motion for rehearing or reconsideration of this Order—provide Defendant with access to, and rights of ownership of, all monies held by Garnishee under any Writ of Garnishment entered in this action.

4. This court reserves jurisdiction to enter all further orders as necessary.

* * *

Insurance—Automobile—Windshield repair—Appraisal provision is valid, and compliance with provision is mandatory condition precedent to filing suit—Motion to dismiss granted

WINDSHIELD WARRIORS, LLC, a/a/o Aaron Tishim, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County, Small Claims Division. Case No. 20-007624-SC - North. February 15, 2021. John Carassas, Judge. Counsel: Michael D. Cerasa, The Cerasa Law Firm, LLC, Orlando, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

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

Plaintiff, Windshield Warriors, LLC, as an assignee of Aaron Tishim, brought this Complaint for breach of contract against Defendant, Progressive Select Insurance Company. Defendant argues in pertinent part that the Complaint should be dismissed because Plaintiff failed to satisfy a condition precedent to bringing this lawsuit by failing to participate in the appraisal process, as expressly required pursuant to the Progressive policy executed by and between Progressive and Aaron Tishim.

Plaintiff argues that 1) no appraisable issue exists; 2) Defendant's appraisal provision violates the Prohibitive Cost Doctrine; and 3) that Defendant's appraisal provision violates the Plaintiff's fundamental right of access to courts.

The Court herby finds that Progressive's appraisal provision is valid and that compliance with the same is a mandatory condition precedent to filing suit. The issue in dispute is one of the amount of loss and not one of coverage. Pursuant to the Policy, upon demand by either party, the other party must participate in the appraisal process before filing suit. Progressive properly invoked its right to appraisal and the terms of conditions of the policy must be complied with before Plaintiff can file suit. Thus, the amount of loss suffered should be determined by appraisal. Accordingly, this matter is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy.

Fort the reasons stated above Defendant's Motion to Dismiss is hereby GRANTED. This case is dismissed without prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Driving pattern that included appropriate and prudent turn from parking lot onto road without affecting other traffic or pedestrians followed by slight weaving within lane was insufficient to justify traffic stop for careless driving or welfare check—Motion to suppress is granted

STATE OF FLORIDA, v. SHANNON LEE FUGIT, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020 CT 912. February 8, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Assistant State Attorney, Office of the State Attorney, for State. Fleming K. Whited II, Whited Law Firm, Daytona Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS BASED ON ILLEGAL STOP

THIS MATTER came before the Court on Wednesday February 3, 2021 on the Defendant's Motion to Suppress. The Court, having heard testimony from the arresting officer, Trooper Ken Montgomery, and having reviewed the AXON video recordings admitted into evidence, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

Trooper Montgomery arrested the Defendant SHANNON LEE FUGIT for Driving Under the Influence within Flagler County. The Defendant filed a Motion to Suppress based on Illegal Stop, challenging the basis for the traffic stop. Trooper Montgomery was the sole witness at the hearing on the motion.

Trooper Montgomery testified to a driving pattern that was also captured on his front facing video camera, which was stipulated to and admitted into evidence. Trooper Montgomery testified that he was driving southbound on AlA and turned westbound on State Road 100 when he witnessed the Defendant's vehicle pull out of a local establishment on the south side of the road in a careless manner. When questioned why exactly he stopped the vehicle, Trooper Montgomery stated for the careless manner of pulling out of the parking lot and onto SR100 and also for a welfare check, to determine if the driver was ill, tired, or impaired, based upon weaving within its lane. With regard to the weaving, Trooper Montgomery acknowledged that the vehicle came "close to touching the lane marker" but never actually touched or crossed the lane marker.

On cross examination and after reviewing the video again with

defense counsel, the Trooper acknowledged that the Defendant's driving neither endangered any pedestrians nor eastbound traffic when he pulled out. The trooper further admitted that his vehicle was the closest westbound traffic and that the Defendant's driving did not endanger him. Additionally, on cross examination, the trooper also admitted that the vehicles traveling in the outside line beside where the Defendant drove were not impacted, took no evasive action, and did not brake. Lastly there were no other vehicles identified as being potentially impacted by the Defendant's driving. Tracking the language of the Careless Driving statute, Florida Statute 316.1925, the trooper was questioned on the Defendant's driving with respect to width, grade, curves, corners, and all other attendant circumstances; he acknowledged that the Defendant's driving did not endanger any life, limb, or property.

The video recording does reflect the vehicle pull safely and appropriately from the south side of SR100 into the inside lane of SR100, with no traffic taking any evasive action and no pedestrians near his vehicle. The video recording does reflect a slight swerve within the lane as the Defendant's vehicle crosses over the bridge. The Defendant's vehicle never touches or crosses the lane markers on either side.

The Defendant contests the validity of the stop, arguing that the Defendant's driving was not careless under Florida Statute 316.1925 and that there was no lawful basis to stop the Defendant due to no violation of law. The Defendant cited several cases in its motion, including *State v. Teamer,* 151 So.3d 421 (Fla. 2014) [39 Fla. L. Weekly S478a]; *Peterson v. State,* 264 So.3d 1183 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]; and *Crooks v. State,* 710 So.2d 1041 (Fla. 2nd DCA 1998) [23 Fla. L. Weekly D1323b]. The State argued that the trooper had reasonable suspicion to believe the driver to be ill, tired, or impaired, citing *Baden v. State*, 174 So.3d 494 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b].

Conclusions of Law:

Having heard the testimony of Trooper Montgomery under oath, coupled with the AXON recording of the Defendant's driving, the Court finds that, as a factual matter, the driving pattern of the Defendant, which included an appropriate and prudent turn onto a four lane road without affecting any traffic, pedestrians, or bicyclists followed by slight weaving within the lane, was insufficient to justify the traffic stop of the Defendant's vehicle for either a civil infraction or a welfare check. *See Crooks v. State,* 710 So.2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b]; *Peterson v. State,* 264 So.3d 1183 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]. Therefore, the Court finds that the State failed to meet its burden and concludes that, based upon the totality of the circumstances, there was insufficient reasonable cause for the Trooper to perform a traffic stop on the Defendant's vehicle.

Based upon the above findings of fact, it is therefore ORDERED AND ADJUDGED as follows:

The Defendant's Motion to Suppress is GRANTED. All evidence after the Defendant SHANNON LEE FUGIT is seized by being pulled over, including any statements, the results of any field sobriety exercises and any matters related to any breath or urine tests are suppressed.

* * *

Insurance—Personal injury protection—Discovery—Documents—Election of deductible

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o John Collins, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2015-SC-13910-O. August 18, 2020. Brian F. Duckworth, Judge. Counsel: David B. Alexander, Bradford Cederberg, Orlando, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL COMPLETE AND/OR BETTER RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE TO DEFENDANT BEARING A CERTIFICATE OF SERVICE DATE AUGUST 26, 2019

THIS MATTER having come before this Honorable Court on Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date August 26, 2019, bearing a certificate of service dated September 23, 2019, and this Honorable Court having heard arguments of counsel on July 16, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date August 26, 2019, bearing a certificate of service dated September 23, 2019, is hereby **GRANTED** in part and **MOOT** in part.

2. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date August 26, 2019, bearing a certificate of service dated September 23, 2019, is hereby **GRANTED** as to Plaintiff's requests numbered one (1.) through four (4.).

3. Defendant shall produce to Plaintiff the documentation/items requested by Plaintiff in Plaintiff's requests numbered one (1.) through four (4.). Specifically, Defendant shall produce to Plaintiff the following documentation/items within thirty (30) days from the date of this Order:

1. The entire application of insurance for the policy of insurance at issue executed by the Named Insured or John Collins;

2. Any Personal Injury Protection (PIP) deductible election forms signed by the Named Insured or John Collins in the possession of Defendant;

3. Any documentation signed by the Named Insured or John Collins in the possession of Defendant; and

4. Any information or documentation in the possession of Defendant regarding compliance by Defendant with Fla. Stat. §627.739 surrounding application of an alleged PIP deductible in the subject claim.

4. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date August 26, 2019, bearing a certificate of service dated September 23, 2019, is hereby **MOOT** as to Plaintiff's request number five (5.) as Plaintiff has withdrawn from the record Plaintiff's request number five (5.) via Plaintiff's Notice of Withdrawal, bearing certificate of service dated July 1, 2020.

* * *

Insurance—Personal injury protection—Standing—Assignment—Document that assigns any and all benefits under PIP policy to medical provider is valid assignment—Insurer has waived any argument regarding provider's alleged failure to attach valid written assignment to demand letter where insurer did not raise any claim of defective assignment in response to original medical bill or demand letter—Even absent a written assignment, provider has standing to bring action based on equitable assignment of benefits and fact that it is real party in interest

FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Natalie Links, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2013-SC-7691. July 8, 2016. Martha C. Adams, Judge. Counsel: David B. Alexander, Bradford Cederberg, PA, Orlando, for Plaintiff. Tina Ann Dampf, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT ON DEFENDANT'S FIRST AND SECOND AFFIRMATIVE DEFENSES (STANDING AND ASSIGNMENT OF BENEFITS)

THIS MATTER having come before this Honorable Court on Plaintiff's Motion for Summary Judgment on Defendant's First and Second Affirmative Defenses (Standing and Assignment of Benefits) and Defendant's Motion for Summary Judgment and this Honorable Court having heard arguments of counsel on June 13, 2016 and being otherwise fully advised in the premises, states as follows,

I. FACTS

This is a claim for PIP benefits arising out of a motor vehicle collision that occurred on or about December 11, 2008. The Plaintiff, FLORIDA HOSPITAL MEDICAL CENTER, as assignee of Natalie Links ("Florida Hospital") rendered emergency services and care to the Defendant's insured, Natalie Links ("Ms. Links"), in Florida Hospital's emergency department following that collision. The insured, Ms. Links executed a document on December 11, 2008, which Plaintiff contends is a clear Assignment of Benefits from Ms. Links to Florida Hospital. The Plaintiff billed the Defendant for its emergency services and care provided to Ms. Links and Defendant, reduced Plaintiff's charged amount to 75% of Plaintiff's usual and customary charge and paid Plaintiff only 80% of that reduced amount.

The Plaintiff provided a Notice of Intent to Initiate Litigation dated June 24, 2013, attaching to said Notice of Intent the document executed by Ms. Links on December 11, 2008. Defendant received Plaintiff's Notice of Intent to Initiate Litigation on June 28, 2013. Defendant responded to Plaintiff's Notice of Intent to Initiate Litigation on or about July 19, 2013. In response to Plaintiff's Demand Letter, Defendant took no issue with the document executed by Ms. Links on December 11, 2008 and failed to allege in response to Plaintiff's Demand Letter that the document executed by Ms. Links on December 11, 2008 was not an Assignment of Benefits.

A lawsuit was filed and the Defendant has asserted within its first alleged affirmative defense that the Plaintiff does not have an Assignment of Benefits and lacks standing to bring this claim. The Defendant contends that the document executed by the Defendant's insured, Ms. Links, in Florida Hospital is not a valid assignment of benefits, but merely a direction to pay, thereby depriving the Plaintiff of standing to bring this claim. The Defendant also contends within its second, and final, alleged affirmative defense that Plaintiff's Demand Letter, dated June 24, 2013, is invalid solely due to the alleged invalidity of the assignment of benefits attached to Plaintiff's Demand Letter.

II. ARGUMENTS OF THE PARTIES

The Plaintiff asserts that it unequivocally has standing based upon the Assignment of Benefits executed by Ms. Links on December 11, 2008; based in equity; and as the real party in interest. The Plaintiff further asserts that the Defendant, by processing the Plaintiff's bill without objection, making payment directly to the Plaintiff in this matter, and by failing to raise it in response to the Plaintiff's Demand Letter, has waived the right to rely on an argument that the Plaintiff does not have a valid written assignment of benefits and has waived the right to rely on an argument that no valid written assignment of benefits was attached to Plaintiff's Demand Letter. Further, the Plaintiff argues that the *Emergency Medical Treatment and Labor Act, 42 U.S.C.A §1395dd* (hereinafter "EMTALA") and the Florida Access to Emergency Services and Care Law, Fla. Stat. §395.1041 (hereinafter "FAEC") require hospital emergency departments to evaluate and treat every single patient that presents to the emergency room, expressly prohibiting the conditioning of treatment on a patient signing an assignment or other financial responsibility forms—thus negating any legal consideration and rendering any such assignment a nullity. Further, the Plaintiff argues that as a result of the *Supremacy Clause of the United States Constitution* EMTALA would expressly and impliedly preempt any provision of the Florida No-Fault Act that interfered with, or was contrary to, a Federal law. See *Bailey v. Rocky Mountain Holdings, LLC.* __ F. Supp. 3d __ (2015)(holding that the fee schedule contained in the 2008 Florida No-Fault Act was pre-empted by federal law that governed an air ambulance's charges).

The Defendant argues that a valid written assignment of benefits is required under Florida law, that the document executed by Ms. Links on December 11, 2008 is only a mere direction to pay, and failure to include a valid written assignment of benefits with Plaintiff's Demand Letter is fatal to the Plaintiff's cause of action.

III. ANALYSIS AND RULING

A. The assignment of benefits executed by Ms. Links on December 11, 2008 in favor of Florida Hospital conferred standing upon Florida Hospital to file the present lawsuit and maintain this action

A review of Florida law on the topic of assignments confirms that there are no express requirements that an assignment contain any particular words or terms. Assignments may be express or implied by the circumstances. *Tunno v. Robert,* 16 Fla. 738 (Fla. 1878); *Mangum v. Susser,* 764 So.2d 653 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1216a]. An assignment may be partly in writing, partly parol or it may be by a showing of circumstances in which the debtor is justified in making payment, regardless of whether there is anything in writing or in parol between the assignor and assignee. *Protection House, Inc. v. Daverman and Associates,* 167 So.2d 65 (Fla. 3rd DCA 1964). The law is clear that a valid equitable assignment exists where it is necessary to effectuate the plain intent of the parties or where to hold otherwise would be just. *See Giles v. Sun Bank NA,* 450 So.2d 258 (Fla. 5th DCA 1984). No particular words or form of instrument is necessary to effect an equitable assignment, and any language, however informal, which shows an intention on one side to assign a right and an intention on the other side to receive it, if there is valuable consideration, will operate as an effective assignment. *Id. See also, Boulevard Nat'l Bank of Miami v. Air Metal Indus., Inc.,* 176 So.2d 94 (Fla. 1865).

Additionally, Florida appellate case law provides excellent guidance on the lack of distinction between a direction to pay and an assignment. *See generally, State Farm Fire and Cas. Co. v. Ray,* 556 So.2d 811 (Fla. 5th DCA 1990); *Schuster v. Blue Cross & Blue Shield of Florida, Inc.,* 843 So.2d 909 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D505a]; *Hartford Ins. Co. of Midwest v. O'Connor,* 855 So.2d 189 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2140a]; *Orion Ins. Co. v. Magnetic Imaging Systems I,* 696 So.2d 475 (Fla. 3rd DCA 1997) [22 Fla. L. Weekly D1595c]; *State Farm Mut. Auto. Ins. Co. v. Gonnella,* 677 So.2d 1355 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1799d].

After careful review and consideration of the assignment of benefits upon which Florida Hospital relies upon to assert standing in the instant matter, the Court agrees with Florida Hospital's position and finds that the document clearly assigns from Ms. Links to Florida Hospital any and all benefits under the insurance contract at issue. Therefore, Ms. Links assigned to Florida Hospital the right to file suit to collect payment(s) due and owing under the subject policy of insurance. Accordingly, the assignment of benefits executed by Ms. Links in favor of Florida Hospital conferred standing upon Florida Hospital to pursue this action.

B. Defendant has waived any argument regarding the Plaintiff's failure to attach a valid written assignment to Plaintiff's Demand Letter

Defendant has waived the right to contest the Plaintiff's alleged failure to attach a valid written assignment to Plaintiff's Demand

Letter based on Defendant's conduct in this matter. Defendant was initially presented with a medical bill from the Plaintiff which sought reimbursement for PIP benefits. Defendant did not deny the bill, ask for further documentation related to standing or a valid written assignment, nor did they raise any other purported claim defect. Prior to the lawsuit being filed the Defendant received Plaintiff's Demand Letter which sought additional PIP benefits. Defendant had two opportunities to apprise the Plaintiff of any alleged deficiencies in its claim submission and yet elected to stay silent. Defendant's silence results in a waiver of claim defects once litigation commenced. See generally, *Florida Medical & Injury v. Progressive Express Ins. Co.,* 29 So. 3d 329 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D215b] ("in the insurer fails to specify the defect in the form so that it can be rectified . . . it will be deemed to have waived its objection to payment. . . . Once the insurer pays, it will not be heard to refuse payment because of a defect in form"). *Digital Medical Diagnostics v. Allstate Ins. Co. Case No. 07-028 AP* (Dade County Circuit Appellate 2008), *Tampa Bay Imaging LLC v. Mercury Indemnity Co. of America,* Case No. 13-000083 AP-88-3 (Pinellas County Circuit Appellate, 2014) [22 Fla. L. Weekly Supp. 504a].

The legal principle of "standing" is not the same thing as asserting a failure to attach a valid written assignment to a demand letter. Article I, Section 21 of Florida's Constitution states: "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Psychiatric Assocs. v. Seigel,* 610 So. 2d 419 (Fla. 1992), the Florida Supreme Court construed Article I, Section 21 of the Florida Constitution and held that the right to go to court to resolve our disputes is one of our fundamental rights. In *Mitchell v. Moore,* 786 So. 2d 521, 527 (Fla. 2001) [26 Fla. L. Weekly S229a] the Court found "[t]he right to access is specifically mentioned in Florida Constitution. See *Art. 1, §21 Fla. Const.* Therefore, it deserves more protection than those rights found only by implication. Standing is that sufficient interest in the outcome of litigation which will warrant the court's entertaining it. *Gen. Dev. Corp. v. Kirk,* 251 So. 2d 284 (Fla. 2d DCA 1971). Under Florida law standing can be established in a multitude of ways and the Plaintiff has clearly alleged and persuasively argued multiple basis for standing.

C. Plaintiff's has clearly alleged equitable assignment of benefits and an equitable assignment of benefits exists from Ms. Links to Florida Hospital, as a result, even absent the valid Assignment of Benefits executed by Ms. Links on December 11, 2008, Plaintiff would have standing to bring and maintain this action

Florida common law has long recognized equitable assignments. *Sammis v. L'Engle,* 19 Fla. 800, 803-804 (Fla. 1883); *All Ways Reliable Bldg. v. Moore,* 261 So. 2d 131 (Fla. 1972). Courts in Florida liberally construe conduct of parties to a contract so as to find an assignment when equity requires. *Protection House, Inc. v. Daverman and Associates,* 167 So. 2d 65 (Fla. 3d DCA 1964). Additionally, the PIP statute uses the word "written" close to twenty times in conjunction with words like "notice," "form," "notification," "report," "request," and "statement," but the phrase "written assignment" does not appear anywhere in the PIP statute. When the legislature has used a term in one section of a statute but has omitted it in another section of the same statute, courts will not imply the term where it has been excluded by the Legislature. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So. 2d 911, 914 (Fla. 1995) [20 Fla. L. Weekly S184a]. As such, the common law is relied upon to fill in any inevitable statutory gaps related to equitable assignments. *Dove v. McCormick,* 698 So. 2d 585 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1870a]. In Plaintiff's Reply to Defendant's Answer, Plaintiff clearly indicated that an equitable assignment of benefits allowed Plaintiff to bring and maintain the present action. As a result, Plaintiff has raised equitable assignment and holds an equitable assignment of benefits which would allow Plaintiff to bring and maintain the present action.

Under Federal and State law the Plaintiff was required to treat the patient, Defendant received a claim for this treatment only from the Plaintiff, Defendant accepted that treatment as covered under the PIP provisions of the policy of insurance and Defendant partially paid Plaintiff directly for that treatment. Only after being sued in this case did the Defendant attempt to claim standing as a defense to payments. There is no record evidence before this court that the insured, Ms. Links, made a demand for these benefits to be paid to her, nor did the insured file suit seeking to recover those benefits paid by Defendant to Plaintiff, or those benefits which the Plaintiff is seeking to recover from the Defendant in this suit. Plaintiff is the real party in interest in this matter. Standing encompasses not only the sufficient stake definition, but an equally important requirement that the claim be brought by or on behalf of one who is recognized in the law as the real party in interest. *Kumar Corp. v. Nopal Lines, Ltd.,* 462 So. 2d 1178 (Fla. 3d DCA 1985). Thus, where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing. *Holyoke Mutual Ins. Co. v. Concrete Equipment, Inc.,* 394 So. 2d 193 (Fla. 3d DCA 1981). The Plaintiff has legal standing to bring this cause of action.

This Court would be remiss to ignore the Plaintiff's argument regarding EMTALA and FAEC and their effect on the emergency department of Florida Hospital and Florida Hospital's inability to condition treatment on a patient signing an assignment of benefits. Plaintiff's position and argument claiming standing in conjunction with the mandatory requirements imposed by EMATALA and FAEC is well-reasoned. The enactment of EMTALA and FAEC afforded medical screening and stabilization to every single patient that presents to an emergency department and requests care. The enactment also created stern penalties for emergency departments which failed to comply with the legislative mandates. *Gatewood v. Washington Healthcare Corp.,* 290 U.S. App. D.C. 31, 933 F. 2d 1037 (D.C. Cir. 1991). Essentially EMATALA and FAEC removed any "arms-length" transaction between the patient seeking emergency department care and the hospital providing the emergency department care because emergency departments are required to treat regardless of a patient's ability to pay and are prohibited from conditioning treatment on a patient signing an assignment of benefits. Taken one step further, the interaction between patient and provider is similar to a contract of adhesion (i.e., a contract with "take it or leave it" terms). However, the hospital emergency department, has no ability to "leave-it" because refusing to treat or conditioning treatment on a patient signing an assignment of benefits would be a violation of Federal and State laws. Numerous state laws have since followed to assist emergency departments with the effects of EMTALA and FAEC. These protections can be found in statutes such as Workers Compensation, HMO, Medicaid, Birth Related Neurological Injury Compensation Plan ("NICA"), and the Good Samaritan Act.

IV. CONCLUSION

This Court finds that Plaintiff unequivocally has standing based upon the Assignment of Benefits executed by Ms. Links on December 11, 2008. The assignment of benefits clearly and unambiguously assigns Ms. Links' PIP benefits to Plaintiff and therefore assigned to Plaintiff the right to bring the present action. Further, the Defendant waived the right to assert any defects in the claim submitted by the Plaintiff or alleged defects in Plaintiff's Demand Letter when it failed to give any notice to Plaintiff regarding any alleged deficiencies in those forms. Instead of providing notice to the Plaintiff the Defendant attempted to play a game of "gotcha litigation." Appellate courts in this state have disallowed such tactics. See *Heimer v. Travelers Ins. Co.,* 400 So. 2d 771 (Fla. 3d DCA 1981). Additionally, the legal premise of "standing" (i.e., a party's ability to seek redress before a Court of competent jurisdiction) is a separate and distinct determina-

tion regardless of claims forms submitted. Even if no valid written assignment of benefits existed in this matter, which it without question does exist in this matter, this Court finds the Plaintiff has standing to maintain the pending cause of action given the laws on equitable assignment and real party in interest.

If this Court were to adopt the Defendant's argument regarding standing, then it would have to turn a blind eye to the Supremacy Clause, which requires that state legislation be preempted by federal statute when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal regulation. *Menefee v. State,* 980 So. 2d 569 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1158a]. Defendant attempts to use the PIP statute, as well as EMTALA and FAEC, as a sword and a shield, but those statutory enactments were not intended to be used as a weapon against an emergency department's ability to file suit for compensation while protecting insurers from lawsuits brought by emergency departments.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Summary Judgment on Defendant's First and Second Affirmative Defenses (Standing and Assignment of Benefits) is hereby **GRANTED**.

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

* * *

Insurance—Automobile—Windshield repair— Appraisal—Policy language clearly and unambiguously provided straightforward appraisal process which, if followed, would provide both parties with fair and efficient means of determining reasonable cost of windshield replacement; appraisal is appropriate mechanism to determine amount of loss; and insurer did not waive right to appraisal—None of the arguments asserted by plaintiff were persuasive—Where insurer paid reduced amount and immediately placed all parties on notice that it invoked its right to appraisal should there be any dispute as to the amount paid, compliance with appraisal provision of policy was condition precedent to suit to recover amount in excess of that paid by insurer—Insurer's motion to abate or stay and motion to compel appraisal granted

BROWARD INS. RECOVERY CENTER (LLC), a/a/o Anthony Otero, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-005457-SP-23, Section ND05. July 29, 2020. Miesha S. Darrough, Judge. Counsel: Emilio R. Stillo, Emilio Stillo, P.A., Davie; and Joseph Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Plaintiff. Randi Franz, Antonio Roldan, and Jessica Lynn Pfeffer, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO ABATE OR STAY AND MOTION TO COMPEL APPRAISAL AND DENYING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING

THIS MATTER came before the Court on Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal, and Plaintiff's Motion for Evidentiary Hearing. The Court, having reviewed the pleadings, heard the arguments of counsel, reviewed the applicable law, and being otherwise fully advised in the premises, finds as follows:

BACKGROUND

This is a consolidated hearing arising out of fifty-four (54) separate cases involving fifty-four (54) separate incidents of property damage. Each case involves the same parties and similar facts wherein the insurer suffered windshield damage and sought repair. The insured assigned to the repair facility, Clear Vision Windshield Repair ("Clear Vision"), the right to collect the costs of repair directly from Progressive. In turn, Clear Vision submitted invoices to Progressive for repair work done. Progressive did not deny coverage or deny payment for the claim. Instead, Progressive issued a check for a reduced amount. Progressive notified Clear Vision and the insured through correspondence that the payment represented the amount Progressive determined to be the amount of loss for the repair, and if there was any dispute as to such amount, Progressive immediately placed all parties on notice that it invoked its right to appraisal. The Progressive policy issued to the alleged assignor, like most automobile policies, provided a method for the insured and insurance company to resolve disputes as to damages and values without the need for a lawsuit or litigation. The method is called Appraisal.

Clear Vision accepted the payment from Progressive, and never contacted Progressive regarding a dispute with the payment amount. Thereafter, Clear Vision assigned to Plaintiff, Broward Insurance Recovery Center, LCC, the right to seek the unpaid portion of the bill. Plaintiff filed a breach of contract action against Progressive seeking payment for the remaining balance and alleging that a full payment was owed to them. Plaintiff proceeded to bring the instant suit against Progressive after Progressive had invoked the appraisal provision in this matter.

LEGAL FINDINGS

When ruling on a motion to compel appraisal, the Court must consider three necessary factors: (1) whether a valid written agreement for appraisal exists; (2) whether an appraisal issue exists; and (3) whether the right to appraisal was waived. *Heller v. Blue Aerospace,* LLC, 112 So.3d 635, 636-37 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a].

When applying the facts of this case to the *Heller* factors, the Court finds that there is a valid and enforceable contractual agreement for appraisal in this case. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *The Cincinnati Insurance Company v. Cannon Ranch Partners Inc.,* 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]. Plaintiff argues that the appraisal process violates the Cost Prohibitive Doctrine and that the Court is bound by the ruling in *Green Tree Financial Corp.—Alabama v. Randolph,* 531 U.S. 79 (2000). There, the Supreme Court acknowledged that an arbitration clause could be rendered unenforceable where the existence of substantial arbitration costs would otherwise prohibit a litigant from effectively vindicating his or her federal statutory rights. *Id.* At 90. However, Plaintiff has failed to demonstrate a statutory right that would not be vindicated by going through appraisal, instead arguing that Plaintiff would be entitled to an ancillary right to attorney's fees pursuant to Florida Statute 627.428 should it prevail in litigation. While Attorney's fees are a substantive right, the right to attorney's fees is not a statutory cause of action as required for the invocation of the prohibitive cost doctrine, but a right derived upon judgment in favor of the Plaintiff. *Green Tree*, at 90. Additionally, federal arbitration is far more costly and time consuming than the appraisal process provided for in the subject policy. The appraisal provision of the subject policy states as follows:

> **APPRAISAL**
>
> If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. Within 30 days of any demand for appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of the appraiser's identity. The appraisers will determine the amount of the loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. We will pay our appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

The policy language is clear and unambiguous, and provides straightforward appraisal process which, if followed, would provide both parties with a fair and efficient means of determining the reasonable cost of replacing a windshield. As such, the holding in *Green Tree* is not applicable to these facts.

Turning to the remaining factors set forth in *Heller,* the Court finds that the issue in this case is a question about the amount of the loss, and appraisal is the appropriate mechanism to determine the amount of the loss. The Court further finds that because Defendant properly invoked appraisal to resolve this matter, it has not waived this right and is entitled to specific performance under the subject policy. *Travelers of Fla. v. Stormont*, 43 So.3d 941, 945 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a] (Once the insurer demanded appraisal, the insured was required to comply with the appraisal clause. Proceeding to Court was not justified."). When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid. *Johnson v. Nationwide Mut. Ins. Co*., 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] (quoting *Gonzalez v. State Farm Fire & Cas. Co*., 805 So.2d 814, 816-17 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D390a].

Furthermore, the Court is not persuaded by the other arguments asserted by Plaintiff in its Complaint and espoused by Plaintiff at the hearing in opposition of appraisal. Plaintiff's challenges to the method Defendant used to calculate the value of the initial payment, and Plaintiff's claims that it is entitled to discovery regarding the policy's limitations of liability provision or that this is a coverage dispute regarding the limits of liability provision are without merit. The appraisal provision of the policy is not subject to the limits of liability provisions of the policy, and Plaintiff has failed to complete appraisal, an action required to actually determine if there is a disputed amount and to challenge the method used by Defendant. Once Defendant invoked appraisal, Plaintiff was required to comply with appraisal, as it was the agreed to mechanism for resolution of disputes regarding the value of loss. *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b]; and *Travelers of Fla.* at 945.

Based upon the foregoing, the Court finds that a valid written agreement for appraisal exists, and the defendant has not waived its right to appraisal. The issue in this matter is the amount of the loss, and appraisal is the appropriate mechanism to determine the amount of the loss. Compliance with the subject policy's appraisal provision is a mandatory condition precedent to the filing and maintaining of the subject lawsuit. *U.S. Fire Ins. Co. v. Franko*, 443 So.2d 170, 172 (Fla. 1st DCA 1983); and *United Community Insurance Company v. Lewis*, 642 So.2d 59 (Fla. 3d DCA 1994).

It is therefore **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion for Evidentiary Hearing is hereby **DENIED.**

2. Defendant's Motion to Abate or Stay and Motion to Compel Appraisal is hereby **GRANTED**.

3. Within twenty (20) days of this Order, Plaintiff shall provide Progressive with the name and contact information of its selected appraiser.

4. The appraisal process set forth in the subject policy shall occur within sixty (60) days of this Order.

5. If the appraisal award is in excess of the benefits already paid, Progressive shall send payment for the additional amount within twenty (20) days of the appraisal award.

6. This matter is hereby abated until the parties comply with the appraisal provision set forth in the policy.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount

BONETT MEDICAL CENTER CORP., Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-000028-CC-21, Section HI01. January 25, 2021. Milena Abreu, Judge. Counsel: George Milev, Milev Law, LLC, Key Biscayne, for Plaintiff. Albert Torres, Coral Gables, for Defendant.

FINAL JUDGMENT ON ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before this Court on Plaintiff's Motion to Tax Attorney's Fees and Costs, the Court having reviewed the file and the Court Docket, including the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees entered on 12/16/20, Plaintiff's Notice of Filing Affidavit of P's Attorneys' Fees Expert and Plaintiff's 1/25/21 Certification of Plaintiff's Compliance and Defendant's Non-Compliance with the 12/16/20 Court Order, hereby FINDS, ORDERS and ADJUDGES as follows:

1. Plaintiff's counsels are entitled to fees, costs and interest in accordance with Florida Statutes 627.428 and 627.736, the Confession of Judgment filed by Defendant with stipulation to Plaintiff's entitlement to reasonable attorney's fees and costs, pursuant to the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees, pursuant to Plaintiff's Notice of Filing of Time Sheets, Costs and Hourly Rate Claims, and the Affidavit of Plaintiff's Attorney's Fees Expert, pursuant to Plaintiff's Certification of Plaintiff's Compliance and Defendant's Non-Compliance with the 12/16/20 Court Order, and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *Standard Guarantee Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2. Plaintiff's counsel Kelly Arias reasonably expended 11.4 hours.

4. The reasonable hourly rate for attorney Kelly Arias is $500.00/hour.

5. Thus the reasonable reimbursement for attorney Kelly Arias is 11.4 hours at $500.00/hour = $5,700.00.

6. Plaintiff's counsel George Milev reasonably expended 42.3 hours.

7. The reasonable hourly rate for attorney George Milev is $500.00/hour.

8. Thus the reasonable reimbursement for attorney George Milev is 42.3 hours at $500.00/hour = $21,150.00.

9. The reasonable costs for Plaintiff are $325.00

10. Plaintiff is entitled to recover the expert witness fees of attorney Cris Boyar based upon the holding and reasoning contained in the cases *Stokus v. Phillips,* 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and that attorney Boyar reasonably expended 3 hours. The Court finds that a rate of $600.00/hour is a reasonable hourly rate for the services of Mr. Boyar per his Affidavit filed with the Court. Thus, the total award for Mr. Boyar is 3 hours at $600.00/hour = $1,800.00.

11. Therefore, Plaintiff's counsel, The Evolution Law Group P.A. and its attorneys, recover from the Defendant the following:

a. Reasonable attorney's fees in the amount of $26,850.00

b. Expert witness fees for Cris Boyar in the amount of $1,800.00

c. Reasonable costs in the amount of $325.00

d. For a total sum of $28,975.00 together with post-judgment interest at the rate of 4.81% per annum until payment in full of the judgment for which let execution issue forthwith.

* * *

Insurance—Personal injury protection—Stay—Motion to stay medical provider's small claims action for PIP benefits pending resolution of federal action brought by insurer alleging fraud scheme against medical provider and other defendants is denied where small claims case is entirely different from federal action, and insurer cannot show irreparable harm—Further, principle of priority is not applicable where county court has exclusive jurisdiction over small claims action, and concurrent jurisdiction does not exist

CEDA ORTHOPEDIC AND INTERVENTIONAL MEDICINE OF HIA, a/a/o Daylin Baez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-014789-SP-25, Section CG01. June 17, 2020. Linda Diaz, Judge. Counsel: Danial R. Moghani, Moghani Law Group, Miami, for Plaintiff.

ORDER ON STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF FEDERAL ACTION

THIS MATTER having come before the Court on June 4, 2020 on the Defendant's State Farm Mutual Automobile Insurance Company's Motion to Stay Proceedings Pending Resolution of Federal Action. The Court having heard argument of counsel, review of the Court file and otherwise being advised in the premises finds as follows:

Defendant filed a Motion to Stay Proceedings Pending Resolution of a Related Federal Action.

Because the instant matter is "entirely different" from the federal action, State Farm's "principle of priority" argument fails as a matter of law. State Farm cannot show any irreparable harm, there is no basis to stay the instant matter. In the federal action, State Farm, along with two other State Farm entities, frivolously allege a complex scheme sounding in fraud against multiple defendants one of which happens to be CEDA. Conversely, in the instant matter, CEDA sues State Farm for reimbursement of a single Claimant's PIP benefits not to exceed $10,000, sounding in contract.

Further, the principle of priority ***only*** applies when the federal and state courts have concurrent jurisdiction. *See U.S. Borax, Inc. v. Forster*, 764 So. 2d 24, 29 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1220a] ("Because the federal and state courts did not have concurrent jurisdiction, we find that the rule of priority, relied upon by [appellant], does not apply in this case."). State Farm glosses over this requirement and treats "concurrent" as if it merely means "simultaneous." However, the "phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1557 (2017) [26 Fla. L. Weekly Fed. S612a]. Concurrent jurisdiction does not exist when one court has exclusive jurisdiction. *See U.S. Borax*, 764 So. 2d at 30 (finding that because the probate court has exclusive jurisdiction over probate matters, only the probate judge had jurisdiction to determine the issues.).

Multiple courts have held that in nearly identical circumstances that the matters are "entirely different". Specifically, the Honorable Judge William P. Dimitrouleas held that the Federal Action is entirely unrelated to a County Court suit for PIP-benefits:

> Furthermore, while Defendant points to a pending lawsuit in the Middle District of Florida where it sued Plaintiff and others for $15,000,000.00 for fraud, **that is an entirely different case** than this one individual's claim for coverage under Defendant's insurance policy.

See e.g., Path Medical LLC aao Kristie Aguirre v. GEICO Indemnity Company, Case No: 18- 60820 (S.D. Fla April 26, 2018); *Path Medical LLC aao Clifford Hyman v. GEICO Indemnity Company,* Case No: 18-60821 (S.D. Fla April 27, 2018); *Path Medical LLC aao Christina Arguinzoni v. GEICO Indemnity Company,* Case No: 18-60862 (S.D. Fla April 26, 2018); *Path Medical LLC aao Patricia Boyer v. GEICO Indemnity Company,* Case No: 18-60863 (S.D. Fla April 27, 2018); *Path Medical LLC aao Willie Murray v. GEICO Indemnity Company,* Case No: 18-60864 (S.D. Fla April 27, 2018) and *Path Medical LLC v. GEICO General Insurance Company,* Case No: 18-60868 (S.D. Fla May 10, 2018) (emphasis added).

In addition, under identical circumstances a second Federal District Court Judge, The Honorable Judge Ungaro, held even more emphatically that the two simultaneously pending suits between the same parties are "wholly different":

> Defendant points to a different lawsuit where it sued Plaintiff and others for $15,000,000 for fraud. **But that case is wholly different from the present insurance contract dispute**, which involves one individual's claim for coverage.

Path Medical LLC v. GEICO Indemnity Company, Case No: 18-60850 (S.D. Fla April 23, 2018) (Remand Order, Ungaro, J.) (emphasis supplied). While these orders were decided on the issue of remand with regard to the amount in controversy, the federal court specifically noted that, regardless, it would not have had jurisdiction due to the fact that a federal case for fraud was entirely different from an individual claimant's claim for coverage and that the health care provider's various PIP suits for no more than $10,000 each could not be conflated and conjoined to reach the jurisdictional minimum. *See Id.*

Just a couple months ago (March 2020), in addressing these same issues involving State Farm's overreaching and siege warfare mentality against health care providers, The Honorable Judge Rodney Smith on the United States District Court for the Southern District of Florida illuminated why a stay is inappropriate here:

> Moreover, even if a state court [such as this County Court] did adjudicate an unfavorable decision to [State Farm] before this [federal] Court did, **any monies that were paid to [the health care provider] entities during the pendency of the instant [federal] case would also be recoverable through [State Farm's] fraud counts [in federal court if it were determined that they were obtained by fraud** [1] (brackets and emphasis added).

State Farm is not prejudiced by having to pay individual County Court claims for PIP benefits as State Farm may seek to "claw back" those payments ***if*** it ever ultimately prevails on its federal claims sounding in fraud. It is well settled that any argument regarding an opposing party's ability to satisfy a future money judgment cannot serve as a basis to stay the instant proceeding; as to do so would grant State Farm a *de facto* injunction prohibiting CEDA from pursuing its statutory rights as the insured's assignee under Fla. Stat. § 627.736. *See Weinstein v. Aisenberg*, 758 So. 2d 705, 706-07 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D652a], *dismissed*, 767 So. 2d 453 (Fla. 2000) ("Even where the party seeking injunctive relief alleges that the opposing party may dissipate bank assets, a judgment for money damages is adequate and injunctive relief is improper, notwithstanding the possibility that a money judgment will be uncollectible.") (*citing Hiles v. Auto Bahn Fed'n Inc.,* 498 So.2d 999 (Fla. 4th DCA 1986) (A claim for money damages does not provide a sufficient basis for injunctive relief)); *see also Lopez-Ortiz v. Centrust Sav. Bank,* 546 So.2d 1126 (Fla. 3d DCA 1989)(Reversing injunction freezing Ortiz's bank account and safe deposit box, because the bank had an adequate remedy at law—money damages for conversion.).

It is a drastic measure to stop the adjudication of a state court PIP suit for recovery of lawfully rendered medical services in accordance with the Florida No-Fault Statute "without even a determination that any fraudulent activity has occurred as alleged" in the federal action. *See State Farm Mut. Auto. Ins. Co. et al., v. Mark Cereceda, D.C., et al*, Case No. 19-CV-22487- SMITH/LOUIS, Order Denying Motion for Injunction (S.D. Fla., March 16, 2020)

(Smith, J.). The federal action and the instant state court action are completely independent of one another. State Farm has a completely independent remedy in the federal action if it should eventually be successful. Preventing CEDA from recovering in this individual claim for insurance coverage just serves to: (i) violate the PIP statute, (ii) harm CEDA as the Claimant's assignee, and (iii) further deprive the Claimant, State Farm's insured, of its contracted and paid for statutory insurance benefits, particularly as any amount not paid by State Farm can be recovered by CEDA directly against the insured unless State Farm somehow prevails on its frivolous federal claims against CEDA and recovers a judgment declaring the charges unlawful—an unlikely outcome.

In addition, there has been no showing that the frivolous claims advanced by State Farm in the federal action, in which there is a pending Motion to Dismiss, overlap with and are determinative of the issues that must be resolved in this case. This is simply an attempt by State Farm to delay this matter. In *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, the Second District affirmed the trial court's denial of a stay of a fraudulent transfer claim pending the resolution in another action of a damages claim. 806 So. 2d 625, 626-27 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D345d], *approved*, 863 So. 2d 189 (Fla. 2003) [28 Fla. L. Weekly S808a]. The court noted that the relief granted under the transfer act was separate and distinct from the damages issue. *Id.* Moreover, State Farm's response to the statutory demand states in pertinent part: "State Farm does not waive any policy or statutory defenses not stated above, but specifically reserves and preserves any and all contractual statutory, and common law defenses available". This response evidences State Farm's true intent to litigate this individual case at bar once it is not successful on the federal action.

Accordingly, a stay in this case would merely "[have] the effect of postponing [the] action until" the federal court "resolve[s] unrelated cases decided on different theories." *Shoemaker v. State Farm Mut. Auto. Ins. Co.*, 890 So. 2d 1195, 1197 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D173a]. Like in *Shoemaker*, a "stay entered here could lead to excessive delay, something not capable of being remedied on direct appeal . . ." *Id.* (*citing Williams v. Edwards*, 604 So. 2d 930 (Fla. 5th DCA 1992)). "[T]he instant case and the [other] cases *do not arise out of the same accident or insurance contract*. Rather than promoting the goal of judicial efficiency, the indefinite stay will cause unnecessary delay . . ." *Id.* (emphasis added). Even if the motion for stay were granted, it will not save judicial labor because this case will ultimately have to be litigated on its distinct facts. Thus, a stay is improper and should not be granted.

In the federal action, State Farm brings claims arising under Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Unjust Enrichment and Declaratory Relief against nineteen (19) defendants, not just CEDA or the Claimant in the instant action, seeking damages in excess of the jurisdictional limit of this County Court.

In the instant matter, CEDA alleges that the amount at issue is "less than Fifteen Thousand Dollars ($15,000.00) and is filed as a Summary Proceeding. (Complaint ¶2). The actual amount in controversy in the case at bar is under $3,000.00, well under the $8,000.00 small claims jurisdictional limit. Therefore, the jurisdiction is that of small claims court. *See Fla. Small Claims Rules of Civil Procedure 7.010(b)*. Thus, the instant matter is within the *exclusive* jurisdiction of the County Court and more specifically, the small claims court. *See Fla. Stat.* § *34.01(1)(c); see also DNA Ctr. for Neurology & Rehab. v. Progressive Am. Ins. Co.*, 13 So. 3d 74, 75 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D978c] ("county courts have exclusive jurisdiction over actions in law not exceeding $15,000"). In *DNA Center*, the Fifth District *sua sponte* reversed a summary judgment in favor of the insurer that was entered by the *circuit* court, because the circuit court did not have subject matter jurisdiction over a suit for damages due to non-payment of personal injury protection benefits. *Id.* There, the complaint similarly alleged that the amount at issue was greater than $500 but less than $5,000 and was therefore not within the circuit court's jurisdiction. *Id.* Thus, as was the case in *DNA Center*, this County Court has *exclusive* jurisdiction over this small claims action.

Because this Court has *exclusive* jurisdiction over this matter, concurrent jurisdiction does not exist and the "principle of priority" is entirely misplaced.

Moreover, when the Honorable Federal Judge Dimitrouleas considered the federal court's jurisdiction over individual PIP suits, he held that the federal court does not have subject matter jurisdiction over a PIP suit when the individual amount in controversy is under $75,000.00. *E.g.*, *Path Medical LLC aao Kristie Aguirre v. GEICO Indemnity Company,* Case No: 18-60820 (S.D. Fla April 26, 2018). Judge Dimitrouleas also made it clear that a federal action in the Middle District alleging fraud against a health care provider is "entirely different" from a simultaneous County Court PIP suit brought by the same health care provider against the same insurer seeking claims on a single contract for purposes of establishing jurisdiction. Thus, while the court was not specifically addressing a motion to stay, the court did address jurisdiction which is **the threshold consideration** when determining the applicability of the "principle of priority" as a basis for a potential stay.

It is clear from the above cited District Court judges' opinions jurisdictional analysis that there is no possible way that the federal District Courts have jurisdiction over the instant matter. As Judge Dimitrouleas repeatedly held, a federal court does not have subject matter jurisdiction over a PIP suit when it does not meet the $75,000.00 amount in controversy requirement. The instant matter falls within the county court's *exclusive* jurisdiction as the amount in controversy is below $8,000.00. Thus, the district courts and this Court **do not have concurrent jurisdiction**, which is a prerequisite for the Court to consider the "principle of priority" as a basis for a potential stay. The decisions cited by State Farm do not controvert this clear legal prerequisite.

In summary, the federal action is seeking damages in excess of $2.9 million. The instant action is brought in small claims court under the Florida No-Fault Statutory regime, which requires CEDA bring each claim in a separate lawsuit on behalf of each insured (*see* Fla. Stat. § 627.736(15)) seeking damages of no more than this Court's jurisdictional limit which is $8,000.00 (small claims). Because of the exclusive jurisdiction of each court, the courts do not have concurrent jurisdiction and the "principle of priority" does not apply. *See U.S. Borax, Inc. v. Forster*, 764 So. 2d 24, 30 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1220a]. Thus, State Farm's Motion to Stay should be denied.

Accordingly, it is ORDERED AND ADJUDGED that upon reviewing the applicable authorities presented by the parties the Defendant's Motion is hereby DENIED.

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[1]*See State Farm Mut. Ins. Co. v. Cereceda,* Case No. 19-CV-22487-SMITH/LOUIS, ECF No. 106 (S.D. Fla. Mar. 16, 2020). Contrary to State Farm's logically inconsistent assertions in the Motion to Stay that this very recent Order denying State Farm an injunction against a different health care provider filing PIP suits somehow supports entering a stay here, The Honorable Judge Rodney Smith correctly recognized that State Farm would not be harmed if it had to simultaneously litigate both the federal and state court cases as ***if*** State Farm was ever able to prevail in the federal action it could recover a money judgment for all of its damages including any funds paid during the pendency of the federal litigation.

* * *

Insurance—Personal injury protection—Coverage—Chiropractic services—Medicare fee schedule—Private insurers are not entitled to 2% reduction in payment for chiropractic treatment implemented by Medicare—2% reduction is specifically reserved only for claims that Medicare is required to reimburse

DOCTOR REHAB CENTER, INC., a/a/o Iliana Fernandez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 11-01983 SP 26. January 9, 2020. Lawrence D. King, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO UNDERPAYMENTS IN CPT CODES 98940 AND 98941

THIS CAUSE came before the Court on 11/14/19 on Plaintiff's Motion for Summary Judgment as to Underpayments in CPT Codes 98940 and 98941.

The parties were represented by counsel at the hearing who presented arguments to this Court. Paula Elkea Ferris, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Plaintiff's Motion for Summary Judgment as to Underpayments in CPT Codes 98940 and 98941 with supporting evidence, the relevant legal authorities, the entire Court file, and having heard argument from counsel and being otherwise fully advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's Motion for Summary Judgment as to Underpayments in CPT Codes 98940 and 98941.

Factual Background

Plaintiff provided treatment to Iliana Fernandez for injuries sustained in an automobile accident and made a claim for payment of no-fault benefits for Chiropractic Adjustments performed as follows:

(i) 1 unit of CPT code 98940 billed on date of service February 17, 2010 in the amount of $85.00; and

(ii) 4 units of CPT code 98941 billed on date(s) of service January 14, 2010, February 18, 2010, February 23, 2010, and March 2, 2010 in the amount of $95.00 per unit.

Plaintiff submitted its bills for the aforesaid services to Defendant for payment. Defendant accepted compensability for the aforesaid treatments, however, in processing payment it made the following reductions purportedly based[1] on the allowable amount under the Medicare Part B Fee Schedule payment methodology[2]:

(i) reduced Plaintiff's charge for CPT code 98940 to $51.46 and then reimbursed Plaintiff $41.17, representing eighty percent of the reduced amount for the service;

(ii) reduced Plaintiff's charges for each unit of CPT code 98941 to $72.38 and then reimbursed Plaintiff $57.90 for each unit, representing eighty percent of the reduced amount for the services.

Plaintiff's Motion contends that had Defendant utilized the correct allowable amount under the Medicare Part B Fee Schedule for CPT code 98940 and 98941, the minimum[3] possible reimbursement would be as follows:

(i) $52.50 for CPT code 98940, which would have resulted in a payment of $42.00 at eighty percent, an underpayment of $0.83 ($42.00 - $41.17);

(ii) $73.84 for each unit of CPT code 98941, which would have resulted in a payment $59.07 at eighty percent, a underpayment of $1.17 ($59.07 - $57.90) for each of the 4 units billed.

Accordingly, Plaintiff's Motion contends that, assuming a Medicare Fee Schedule reimbursement was even permitted, Defendant has underpaid Plaintiff for the aforesaid services, as a matter of law.

This issue, commonly known as the "2% chiropractic reduction", involves a purely legal question of statutory interpretation which has previously been addressed by this Court, as well as other Florida county courts. *Doctor Rehab Center, Inc., a/a/o Eduardo Gomez v. United Auto. Ins. Co.,* Case # 11-01878 SP 26 (Fla. 11th Judicial Circuit, Miami-Dade County Court, Judge King, October 19, 2018); *Doctor Rehab Center, Inc., a/a/o Yaremis Nacher v. United Auto. Ins. Co.,* Case # 11-01798 CC 26 (Fla. 11th Judicial Circuit, Miami-Dade County Court, Judge King, October 19, 2018); *Russell T. Elba D.C., P.A., d/b/a Worldwide Chiro. Wellness (Vincent Ferrovecchio) v. Security Nat'l Ins. Co.,* 26 Fla. L. Weekly Supp. 909a (Broward Cty. Ct., Judge Kanner, 2018); *County Line Chiropractic University at Commercial, a/a/o Stephanie Pickett v. Security National Ins. Co.,* Case # 17-9263 COCE 53 (Fla. 17th Judicial Circuit, Broward County Court, Judge Lee, April 23, 2018).

Analysis

As Plaintiff's Motion details, Medicare reimbursements are determined via a mathematical calculation involving relative value units ("RVUs"), conversion factors and geographic adjustments. The reimbursement value for any covered Medicare service in the United States can easily be calculated by multiplying the relative value for the service, the conversion factor for the year that the service was performed and the geographic adjustment factor applicable to the locality in which the service is provided. Legal authority provided to the Court by the parties establishes that the above referenced formula is the statutorily mandated method for calculating the allowable amount under the participating physician fee schedule of Medicare Part B ("PFS") pursuant to §42 U.S.C. 1395w-4(b)(1) which states that:

(B) ESTABLISHMENT OF FEE SCHEDULES

(1) IN GENERAL

Before November 1 of the preceding year, for each year beginning with 1998, subject to subsection (p), the Secretary shall establish, by regulation, fee schedules that establish payment amounts for all physicians' services furnished in all fee schedule areas (as defined in subsection (j)(2)) for the year. Except as provided in paragraph (2), each such payment amount for a service shall be equal to the product of-

(A) the *relative value* for the service (as determined in subsection (c)(2)),

(B) the *conversion factor* (established under subsection (d)) for the year, and

(C) *the geographic adjustment factor* (established under subsection (e)(2)) for the service for the fee schedule area.

See also Tower Health Center, Inc. a/a/o Yesenia Gomez v. Government Employees Ins. Co., 2018 WL 3109629 (S.D. Fla. Apr. 2018).

Using this relative value formula, which is detailed by Plaintiff in its Motion, the Medicare reimbursement for CPT code 98940 rendered in Miami-Dade County in February 2010 is $26.25. Two hundred percent of this amount equals the $52.50 reimbursement amount advocated by the Plaintiff. In contrast, the Medicare *payment files* only reflect a reimbursement value of $25.73 for CPT code 98940, two hundred percent of which equals $51.46, the amount which Defendant allowed as reflected in its statutorily mandated Explanations of Review. Plaintiff contends that the payment files were *intentionally reduced* by 2 percent and that clear notice was provided by Medicare that its payment files did not accurately reflect the correct allowable amount for chiropractic services under the participating physicians schedule of Medicare Part B.

Likewise, using the same relative value formula, the Medicare

reimbursement for CPT code 98941 rendered in Miami-Dade County in January, February, and March 2010 is $36.92. Two hundred percent of this amount equals the $73.84 reimbursement amount advocated by the Plaintiff. In contrast, the Medicare *payment files* only reflect a reimbursement value of $36.19 for CPT code 98941, two hundred percent of which equals $72.38, the amount which Defendant allowed as reflected in its statutorily mandated Explanations of Review. Plaintiff contends that the payment files were *intentionally reduced* by 2 percent and that clear notice was provided by Medicare that its payment files did not accurately reflect the correct allowable amount for chiropractic services under the participating physicians schedule of Medicare Part B.

This same issue has been addressed in detail by numerous Federal Courts which provide a detailed analysis of the history concerning the correct allowable amount for chiropractic services under the participating physicians schedule of Medicare Part B. *See Coastal Wellness Centers, Inc. a/a/o Marlene Williams, et. al. v. GEICO General Ins. Co.,* Case No. 17-cv-61963-WPD (S.D. Fla. Apr. 2018); *Plantation Spinal Care Center, Inc. a/a/o Kristopher Gyorok v. Esurance Property and Casualty,* 2018 WL 3109630 (S.D. Fla. Apr. 2018); *Plantation Spinal Care Center, Inc. a/a/o Joseph Laban v. Direct General Ins. Co.,* 2018 WL 3109631 (S.D. Fla. Apr. 2018); *Tower Health Center, Inc. a/a/o Valerie Maddox v. GEICO Indemnity Co.,* 2018 WL 3109631 (S.D. Fla. Apr. 2018); *see also,* 74 Federal Register No. 26, pp. 61926-61928 cited in the above cases.

Essentially, the Department of Health and Human Services commissioned a study to determine the feasibility of extending Medicare coverage to include certain chiropractic treatments. Unfortunately, the actual cost of performing the feasibility study exceeded the budgeted amount by 50 million dollars, which violated the requirement that Medicare remain "budget neutral." To recoup this overpayment, the Department of Health and Human Services, Centers for Medicare and Medicaid Services, implemented a plan to reduce payment for specific chiropractic treatments by 2 percent for the calendar years 2010 through 2014 and applied the withheld monies to cost overruns. The specific chiropractic treatment subject to this reduction included CPT codes 98940, 98941 and 98942. Notice of this plan was published in the Federal Register on November 25, 2009. *See* 74 Federal Register No. 26, pp. 61926-61928. In this notice, Medicare also advised that to preserve the integrity of the participating physicians fee schedule of Medicare Part B ("PFS"), in which *all charges were determined* by the aforesaid relative value formula, the reductions would *only* appear in *the payment files* used by Medicare contractors, and that private payers should utilize the relative values published by Medicare to arrive at the correct payment amount. It its notice, the Department of Health and Human Services made clear that the 2 percent reduction was only to be applied to Medicare claims made by Medicare contractors.

> "Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs."
>
> 74 Federal Register No. 26, pp. 61926-61928.

Where language is clear and unambiguous, judicial interpretation of statutes, regulations and insurance contracts requires that Courts construe said language according to its plain meaning. *Allstate Ins. Co. v. Holy Cross Hospital,* 961 So.3d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]. The plain language of §627.736 (5)(a)(2)(f), Fla. Stat. (2008) states that:

> 2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> f. For all other medical services, supplies, and care, 200 percent of the *allowable amount* under the participating physicians schedule of Medicare Part B.

The plain language of the aforesaid statute contains no language that would permit a private payor, such as Defendant, to use the 2 percent reduction that was specifically reserved for Medicare to recoup its cost overruns. *Coastal Wellness Centers, Inc. et. al. v. GEICO General Ins. Co.,* Case No. 17-cv-61963-WPD (S.D. Fla. Apr. 2018) ("The Medicare Physicians Fee Schedule ("PFS") does not include the two percent (2%) reduction for CPT codes 98940, 98941 or 98942.); *see also Plantation Spinal Care Center, Inc. a/a/o Kristopher Gyorok v. Esurance Property and Casualty,* 2018 WL 3109630 (S.D. Fla. Apr. 2018):

> "The Court rejects Defendant's argument that it was permitted to use the 2% fee reduction because those values were calculated into the CMS payment files. Regardless of whether it was easier for a private payer to use those values rather than calculate the formula once a year, such reduction is contradicted by the plain language of §627.736(5)(a)1 Florida Statutes[4], which clearly allows an insurer to limit reimbursement to medical care to the treating chiropractor to "200 percent of the allowable amount under" the "participating physicians fee schedule of Medicare Part B."

Conclusion

Based on the foregoing analysis, this Court concludes, consistent with its prior rulings on the same legal issue, that the 2 percent reduction for chiropractic services applied exclusively to services that were rendered to *Medicare recipients* submitted for payment under the Medicare program so that Medicare could recoup its feasibility cost overruns. Defendant, who is not a Medicare contractor making a Medicare claim, *was not* permitted to utilize this discount.

The Court finds as a matter of law that the minimum fee schedule reimbursement authorized by the No-Fault Act for the chiropractic treatment billed in this case under CPT code 98940 is $42.00, representing eighty percent of $52.50. The Court finds as a matter of law that the minimum fee schedule reimbursement authorized by the No-Fault Act for the chiropractic treatment billed in this case under CPT code 98941 is $59.07, representing eighty percent of $73.84.

Plaintiff is therefore entitled, at a minimum,[5] to an additional $5.51 in benefits,[6] plus applicable prejudgment interest for CPT codes 98940 and 98941.

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[1]Defendant's statutorily mandated Explanations of Review contain a reason code and an explanation as to payments tendered and same confirm that *"reimbursement has been calculated according to the state fee schedule guidelines"* and further advise that *"all reductions are due to guidelines indicated in Senate Bill SB1092"*.

[2]Eighty percent of two hundred percent of the "*allowable amount under the participating physicians schedule of Medicare Part B*". §627.736(5)(a)(2)(f), Fla. Stat. (2008). The "*participating physician's schedule of Medicare Part B*" is commonly abbreviated and referred to as simply "PFS".

[3]The floor and/or minimum possible reimbursement under the No-Fault Act is the Medicare Part B fee schedule reimbursement amount. *See Nationwide Mutual Fire Ins. Co. v. AFO Imaging, Inc.,* 71 So.3d 134 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1463b] (the fee schedule is "the *minimum amount* the Insurance Companies were statutorily authorized to remit"); *see also SOCC, P.L. d/b/a South Orange Wellness v. State Farm Mutual Auto. Ins. Co.,* 95 So.3d 903 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1663a]; *Windsor Imaging (Roniel Morris) v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 215b (Broward Cty. Ct., Judge Lee, 2011) ("The No-Fault Act set the floor with respect to the *minimum* reimbursement under Florida Statute 627.736(5)(a)2.f."); *Health Diagnostics of Fort Lauderdale, LLC (John Winn) v. USAA Cas. Ins. Co.,* 20 Fla. L. Weekly Supp. 292b (Broward Cty. Ct., Judge Deluca, 2012) (Fla. Stat. 627.736(5)(a)2.f. "sets the floor with respect to the *minimum* reimbursement"); *Pan Am Diagnostic Services, Inc. (Joel Pasterin) v. Metropolitan Cas. Ins. Co.,* 19 Fla. L. Weekly Supp. 874a (Broward Cty. Ct., Judge Zeller, 2012) ("[t]he No Fault Act set the floor with respect to the *minimum* reimbursement under Fla. Stat. 627.736(5)(a)(2)").

[4]*Gyorok* dealt with the 2012 amendments to the PIP statute which essentially relabeled the statute which used to be §627.736(5)(a)(2), Fla. Stat. (2008).

[5]This determination does not preclude Plaintiff from seeking eighty percent of its billed amount for these services, an issue addressed and encompassed by this Court's Order Granting Plaintiff's Amended Motion for Summary Final Judgment, Motion for Entry of Final Judgment, and Final Judgment in Favor of Plaintiff.

[6]$0.83 for CPT code 98940 (calculated by taking $42.00 minus $41.17 paid by Defendant) plus $4.68 for CPT code 98941 (calculated by taking $59.07 minus $57.90 paid by Defendant, times a total of 4 units billed).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Res judicata—Settlement agreement in medical provider's first case against insurer foreclosed provider's later suit based on invoices resulting from treatment of same patient for same injuries resulting from same accident—Additionally, claim-splitting is prohibited by PIP statute

MIAMI MEDICAL GROUP, INC., a/a/o Miguel Prado, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-008362-SP-05, Section CC06. July 29, 2019. Gina Beovides, Judge. Counsel: Narcy Fajardo-Sanchez, Progressive PIP House Counsel, Miami, for Defendant.

PROPOSED ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE SETTLEMENT, MOTION TO DISMISS AND FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE having come on to be heard on Defendant's Motion to Enforce Settlement, Motion to Dismiss and for Attorney's Fees and Costs, and the Court having heard argument of counsel, and the Court being fully advised in the premises makes the following findings:

On or about December 5, 2018, Plaintiff, MIAMI MEDICAL GROUP, INC., filed its first breach of contract suit ("First Complaint") against Defendant regarding personal injury protection ("PIP") benefits for treatment it provided to Miguel Prado ("Claimant") as a result of his involvement in a motor vehicle incident occurring on July 25, 2018. In paragraph #7 of the First Complaint, Plaintiff indicates the dates of service at issue were from July 26, 2018 to September 19, 2018.

On February 19, 2019, Plaintiff filed its notice of voluntary dismissal with prejudice as a result of the parties' settlement of the matter. Prior to settlement, on February 13, 2019, Plaintiff sent a second pre-suit demand letter seeking payment for dates of service November 20, 2018 through November 29, 2018. Plaintiff did not seek to amend its First Complaint to include these additional dates of service and cashed the settlement drafts on March 8, 2019. In response to Plaintiff's second pre-suit demand letter, Defendant asserted a prior lawsuit involving the same patient and provider was filed and settled.

On March 19, 2019, Plaintiff filed the present suit ("Second Complaint") against Defendant, and in paragraph #7, indicated the dates of service at issue were from November 20, 2018 through November 29, 2018, and related to the same motor vehicle incident occurring on July 26, 2018.

Plaintiff argued the instant case, Second Complaint, is proper because the parties' settlement agreement was solely as to dates of service July 26, 2018 to September 19, 2018. Plaintiff argued that at the time of the filing of the first suit, the second set of dates of service November 20, 2018 to November 29, 2019, were not ripe since (a) the services had not been rendered and payment was not overdue, and (b) a statutory suit demand letter was required before they could become ripe for suit.

Defendant moved to enforce settlement and dismiss the Second Complaint, pursuant to Fla. Stat. § 627.736(15). Defendant argued (a) as part of the settlement all dates of service were considered and included, and (b) Fla. Stat. 627.736 prohibits splitting causes of action.

Fla. Stat. 627.736(15) states:

> ALL CLAIMS BROUGHT IN A SINGLE ACTION.—In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, *all claims related to the same health care provider for the same injured person shall be brought in one action, unless good cause is show why such claims should be brought separately*. If the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.

After reviewing the facts and considering the parties' arguments, this Court finds the settlement agreement encompassed all dates of service and is enforceable. The Plaintiff's second suit is subject to the doctrine of *res judicata. See Gomez-Ortega v. Dorten, Inc.,* 670 So.2d 1107 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D759d] (When second suit is upon same cause of action and between same parties as first, res judicata applies; under doctrine of res judicata, first judgment is conclusive as to all matters which were or could have been determined.)

Additionally, Fla. Stat. 627.736(15) prohibits claim splitting and requires all claims related to the same health care provider for the same injured person be brought in one action. *See also United Auto. Ins. Co. v. Affiliated Healthcare Center, Inc.,* 11th Judicial Circuit (Appellate) in and for Miami-Dade County, 20 Fla. L. Weekly Supp. 375a, Jan. 22, 2013 (Final judgment in provider's first case against insurer foreclosed provider's later suit based on invoices resulting from treatment of same patient for same injuries resulting from same accident—Requiring a party such as Affiliated to bring all of its claims in one (1) proceeding furthers the policies of underlying this doctra; namely, that "litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits;" Parties are required "to raise all available claims involving the same circumstances in one action" because doing so promotes finality, stability in the law and judicial efficiency.); *James D. Shortt, D PA a/a/o Leila Marshall v. Hartford Underwriters Ins. Co.,* 12th Judicial Circuit in and for Sarasota County, Case No. 24 Fla. L. Weekly Supp. 347a, May 23, 2016, *affirmed in James D. Shortt, MD PA v. Hartford Ins. Co. of the Americas*, 12th Judicial Circuit (Appellate) in and for Sarasota County, 26 Fla. L. Weekly Supp. 6a (Statute requires a claimant seeking PIP benefits to bring all claims related to same provider for same injured person to be brought in one action unless good cause is shown why claims should be brought separately.); *Active Chiropractic Wellness Center a/a/o Carla Koller v. State Farm Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 341b, 4th Judicial Circuit in and for Duval County, Aug. 3, 2015 (Where medical provider filed and then dismissed suit against PIP insurer, and thereafter provider filed second lawsuit against insurer for different dates of service, some of which occurred prior to dismissal of first, claims for services rendered on or before date of dismissal of first lawsuit are dismissed.)

ORDERED AND ADJUDGED that the action of the above-named Plaintiff against the above-named Defendant is hereby,

Dismissed with Prejudice. Plaintiff, MIAMI MEDICAL GROUP, INC. A/A/O MIGUEL PRADO, takes nothing by its action and that Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY, shall go hence without day. The Court reserves jurisdiction to determine Defendant's entitlement and amount to attorney's fees and costs.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Relatedness and medical necessity of treatment—Summary judgment—Opposing affidavit filed by insurer does not preclude summary judgment in favor of medical provider on issue of relatedness of treatment where affidavit does not indicate that treatment arose out of anything other than ownership, maintenance or operation of motor vehicle—Insurer's expert cannot opine as to medical necessity of initial examination where he did not review report of that examination—Expert's opinions regarding unpled issues of upcoding and deficient record keeping are rejected—Expert's speculative opinion that any treatments that have "daily consecutive treatment" are not medically necessary is rejected

WEST KENDALL REHAB CENTER, INC., a/a/o Jason Garavito, Plaintiff, v. STATE FARM MUTUAL AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-013574-SP-25, Section CG04. February 14, 2021. Scott M. Janowitz, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Scott Danner, Kirwan, Spellacy & Danner, P.A., Ft. Lauderdale, for Defendant.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RELATED AND MEDICALLY NECESSARY TREATMENT

THIS CAUSE came before the Court on January 27, 2021 on Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment.

The Court having reviewed Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment with supporting evidence, Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment and Memorandum of Law with supporting evidence, Plaintiff's Memorandum of Law and Response to Affidavit of Dr. Michael Mathesie, D.C., the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order GRANTING in part Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

Jason Garavito, both the Named Insured and Claimant, was involved in an automobile accident on or about May 3, 2012. He sought treatment with West Kendall Rehab Center ("Plaintiff") between May 9, 2012 and June 11, 2012. Plaintiff, as assignee of Defendant's policy of insurance, submitted its bills for treatment of Jason Garavito for payment of Personal Injury Protection ("PIP") benefits to Defendant. Despite Defendant making payments, Plaintiff, subsequently filed a breach of contract suit against Defendant for claimed, unpaid PIP benefits pursuant to Fla. Stat. 627.736.

On June 18, 2018, Plaintiff filed an affidavit from Jason Morris Levine, D.C. in support of its contention that the services provided by Plaintiff were related and medically necessary to an accident that occurred on May 3, 2012. Dr. Levine's affidavit details the reported complaints of Mr. Garavito following the subject automobile accident, his diagnosis, and the treatment program consisting of examinations, diagnostic studies, and various physiotherapies. Dr. Levine opines that the examinations, x-rays, as well as treatment and modalities utilized by Plaintiff were related and medically necessary.

In opposition, Defendant filed a response and relies upon the affidavit of Michael Mathesie, D.C., both filed on January 20, 2021. As more fully discussed below, Dr. Mathesie's opinion does not create a material issue of fact as to certain treatment and/or modalities rendered by the Plaintiff and same remains uncontested in this action.

LEGAL ANALYSIS

Fla. R. Civ. P. 1.510(c) provides that "judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [citing *Menendez v. Palms West Condominium Ass'n*, 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; *see also Holl v. Talcott,* 191 So.2d 40 (Fla. 1966); *Moore v. Morris,* 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.,* 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the [Plaintiff] need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id.* at 601 [citing *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla. 1965)]; *see also Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach,* 226 So.2d 866 (Fla. 4th DCA 1969).

To prevail, Plaintiff must first meet a prima facie burden of proof on the issues of relatedness and medical necessity. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] (a plaintiff's prima facie case to recover PIP benefits requires proof that its services are related to the subject accident and medically necessary). The Court finds that Plaintiff has made a prima facie case demonstrating relatedness and medical necessity of its treatment.

Relatedness

While often confused and misapplied, at its simplest terms, "relatedness" is causation, or whether the services relate to the subject accident. See *In re Standard Jury Instructions in Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions),* 35 So. 3d 666 (Fla. 2010) [35 Fla. L. Weekly S425a]. Jury Instruction 413.4 states: "[t]he first issue is whether the service is related to the automobile accident of (date). If you decide that a service is not related to the accident, you should not award damages for that service. If you decide that one or more services are related to the accident, you must then decide a second issue." *Id.* As succinctly put by the Eleventh Judicial Circuit in its appellate capacity, "relatedness is established by showing that injuries and subsequent medical treatment. . .arose out of a subject accident*." Sevila Pressley Weston v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 306b (Fla. 11th Cir. App., Nov. 26, 2013). Once the Plaintiff makes a prima facie case as to relatedness, it is up to the insurer Defendant to present evidence that the injuries being treated either pre-existed (and were not further injured in the subject accident) or otherwise were not caused by the subject accident. *Id.*

The record evidence (via the medical records and Dr. Levine's affidavit) reflects that Jason Garavito was injured during the motor vehicle accident of May 3, 2012 and that the treatment and/or services rendered by the Plaintiff were performed in relation to same. Neither Defendant nor Dr. Mathesie argue that Mr. Garavito was treated for anything other than the injuries sustained in the May 3, 2012 motor vehicle accident.

Defendant has not come forth with any evidence whatsoever purporting to show that Mr. Garavito was treated for anything other than the injuries sustained in the May 03, 2012 motor vehicle accident as otherwise required by *Sevila. See also American Health & Rehab., Inc. v. United Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 615b (Fla. 17th Cir., Broward Cty. Ct., J. Skolnik, October 16, 2015) ("[t]he mere denial by United Auto that the treatment was related. . .without the demonstration of some intervening act or circumstance eliminating the pre-existing relatedness does not create a genuine issue of material fact"); *A-Plus Medical & Rehab Center v. State Farm,* 27 Fla. L. Weekly Supp. 186a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Diaz, March 19, 2019) (finding affidavit insufficient to create genuine issue of material fact as to relatedness since it failed to set forth "any factual basis to conclude that the claimant was treated for anything other than the injuries in the [subject] accident"); *Coast Chiro. Center v. State Farm,* 26 Fla. L. Weekly Supp. 327a (Fla. 17th Cir., Broward Cty. Ct., J. Benson, June 18, 2018) (same); *Marshall Bronstein, D.C. v. United Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 945b (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Multack, March 11, 2015) ("the term 'related' represents a causal connection between the treated injury and the automobile accident" and does not "hinge[ ] on the benefit or necessity of treatment", that is, "[t]he terms 'related' and 'necessary'. . .must be analyzed independent of one another"); *Silverland Medical Center, LLC., a/a/o Yisander Garcia v. United Auto. Ins. Co.,* 28 Fla. L. Weekly Supp. 720c (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Pedraza, April 30, 2020) (citing to *Sevila* and finding relatedness was undisputed where defense expert furnished a similar affidavit).

Accordingly, Dr. Mathesie's affidavit fails to create a fact issue as to the relatedness of all treatment rendered by Plaintiff since same does not indicate that the treatment rendered by Plaintiff to Mr. Garavito arose out of anything other than *"the ownership, maintenance, or use of a motor vehicle*." Fla. Stat. 627.736(1).

The record before this Court reflects that it is undisputed that all treatment rendered by the Plaintiff is related to the May 3, 2012 automobile accident and, accordingly, **Plaintiff's Motion is GRANTED as to all claimed services as to the issue of relatedness**.

Medically Necessary Treatment

Fla. Stat. 627.732(2) specifically defines "medically necessary" as that term is used throughout the No-Fault Act as follows:

> (2) "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:
>
> (a) In accordance with generally accepted standards of medical practice;
>
> (b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and
>
> (c) Not primarily for the convenience of the patient, physician, or other health care provider

Id.

The Court must first make three specific findings regarding Dr. Mathesie's opinions concerning the initial examination, upcoding, and convenience of treatment as they permeate throughout his affidavit and serve as a basis to Dr. Mathesie's opinions. As it pertains to treatment rendered and billed by Plaintiff under CPT code 99203 (initial examination) on date of service May 09, 2012, it is undisputed that Dr. Mathesie did not review the Plaintiff's initial examination report [*see e.g.,* ¶11f. and ¶14 (alleging that there was no initial evaluation and/or data presented for his review); ¶27 (alleging that Plaintiff's expert claims to have reviewed initial evaluation and/or data without attaching same to his affidavit)].

Dr. Mathesie is factually incorrect in asserting that Plaintiff's initial examination report was not attached to Dr. Levine's affidavit. Specifically, a review of this Court's docket reflects that Plaintiff's initial examination report was in fact attached as an exhibit to Dr. Levine's affidavit and filed with the Court (filed June 18/18, docket # 25, p. 64-68) in support of Plaintiff's motion for summary judgment. In fact, at the hearing defense counsel initially argued that the Plaintiff had never previously furnished the initial examination report to the Defendant; however, defense counsel ultimately recognized he was mistaken and abandoned this argument. (The Court does take note that current defense counsel was not counsel of record at the time of Dr. Levine's affidavit).

Since Dr. Mathesie did not review the Plaintiff's initial examination report, this Court finds that he is not competent and/or does not possess a proper factual basis to formulate any opinions as to the medical necessity of this service. Fla. R. Civ. P. 1.510(e) ("affidavits must be made on *personal knowledge*, must set forth such *facts* as would be admissible in evidence, and must show affirmatively that the affiant is *competent* to testify to the matters stated therein"). It is axiomatic that Dr. Mathesie, as an expert, cannot attest to the medical necessity of Plaintiff's initial examination when he has not reviewed the very report which describes the service performed as well as the findings of the examination.

Secondly, Mr. Mathesie makes various issues pertaining to "upcoding" and/or "deficient recording keeping" which may otherwise serve as grounds for denial of treatment are affirmative defenses that must be pled as a bar to payment of a PIP claim. *See e.g., Progressive v. Craig A. Newman, D.C.,* 15 Fla. L. Weekly Supp. 129a (Fla. 13th Cir. App., July 17, 2007) (holding that upcoding is an affirmative defense that ought to be pled and for which a carrier has the burden of persuasion); *Silverland Medical Center, LLC., v. United Auto Ins. Co.,* 28 Fla. L. Weekly Supp. 720c (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Pedraza, April 30, 2020) ("[i]ssues pertaining to 'CPT coding' and/or 'upcoding'. . .are affirmative defenses that must be pled"); *A-Plus Medical & Rehab Center v. State Farm,* 27 Fla. L. Weekly Supp. 186a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Diaz, March 19, 2019) (rejecting Mathesie affidavit testimony premised upon unpled issues regarding "the sufficiency of the records, unbundling/upcoding and services not being rendered"); *Benito Alfonso v. State Farm Mut. Auto. Ins. Co.,* 28 Fla. L. Weekly Supp. 852a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Pedraza, July 28, 2020) (rejecting insurer's expert affidavit testimony on issue of medical necessity premised upon "the sufficiency of the records" since "[t]he Defendant [had] not timely raised affirmative defenses regarding this issue"). Fla. Stat. 627.736(5)(b)(1)(e) sets specific requirements and responses by the insurer defendant as it relates to upcoding and the record is clear that the Defendant did not avail itself of any statutory upcoding defense.

Issues of "improper CPT coding" and/or "deficient recording keeping" are not a basis to contest the medical necessity of treatment. *See Sims v. Brown,* 574 So.2d 131 (Fla. 1991) (affirming the exclusion of evidence of a hospital's alleged deficient medical record keeping on the basis that record keeping is not relevant to a determination of whether medical treatment is rendered within the acceptable standards of care); *Sevila Pressley Weston v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 306b (Fla. 11th Cir. App., Nov. 26, 2013) (allegations of deficient record keeping do not provide a legal basis for contesting compensability of a PIP claim); *United Auto. Ins. Co. v. Apple Medical Center, L.L.C.,* 18 Fla. L. Weekly Supp. 336b (Fla. 11th Cir. App., Feb. 10, 2011) (holding that expert's conclusory affidavit containing assertion that the physician provider's documentation is deficient does not create an issue of material fact to avoid summary judgment); *South Florida Pain & Rehab., Inc. v. United Auto.,* 16 Fla. L. Weekly Supp. 981b (Fla. 17th Cir., Broward Cty. Ct., J. Trachman,

August 10, 2009) ("Any opinion regarding the adequacy of the records is not germane to the issue of RRN. An alleged failure to maintain adequate records is not a legal basis to support the finding that the medical services were not RRN."); *Priority Medical Centers, LLC (Arlene Robinson-Rampone) v. State Farm Fire & Cas. Co.,* 21 Fla. L. Weekly Supp. 201b (Fla. 17th Cir., Broward Cty. Ct., J. Lee, June 3, 2013) (detailed discussion of multiple deficiencies in Mathesie affidavit including alleged lack of documentation or record keeping).

Thirdly, Dr. Mathesie opines in his affidavit that any treatments which had "consecutive daily treatment" cannot be considered medically necessary. The first basis for that opinion is that since the insured claimant did not go every day, then the treatment was one of convenience. See ¶17 of Dr. Mathesie's affidavit. The Court finds there to be no support (expert, opinion, statutory, etc.) for this conclusion and the Court does not consider it. This Court finds that Dr. Mathesie's opinion regarding "convenience" as stated in ¶17 of his affidavit fails to create a factual issue since same is premised upon his own speculation, conjecture, surmise, and/or otherwise constitutes a stacking of inferences in violation of clear Florida law. *See e.g., Morgan v. Continental Cas. Co.,* 382 So.2d 351 (Fla. 3d DCA 1980) (affidavits based on speculation, surmise, and conjecture are inadmissible at trial and legally insufficient to create a disputed issue of fact in opposition to a motion for summary judgment); *Food Fair Stores, Inc. v. Trusell,* 131 So.2d 730 (Fla. 1961); *M.A. Hajianpour, M.D., P.A., v. Khosrow Maleki, P.A.,* 932 So.2d 459 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1524c] ("when the expert's opinion is based on speculation and conjecture, not supported by the facts, or not arrived at by recognized methodology, the testimony will be stricken."); *Stanley v. Marceaux,* 991 So.2d 938 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2019b] (stacking of inferences is not permitted); *50 State Security v. Giangrandi,* 132 So.3d 1128 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2515a]; *Broward Executive Builders, Inc. v. Zota,* 192 So.2d 534, 537 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1126a]; *Pacific Medical & Rehab Center v. State Farm Mut. Auto Ins. Co.,* 26 Fla. L. Weekly Supp. 257a (Fla. 11th Cir. App., June 12, 2018) ("[t]he only evidence the instant jury had before it to support the false statement defense required the improper pyramiding of inferences—in such situations, a directed verdict should be granted, and the issue should not be submitted to the jury"). Additionally, it appears this opinion, if accepted, would nonetheless directly conflict with Dr. Mathesie's "consecutive daily treatment" opinion (¶25). The Court does find support for Dr. Mathesie's second basis (see ¶25) that any treatments rendered on May 22, 2012 and June 1, 2012 are not medically necessary due to necessary rest between sessions.

CPT code 99203

Although Dr. Mathesie did not review the initial examination report, he nonetheless opines that the Plaintiff "*upcoded*" this service (¶15) and that the "*medical/legal documentation of the initial consultation and examination*" was insufficient and/or defective (¶16) in support of an allegation that same was not medically necessary. As an initial matter, it is unclear how Dr. Mathesie arrived at these conclusions given that he did not even review the initial examination report. Regardless, even if he had, this Court finds Dr. Mathesie's opinions to be inadmissible for the additional reasons set forth below.

Dr. Mathesie's opinion as to CPT code 99203 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary" as is otherwise required. Accordingly, this testimony is disallowed. *See e.g. State Farm Mut. Auto. Ins. Co. v. Renfroe,* 915 So.2d 212 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2497a] (court departed from essential requirements of law "in refusing to apply the [statutory] definition of medically necessary"); *Martinez Chiro. Center, Inc. (William Guell) v. State Farm,* 24 Fla. L. Weekly Supp. 190a (Fla. 17th Cir., Broward Cty. Ct., J. Kanner, May 10, 2016) (where insurer's expert did not apply statutory definition of "medically necessary" in rendering opinion, expert's opinion failed to create issue of fact).

Further, rather than relying upon the applicable statutory definition, Dr. Mathesie's opinion is instead premised upon purported "upcoding" and/or "deficient recording keeping" defenses which have not been pled by the Defendant in this case.

Defendant has not raised any "upcoding" and/or "deficient recording keeping" issues as an affirmative defense in this case. Since no such "upcoding" and/or "deficient recording keeping" affirmative defenses pertaining to CPT code 99203 have been pled by the Defendant, any such defenses are deemed waived and not an issue in this case. Fla R. Civ. Pro. 1.140(h)(1). Even if this defense had been raised by the Defendant, this Court would find same to be futile and/or without merit as same pertains to CPT code 99203. First, the plain language of Fla. Stat. 627.736(5)(b)(1)(e) provides that an insurer can only assert an "upcoding" defense if it has contacted the insured before asserting same, discussed the reasons for the insurer's change in the coding, or has documented in its claim file that it has made a reasonable good faith effort to do so. The record before the Court is devoid of anything that reflects the Defendant complied with these statutory provisions. Second, Dr. Mathesie's opinion as to allegedly "deficient record keeping" is completely unsupported when he did not even review the initial examination report.

Therefore, Dr. Mathesie's purported "upcoding" and/or "deficient recording keeping" opinion as to CPT code 99203 is premised on unpled affirmative defenses rendering same inadmissible testimony that does not create a factual issue for purposes of summary judgment and/or trial. **Accordingly, Plaintiff's Motion is GRANTED regarding the medical necessity of CPT code 99203 for May 9, 2012**.

CPT code 97014

As it pertains to treatment rendered and billed by Plaintiff under CPT code 97014, Dr. Mathesie does not state any opinions as to this service, beyond his "consecutive daily treatment" opinion (¶25). **Accordingly, Plaintiff's Motion is GRANTED regarding the medical necessity of CPT code 97014 for May 9, 11, 14, 16, 18, 21, 31, June 4, 7, and 11, 2012**.

CPT code 97012

As it pertains to treatment rendered and billed by Plaintiff under CPT code 97012, Dr. Mathesie does not state any opinions as to this service, beyond his "consecutive daily treatment" opinion (¶25). **Accordingly, Plaintiff's Motion is GRANTED regarding the medical necessity of CPT code 97012 for June 11, 2012**.

CPT codes 97035, 97124, 97140, and 97112

As it pertains to treatment rendered and billed by Plaintiff under CPT codes 97035 (ultrasound), 97124 (massage), 97140 (manual therapy), and 97112 (neuromuscular reeducation), Dr. Mathesie opines that the Plaintiff failed to comply with principles and/or guidelines of "CPT coding" requiring certain documentation to be included in the medical records Specifically, Dr. Mathesie opines that the "*AMA CPT Editorial Panel dictates that the specific duration of time be documented in the records*" (¶22), and so "*the omission of specific duration of time. . .would be evidence that the provider did not follow or comply with the AMA CPT Editorial Panel*" (¶23).

As to CPT code 97112 (neuromuscular reeducation), Dr. Mathesie also opines that the "*specific techniques and methods*" used by the Plaintiff to perform this treatment were not "*specifically described and substantiated in the records*" and concludes that the treatment was not "*actually performed*" (¶20). Dr. Mathesie's opinion is premised upon the fact that he apparently could not determine from

the documentation in the medical records which specific type of neuromuscular reeducation was rendered by the Plaintiff.

The Court finds Dr. Mathesie's opinions to be inadmissible and, therefore, do not create a material issue of fact for purposes of summary judgment. Fla. R. Civ. P. 1.510(e) (affidavits must "set forth facts as would be *admissible* in evidence"). Dr. Mathesie's opinion as to CPT codes 97035, 97124, 97140 and 97112 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary" as is otherwise required. Dr. Mathesie's opinion is instead premised upon purported "improper CPT coding" and/or "deficient recording keeping" issues which have not been pled by the Defendant in this case. Additionally, Dr. Mathesie can only opine that he doubts some of the treatments and hypothesizes some of the treatment *might* not have been necessary, which does not create a genuine issue of material fact. *Gonzalez v. Citizens Prop. Ins. Corp.,* 273 So. 3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a]. The Court finds neither Dr. Mathesie nor Defendant have refuted the medical necessity of CPT codes 97035, 97124, 97140, and 97112.

Accordingly, Plaintiff's Motion is GRANTED regarding the medical necessity of:

i. **CPT Code 97035 for May 9, 11, 14, 16, 18, 21, 31, June 4, 7, and 11, 2012;**

ii. **CPT Code 97124 for June 11, 2012;**

iii. **CPT Code 97140 for May 9, 11, 14, 18, 31, June 4, 7, 11, 2012; and**

iv. **CPT Code 97112 for May 9, 14, 16, 18, 21, 31, June 4, 7, and 11, 2012.**

CONCLUSION

Therefore, based on this Court's analysis set forth above, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment is **GRANTED IN PART** as more fully set forth above.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Insurer is not estopped from rebutting medical provider's showing regarding reasonableness of MRI charge by prior case finding same charge pertaining to another insured to be reasonable where insurer never had opportunity to have its argument on issue properly considered in prior case since court disregarded insurer's evidence based on since-overruled rationale that consideration of fee schedules was not relevant to reasonableness issue when insurer had not elected fee schedule method of reimbursement—Further, insurer's evidence in prior case was offered through litigation adjuster found by that court to not be competent to testify on issue, whereas evidence in current case is offered through qualified expert

BEST AMERICAN DIAGNOSTIC CENTER, INC., a/a/o Dania Garcia, Plaintiff, v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-018691-SP-05, Section CC06. February 15, 2021. Luis Perez-Medina, Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT ON THE ISSUE OF REASONABLENESS OF PLAINTIFF'S CHARGES BASED UPON COLLATERAL ESTOPPEL BY A PRIOR FINAL JUDGMENT IN PLAINTIFF'S FAVOR

THIS CAUSE, came before the Court on October 6, 2020 on Plaintiff's Motion for Final Summary Judgment on the Issue of Reasonableness of Plaintiff's Charges Based Upon Collateral Estoppel by a Prior Final Judgment in Plaintiff's Favor and the Court having heard arguments from counsel, having reviewed Plaintiff's Motion with supporting evidence, the entire court file, Plaintiff and Defendant's Memorandums of Law on the doctrine of collateral estoppel and its application to this case, having reviewed relevant legal authorities on collateral estoppel, and being otherwise sufficiently advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order **DENYING** Plaintiff's Motion for Final Summary Judgment on the Issue of Reasonableness of Plaintiff's Charges Based Upon Collateral Estoppel by a Prior Final Judgment in Plaintiff's Favor.

Background and Factual Findings

I. ***Best American a/a/o Dania Garcia v. United Auto***

Plaintiff, Best American Diagnostic Center ("Best American"), as the Assignee of Dania Garcia's policy of insurance issued by Defendant, United Automobile Insurance Company ("Unite Auto"), filed suit for services rendered to the insured as a result of an automobile accident. The suit was filed on December 11, 2011. Best American billed United Auto for one MRI taken on March 4, 2010 under CPT Code 73721. The bill totaled $1,750.00. United Auto paid $900.04 equating to 200% of Medicare Part B Fee Schedule. United Auto's policy of insurance did not elect the permissive fee schedule under Fla. Stat. §627.736(5)(a)(2).

To support its charge of $1,750.00 on a motion for summary judgment, Best American filed the affidavit of Olga Bacallao, its owner and corporate representative. Ms. Bacallao attested to opening her diagnostic center in 2006 and setting all MRI charges at $1,750.00 each. Bacallao Aff. ¶ 12, July 15, 2019. The charges were set after consulting with other diagnostic facilities in Miami-Dade County. *Id.* Ms. Bacallao also reviewed several publications which provided a range of usual and customary charges in the community. *Id.* at ¶ 17. Since 2008, Best American received reimbursements of 80% of its charge of $1,750.00 per MRI from auto insurers who had not adopted the 200% Medicare limited reimbursement in their policies. *Id.* at ¶ 16. Ms. Bacallao concluded that Best American's charge was supported by published data and consistent with charges by other providers. *Id.* at ¶ 29.

To rebut Best American's claim that the $1,750.00 charge was reasonable, United Auto filed the affidavit of Dr. Edward Dauer. Dr Dauer attested to being a licensed medical doctor since 1976. Dr. Dauer Aff. ¶ 4, August 5, 2019. For over 40 years, he treated, reviewed, and evaluated "medical records and bills for patients who were injured in automobile accidents and received medical treatments and diagnostic studies." *Id.* at ¶ 6. He owned and operated diagnostic centers and was consistently supplying radiology services, including MRIs. *Id.* at ¶ 7. He evaluated the charges and medical reimbursements of hundreds of patients who received MRIs, x-rays, and CT scans. *Id.* at ¶ 8. Dr. Dauer reviewed "[v]arious federal and state medical fee schedules applicable to motor vehicles and other insurance coverages including worker's compensation, Medicare, HMO/PPO, and other third-party insurance carriers." *Id.* at ¶ 9. He reviewed the "payments and reimbursements that Best American Diagnostic Center, Inc. accept[ed] from all sources, including government and non-governmental insurance companies which pay[ed] less than the amount received from United Automobile Insurance Company." *Id.* Based upon his review of the range and rate of charges by other providers and diagnostic centers in the area, he concluded that the amount billed by Best American for the service provided in this case was excessive and significantly higher than what a reasonable charge should be. *Id.* at ¶ 17. Dr. Dauer provided a detailed explanation why he believed that any payment above 200% of Medicare was unreasonable. *Id.* at ¶ 18. He referenced several statutory factors considered when evaluating a reasonable charge and concluded that Best American charge of $1,750.00 was not reasonable. *Id.* at ¶ 16, 37.

On December 2, 2019, after an extensive Daubert hearing, Dr. Dauer was classified by this Court as United Auto's expert witness on the issue of reasonableness. The case was put on the trial docket and is currently awaiting trial.

On August 5, 2020, nearly a year after the Daubert hearing, American Best filed the present motion asking this Court to rule that United Auto was estopped from relitigating the reasonableness of the $1,750.00 MRI charge under CPT code 73721 since that issue was previously decided in *Best American Diagnostic Center, Inc. a/a/o Obdulia Romaguera v. United Automobile Insurance Company*, 25 Fla. L. Weekly Supp. 279a (Fla. Cnt. Ct. 11th Cir. 2017) (Schwartz, J). Best American argued that collateral estoppel applied since United Auto was utilizing the Medicare fee schedule for its reimbursement calculation without adopting this methodology in their policy. United Auto would also be estopped from utilizing Dr. Dauer as a witness since it previously relied on the affidavit of Ms. Velasquez, its corporate representative, to establish reasonableness.

United Auto countered that collateral estoppel was not applicable since the current case did not arise out of the same accident, policy, or claim, and it predated *Best American a/a/o Obdulia Romaguera*'s case. In addition, the Order in *Best American a/a/o Obdulia Romaguera* incorrectly struck down the affidavit of adjuster Lizbeth Velazquez, concluding that Medicare and HMO reimbursements were not relevant to the determination of a reasonableness. United Auto, therefore, argued that it was not afforded a full and fair opportunity to litigate the issue of reasonableness.

II. ***Best American a/a/o Obdulia Romaguera v. United Auto***

In *Best American a/a/o Obdulia Romaguera*, 25 Fla. L. Weekly Supp. 279a, Best American, as the Assignee of Obdulia Romaguera's policy of insurance issued by United Auto, filed suit for services rendered to the insured as a result of an automobile accident. The suit was filed on December 23, 2011. Best American's billed for two MRI's for a total of $3,500.00 ($1,750.00 for each MRI). United Auto paid a total of $1,881.31, equating to 200% of Medicare Part B Fee Schedule.

On May 1, 2017, the Trial Judge issued an Order granting Plaintiff's Motion for Final Summary Judgment. *Id.* In her Order, the Court held that Best American "met its burden to set forth its prima facia showing that the amount of $1,750.00 [was] reasonable"; that Best American's charges were set based on what the owner learned "other facilities were charging for similar services"; and, that Best American received regular reimbursements at "80-100% of her charges." *Id.*

To rebut Best American's claim that the $3,500.00 bill was reasonable, United Automobile filed the affidavit of Litigation Adjuster Lizbeth Velasquez who was offered as a fact witness. *Id.* United Auto never relied on an expert to testify as to the reasonableness of the charges. *Id.*

The Court held that United Auto "failed to present competent, admissible evidence to rebut Plaintiff's prima facie showing that their charge [was] reasonable." *Id.* The Court based its decision on United Auto's choice to rely on Lizbeth Velasquez as its "corporate designee and fact witness." *Id.*

> Essentially, Ms. Velasquez's opinion is that Plaintiff's charges are unreasonable because Medicare, Florida Workers' Compensation, federal workers' compensation, Champus TriCare, and HMOs pay less than the amount of the Plaintiff's charge and that Plaintiff receives reimbursements from Medicare, HMO, and workers' compensation. The opinion offered are inadmissible lay opinions testimony. Ms. Velazquez's affidavit fails to show that she has any experience in the field of medical billing. *Id.*

The Court found that Ms. Velasquez's could not base her opinion on unauthenticated documents that did not meet any hearsay exception. *Id.* She also could not base her opinion on "settlement documents between United Automobile Insurance Company and medical providers". *Id.* Even is Ms. Velasquez was tendered as an expert, the Court found that she would not be competent to testify since her opinions were not based on sufficient facts or data. *Id.*

In addition to not finding Ms. Velasquez competent to testify, the Court held that United Auto's reliance upon Plaintiff's reimbursements from Medicare and HMO policies were not relevant "in determining whether a charge [was] reasonable pursuant to Fla. Stat. 627.736(5)(a)(1)". The Court held that 200% of Medicare Part B Schedule "define[d] the floor for reimbursement of medical charges." *Id.* "[I]n determining the reasonable charge for Plaintiff's services, no evidence that limits the maximum reasonable charge to an amount equal to or less than the 200% of the Medicare Part B fee schedule is relevant or admissible." *Id.*

The Court concluded that United Auto did not come forward with any admissible evidence which would create a genuine issue of material fact as to the reasonableness of [Best American's] charge." *Id.* United Auto did not appeal the decision of the Trail Court.

Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *State Farm Mutual Auto Co. v. Gonzalez,* 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a]. It is axiomatic that the movant has the burden of producing sufficient evidence to sustain its motion for summary judgment. *Holl v. Talcott,* 191 So. 2d 40 (Fla. 1966). On a motion for summary judgment, a court may rule based only on uncontradicted evidence, and may not weigh the evidence to arrive at a factual conclusion necessary for granting summary judgment. *City of Live Oak v. Arnold,* 468 So. 2d 410 (Fla. 1st DCA 1985). "A mere 'iota' or 'scintilla' of evidence in the nonmoving party's favor is sufficient to preclude the entry of summary judgment." *United Automobile Insurance Co. v. Miami-Dade County MRI, Corp, a/a/o Javier Rodriguez*, 27 Fla. L. Weekly Supp. 501a (Fla. 11th Cir. App. Ct. 2019) (citing *Ortega v. Citizens Property Insurance Corp.*, 257 So. 3d 1171, 1172 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2427b]).

Doctrine of Collateral Estoppel

"Collateral estoppel . . ., like its near relative res judicata, serves to limit litigation by determining for all time an issue fully and fairly litigated." *Cook v. State*, 921 So. 2d 631, 634 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2195a]. The terminology used to discuss the preclusive effects of earlier litigation is somewhat confusing because claim and issue preclusion are sometimes "lumped together under the rubric of res judicata." *David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1330 n. 7 (11th Cir. 2000). Claim preclusion or res judicata "bars a subsequent action between the same parties on the same cause of action." *State v. McBride,* 848 So. 2d 287, 290 (Fla. 2003) [28 Fla. L. Weekly S401a]; *see also Pumo v. Pumo,* 405 So. 2d 224, 226 (Fla. 3d DCA 1981) ("Under the doctrine of res judicata, a final judgment or decree on the merits by a court of competent jurisdiction constitutes an absolute bar to a subsequent suit on the same cause of action and is conclusive of all issues which were raised or could have been raised in the action.").

Collateral estoppel or issue preclusion, by contrast, "operates more narrowly to prevent re-litigation of issues that have already been decided between the parties in an earlier lawsuit." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C1192a]; *See Mortg. Elec. Registration Sys., Inc. v. Badra,* 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2418a] (stating that issue preclusion "precludes re-litigating an issue where the same issue has been fully litigated by the same

parties or their privies, and a final decision has been rendered by a court").

The "essential elements" of collateral estoppel under Florida law are: "(1) an identical issue must have been presented in a prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated." *Provident Life and Accident Insurance Company v. Genovese, M.D.*, 138 So. 3d 474, 477 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b]; *Goodman v. Aldrich & Ramsey Enterprises, Inc.*, 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D162a]; *Holt v. Brown's Repair Serv., Inc.,* 780 So. 2d 180, 182 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D307a].

Differences in the burden of proof or persuasion between the original and subsequent proceeding may affect whether the doctrine of collateral estoppel can be applied. *Cook*, 921 So. 2d at 635. The "determination of an issue will not be given preclusive effect where '[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.' " *Id.* (quoting Restatement (Second) of Judgments Section 28(4)). What might have been a " 'full and fair opportunity to litigate,' when considered in the context of the first proceeding, may not be sufficient when viewed in the context of the second proceeding." *Id.* (quoting to *Goodman,* 804 So. 2d at 546).

For an issue to have been fully litigated, a court of competent jurisdiction must enter a final decision. *Mobil Oil Corp. v. Shevin,* 354 So.2d 372, 374 (Fla.1977). If the issue in dispute has not been fully litigated, the doctrine is inapplicable. *Wacaster v. Wacaster*, 220 So. 2d 914, 916 (Fla. 4th DCA 1969). For example, collateral estoppel "does not apply where unanticipated subsequent events create a new legal situation." *Newberry Square Fla. Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 591 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1376a]. Collateral estoppel cannot be used on issues which could have, but may not have, been decided in an earlier lawsuit between the parties. *See, e.g., Acadia Partners, L.P. v. Tompkins,* 673 So. 2d 487, 488-89 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D795a] (holding that a general jury verdict for the defendant in a breach of contract action could not establish the absence of breach since the jury was instructed that it could find for the defendant if the defendant had not breached the contract or if the defendant proved an affirmative defense).

Even when all the elements of collateral estoppel are met, an exception may be warranted if there has been an intervening "change in [the] applicable legal context." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) [21 Fla. L. Weekly Fed. S887a] (quoting Restatement (Second) of Judgments § 28, Comment *c* (1980)); see *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 363 (1984) (refusing to find a party bound by "an early decision based upon a now repudiated legal doctrine"); *Krug v. Meros,* 468 So.2d 299, 303 (Fla. 2d DCA 1985) (collateral estoppel "does not apply where unanticipated subsequent events create a new legal situation."); *Montana v. United States*, 440 U.S. 147, 155 (1979) (asking "whether controlling facts or legal principles ha[d] changed significantly" since a judgment before giving it preclusive effect); *Commissioner v. Sunnen*, 333 U.S. 591 (1948) (issue preclusion "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally"). The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U.S. at 836-837.

Reasonableness of a Charge

In a lawsuit seeking Personal Injury Protection benefits, the plaintiff carries the burden of proving all essential elements in their case in chief, which includes reasonableness, relatedness, and medical necessity. *Derius v. Allstate Indemnity Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]; *see also Auto Owners Ins. Co. v. Marzulli*, 788 So. 2d 1031, 1034 (Fla. 2nd DCA 2001) [26 Fla. L. Weekly D734a]; Florida Statute Section 627.736(1)(a) (2008). As a threshold matter, the plaintiff must prove that the disputed charge does not exceed what the plaintiff customarily charges for "like services or supplies." § 627.736(5)(a)(1) Fla. Stat. (2008); *Geico General Insurance Company v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 155 (Fla. 2013) [38 Fla. L. Weekly S517a]. The plaintiff must also prove that they charged "only a reasonable amount" based on several factors, including "evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply." Fla. Stat. § 627.736(5)(a)(1) (2008); *Virtual Imaging*, 141 So. 3d at 155; *Progressive Select Ins. Co. v. Emergency Physicians of Cent. Fla., LLP*, 202 So. 3d 437, 438 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a].

Reasonableness can also be determined by applying 200% of the Medicare Part B fee schedules to the charges submitted. When an insurer provides notice in the policy of its intention to limit payment to 200% Medicare Part B fee schedules, it caps the maximum payment pursuant to section (5)(a)(2). Fla. Stat. § 627.736(5)(a)(2) (2008); *Virtual Imaging*, 141 So. 3d at 156. When an insurer does not include the notice requirement, reasonableness is determined under the fact-based analysis of the factors enumerated in section (5)(a)(1), which can still include reimbursement based on 200% of the Medicare Part B fee schedule as one of the permissive factors to be considered. *Virtual Imaging*, 141 So. 3d at 157, 161 n8.; *Nw. Ctr. for Integrative Med. & Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 214 So. 3d 679 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b].

In recent decisions, the Eleventh Circuit Appellate Court has held that despite an insurance provider's failure to elect to use the Medicare Part B Fee Schedule in its policy to limit its reimbursements, "it is not precluded from having an opportunity to litigate the reasonableness of [a] bill under Section 627.736(5)(a)(1)". *State Farm Mutual Ins. Co. v. Gables Insurance Recovery, Inc. a/a/o Dianelys Hernandez*, 28 Fla. L. Weekly Supp. 780a (Fla. 11th Cir. Ct. App. 2020) (citing *Virtual Imaging*, 141 So. 3d at 155-56; *Emergency Physicians*, 202 So. 3d at 438; *State Farm Mutual Automobile Ins. Co. v. Gables Insurance Recovery, Inc., a/a/o Maria Manyoma*, 28 Fla. L. Weekly Supp. 656d (Fla. 11th Cir. Ct. App. 2020); *see State Farm Fire & Casualty Co., v. Gables Insurance Recovery, Inc. a/a/o Felix Cabrera*, 28 Fla. L. Weekly Supp. 763a (Fla. 11th Cir. Ct. App. 2020)(the Medicare Part B Fee Schedule can be utilized as a factor when "determining reasonableness of the fees submitted for payment."). Since Section 627.736(5)(a)(1) of the PIP statute allows for consideration of "various federal and state medical fee schedules applicable to automobile and other insurance coverages", evidence pertaining to Medicare and Worker's Compensation fee schedules may be considered when determining the reasonableness of a particular charge. *United Auto Inc. Co. v. Miami-Dade County MRI, Corp., a/a/o Beisy Munoz*, 27 Fla. L. Weekly Supp. 934a (Fla. 11th Cir. Ct. App. 2019). "Medicare Part B Fee Schedules are fee schedules clearly applicable to automobile insurance coverage because they are incorporated into the PIP insurance statute and form a statutory basis

upon which various PIP claims must be paid." *Id.* Furthermore, "negotiated contract rates, including HMO and PPO rates" are relevant to determine the reasonableness of a medical bill "since section 627.736(5)(a) allows the consideration of 'information relevant to the reasonableness of the reimbursement,' to determine whether a charge is reasonable." *Id.*; *See Shands Jacksonville Medical Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 213 So. 3d 372, 376 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1447a] (different subsection of the PIP negotiated reimbursement rates "may very well be relevant and discoverable in the context of litigation over the issue of reasonableness of charges instituted pursuant to subsection (5)(a) . . . ."); *see also Hialeah Med. Assocs., Inc. a/a/o Coto v. United Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 868b (Fla. 11th Cir. Ct. App. 2014) ("insurers can consider charges derived from public sector programs and managed care plans, in addition to the customary billed-charges of private providers."). Accordingly, a trial court commits reversible error if it finds that "Medicare fee schedules cannot be utilized in a reasonableness determination." *Miami-Dade County MRI a/a/o Beisy Munoz*, 27 Fla. L. Weekly Supp. 934a; *See, e.g., United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp., a/a/o Miguel Garcia Pagan*, 27 Fla. L. Weekly Supp. 677a (Fla. 11th Cir. Ct. App. 2019); *United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp., a/a/o Tania Barrios*, 27 Fla. L. Weekly Supp. 7a (Fla. 11th Cir. Ct. App. 2019); *United Auto. Ins. Co. v. Miami Dade Cty. MRI Corp, a/a/o Ana Rojas*, 26 Fla. L. Weekly Supp. 865b (Fla. 11th Cir. Ct. App. 2019); *State Farm Mut. Auto. Ins. Co. v. Gables Ins. Recovery, Inc. a/a/o Luis A. Aispur*, 26 Fla. L. Weekly Supp. 709a (Fla. 11th Cir. Ct App. 2018); *State Farm Mut. Auto. Ins. Co. v. Roberto Rivera-Morales, M.D., a/a/o Syed Ullah*, 26 Fla. L. Weekly Supp. 469a (Fla. 11th Cir. Ct. App. 2018).

The Eleventh Circuit Appellate Court has also ruled that an expert is competent to testify as to medical pricing in Miami-Dade County if the expert satisfies the requirements of Florida Rule of Civil Procedure 1.510. *Gables Insurance a/a/o Felix Cabrera*, 28 Fla. L. Weekly Supp. 763a. The affidavit or testimony at trial must be based on the expert's personal knowledge and provide the basis for that knowledge, it must set forth facts admissible in evidence, it must address the statutory factors, reference various fee schedules, and must be based upon the expert's experience and training. *Id.* An affidavit presented by an insurance provider in opposition to summary judgment on the issue of reasonableness will not be discarded if it "raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party, and summary judgment must be denied." *Id. See State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Yuderis Rego*, 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. App. 2019); *United Automobile Ins. Co. v. Miami Dade County MRI Corp., a/a/o Tania Cazo*, 28 Fla. L. Weekly Supp. 276a (Fla. 11th Cir. Ct. App. 2020); *United Auto. Ins. Co. v. Miami-Dade MRI a/a/o Bermudez*, 28 Fla. L. Weekly Supp. 299a (Fla. 11th Cir. Ct. App. 2020); *United Automobile Insurance Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo*, 27 Fla. L. Weekly Supp. 791b (Fla. 11th Cir. Ct. App. 2019); *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo*, 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. Ct. App. 2019); *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Javier Rodriguez*, 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. App. 2019); *United Automobile Insurance Co. v. Miami Dade County MRI, Corp. a/a/o Rene Dechard*, 27 Fla. L. Weekly Supp. 226a (Fla. 11th Cir. Ct. App. 2019); *United Automobile Insurance Co. v. Millennium Radiology, LLC a/a/o Javier Rodriguez*, 25 Fla. L. Weekly Supp. 911b (Fla. 11th Cir. Ct. App. 2019).

In *United Automobile Insurance Company v. Miami-Dade County MRI, Corp., a/a/o Jawanda James*, 27 Fla. L. Weekly Supp. 223a (Fla. 11th Cir. App. Ct. 2019) the Eleventh Circuit Appellate Court noted that there is "a huge chasm in our circuit court appellate precedent: different results being reached by different appellate panels on the same issue." *Id.* The result of all of this is that "a litigant wins or loses based upon the predilections of the individual judges who heard the trial and appeal and not upon a coherent body of law that applies to all litigants." *Id.* Thus, the intra-circuit split creates great uncertainty in the lower courts and among litigants. *Id.*

The Eleventh Circuit's Appellate decision in *Miami-Dade County MRI a/a/o Javier Rodriguez*, 27 Fla. L. Weekly Supp. 501a is instructive. Just like the present case, United Auto relied on the affidavit of Dr. Dauer to rebut Miami-Dade County MRI's affidavit in support of summary judgment as to the reasonableness of its charges. Miami-Dade County MRI argued that "even if Dr. Dauer's affidavit were sufficient to raise an issue of disputed fact, the trial court did not abuse its discretion by disregarding the affidavit . . . because other circuit appellate panels have affirmed other trial courts that struck Dr. Dauer's affidavit." *Id.* The court opined that the appellate decisions upon which the provider relied on were incorrectly decided when the Eleventh Circuit concluded that "Medicare, HMO, and PPO reimbursements are not relevant as to the issue of reasonableness of charges." *Id.* The court stated that it would "refuse to compound legal error by blindly following erroneous ones." *Id.*

To determine the reasonableness of the charge of $1,750.00 for CPT code 73721 in Miami-Dade County in 2010 based on reimbursement from a policy that does not provide a notice requirement for 200% of Medicare Part B Fee Schedule, the Court must decide two issues: did the provider meet its initial burden of setting forth a prima facia showing that the $1,750.00 charge was reasonable; second, did the insurer provide sufficient evidence to rebut that presumption. On the first issue, this Court finds that collateral estoppel is applicable and Best American has met its burden of setting forth a prima facia showing that $1,750.00 charge was reasonable. On the second issue, this Court finds that United was never given a full and fair opportunity to litigate that issue. In *Best American a/a/o Obdulia Romaguera* the Court held that United Auto did not present competent, admissible evidence to rebut Plaintiff's prima facie showing that their charge was reasonable. The Court ruled that any reimbursement below or at 200% of Medicare part B fee schedule was not relevant and could not create a question of fact pursuant to Florida Statute 627.736(5)(a)(1). That reasoning has been overruled and found to be based on an erroneous application of Florida Law. Thus, United Auto never had an opportunity to have their argument properly considered based on the correct law.

The Court also determined that Ms. Velasquez was not competent to testify to the reasonableness of the charge. In the case before us, Dr. Dauer rather than Ms. Velazquez was the witness which would testify as to the reasonableness of the charge. Prior to the filing of this motion, this Court had already determined that Dr. Dauer was qualified to testify since he had sufficient knowledge and possessed evidence to rebut Best American prima facia showing of reasonableness. The decision of this Court to allow Dr. Dauer to testify created a new factual issue not addressed in *Best American a/a/o Obdulia Romaguera*.

Even if all the elements of collateral estoppel were met, an exception is warranted in this case because there have been significant intervening changes in the law within the Eleventh Appellate Circuit. In addition, United Auto had a heavier burden of proof or persuasion in the first case than it has in the current case. Thus, applying issue preclusion when there has been a change in circumstances does not advance the equitable administration of justice. *Bobby*, 556 U.S. at 836-837.[1]

Best American argues that this Court is bound by *United Auto. Ins.*

Co. v. Doctor Rehab Ctr., Inc., 307 So. 3d 101 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1766a] as well as *United Auto. Ins. Co. v. Doctor Rehab Ctr., Inc.*, 28 Fla. L. Weekly Supp. 466b (Fla. Cir. Ct. App. 2020). Both cases relied on *Pearce v. Sandler*, 219 So. 3d 961, 965 (Fla. 3rd DCA 2017) [42 Fla. L. Weekly D1214b] which barred a subsequent action under the doctrines of collateral estoppel and res judicata. While *Pearse* involved identical operative facts, that is not the case in the present case. The case American Best was relying on for collateral estoppel had Lisbeth Velasquez testifying as a fact witness for United Auto. The present case has Dr Dauer testifying as an expert witness for United Auto and he has already been qualified by this Court as an expert. Finally, the law applicable to this case has substantially changed since 2017. This Court decided the admissibility of Dr. Dauer based on current case law rather than the law which existed in 2017. Thus, *Doctor Rehab* as well as *Pearse* are both distinguishable from this case.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Final Summary Judgment on the Issue of Reasonableness of Plaintiff's Charges Based Upon Collateral Estoppel by a Prior Final Judgment in Plaintiff's Favor is hereby **DENIED**.

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[1]This Court finds that United Auto's argument that collateral estoppel was not applicable since the current case did not arise out of the same accident, policy, or claim, and it predated *Best American a/a/o Obdulia Romaguera*'s case is without merit and was not considered in this Order.

* * *

Insurance—Personal injury protection—Coverage—Passenger whose spouse's policy has been rescinded—Where policy issued to wife of claimant injured as passenger was rescinded due to material misrepresentation by wife, and claimant is not otherwise owner of motor vehicle for which security is required, policy covering vehicle in which claimant was injured covers his loss

ICON MEDICAL CENTERS, LLC, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-005444-CC-26, Section SD03. November 25, 2020. Gloria Gonzalez-Meyer, Judge. Counsel: Zachary A. Hicks, Berger & Hicks, P.A., Miami, for Plaintiff. Ana De La O, Progressive House Counsel, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

This cause came before the Court on November 17, 2020, on Plaintiff's Motion for Final Summary Judgment. The Court, having reviewed the motion and Court file, including the affidavits attached to Plaintiff's motion, the Affidavit of Richard Beem and the deposition transcript of John Burg, having heard argument of counsel, reviewed relevant legal authority, and been otherwise advised in the premises, makes the following findings of fact and conclusions of law:

Background

1. This is an action for personal injury protection benefits.

2. Plaintiff filed its Motion for Final Summary Judgment on October 25, 2019. Plaintiff moved for summary judgment on the reasonableness, relation, and medical necessity of its services, as well as on Defendant's first affirmative defense regarding coverage.

3. Daniel Magnoler was involved in an automobile collision on October 21, 2017. He was a passenger in a motor vehicle driven and owned by Raffaella Pizio. Ms. Pizio's vehicle was insured by Defendant, Progressive Select Insurance Company.

4. Mr. Magnoler and Plaintiff originally made a claim under the Infinity Auto Insurance Company policy issued to Sharon Flores, Daniel Magnoler's wife. However, that policy of insurance was rescinded due to a material misrepresentation on the part of Sharon Flores. Plaintiff then proceeded to make a claim with Defendant, which was subsequently denied.

5. Defendant's claim denial resulted in the underlying lawsuit.

Plaintiff's Services Are Reasonable, Related and Medically Necessary

6. In support of its Motion for Summary Judgment, Plaintiff filed the Affidavit of Matthew Holmes, D.C. regarding the examinations and physical therapy performed by Plaintiff. Plaintiff also filed and relied upon the Affidavit of Ali Malik, D.O. regarding an examination she performed wherein she determined that Daniel Magnoler had suffered an emergency medical condition.

7. With the production of the Matthew Holmes, D.C. and Ali Malik, D.O. affidavits, Plaintiff met its burden of proof that Plaintiff's services are reasonable, related and medically necessary.

8. Defendant did not file anything in opposition to Plaintiff's affidavits regarding the reasonableness, relation, and medical necessity of the services at issue.

9. Therefore, the Court grants summary judgment in favor of Plaintiff and finds that Plaintiff's services are reasonable, related, and medically necessary. The parties stipulated at the hearing that the reasonableness of the charges would be governed by the schedule of maximum charges found in Florida Statute § 627.736 (5)(a)(1)(f) (2017). The Court adopts that stipulation.

Defendant's First Affirmative Defense

10. Defendant alleged a single affirmative defense in response to Plaintiff's Complaint.

11. Specifically, Defendant alleged that it was not the responsible carrier and that Daniel Magnoler was entitled to personal injury protection benefits from his wife's insurance carrier, Infinity Auto Insurance Company, as a resident relative of his wife, Sharon Flores.

12. Defendant's affirmative defense fails in law and fact as Infinity Auto Insurance Company rescinded the policy of insurance for Mr. Magnoler's wife due to material misrepresentation.

13. Undisputed record evidence shows that Daniel Magnoler was married and resided with his wife, Sharon Flores, at all relevant times including the time of Ms. Flores' application for insurance with Infinity Auto Insurance Company. See the Affidavit of John Burg attached to Plaintiff's Motion for Final Summary Judgment. See also the deposition transcript of John Burg, filed by Defendant.

14. Record evidence also conclusively establishes that Sharon Flores, who was married at the time, listed herself as single on the application for insurance with Infinity Auto Insurance Company. Ms. Flores also failed to list any household members, despite living with Daniel Magnoler, her husband.

15. Infinity Auto Insurance Company discovered the above misrepresentations after Mr. Magnoler made a claim on the Flores policy. Infinity determined that the failure to list Mr. Magnoler as a resident relative was material to the policy application because listing Mr. Magnoler would have resulted in a substantially higher premium. See Burg affidavit and deposition.

16. Based upon the material misrepresentation by Sharon Flores, Infinity Auto Insurance Company rescinded the policy of insurance and returned all of the collected premiums to Sharon Flores. Ms. Flores cashed the check for the returned premiums. See Burg affidavit and deposition.

17. Florida law is clear that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify any policy issued and is an absolute defense to enforcement of the policy. Fla. Stat. § 627.409; *Continental Ins. Co. v. Carroll,* 485 So. 2d 406 (Fla. 1986).

18. Once an insurance policy is rescinded, it is considered void *ab initio*. In other words, it not only ceases to exist, but it is as if the policy never existed.

19. The Court notes that Infinity Auto Insurance Company is not a party to this action and has never been. Defendant, Progressive

Select Insurance Company, despite having every right to, did not bring Infinity Auto Insurance Company into this action through a declaratory action or third-party claim. Nor was a separate lawsuit ever brought by Sharon Flores or any other person/entity seeking to overturn Infinity's rescission of the Flores policy. Defendant had several avenues through which it could have legally proven its defense, yet Defendant chose to do none of them, and as a result the rescission was left standing.

20. This Honorable Court does not have jurisdiction to overturn the Infinity Auto Insurance Company rescission of its policy of insurance issued to Sharon Flores. That issue is simply not before this Court.

21. Defendant argues that Mrs. Flores' selection of the policy deductible and work loss exclusion applying to the named insured and dependent resident relatives, somehow proves the rescission was improper. But this argument is of no matter as Defendant failed to prove through record evidence that the rescission was either deemed improper by a court of competent jurisdiction or was in fact reversed.

22. Furthermore, assuming this Court could issue a ruling as to the correctness of Infinity's rescission, the Court finds that Infinity acted properly and within its right to rescind the Flores policy. "An insurer is entitled, as a matter of law, to rely upon the accuracy of the information contained in the application and has no duty to make additional inquiry." *Independent Fire Ins. Co. v. Arvidson and Arvidson*, 604 2d 854 (Fla. 4th DCA 1992) (citing *New York Life Ins. Co. v. Nespereira*, 366 So. 2d 859 (Fla. 3d DCA 1979).

23. As the Flores/Infinity policy of insurance is and remains rescinded, and the record does not reflect that Mr. Magnoler was otherwise the owner of a motor vehicle for which security was required, the Pizio/Progressive policy covers Mr. Magnoler's loss.

24. Therefore, summary judgment is granted for the Plaintiff as to Defendant's first affirmative defense regarding coverage.

It is **ORDERED** and **ADJUDGED**, that Plaintiff's Motion for Summary Judgment is hereby **GRANTED.**

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Unbundled CPT codes are not reimbursable

INTERVENTIONAL SPINE CENTER, (LLC), a/a/o Pascal Fils-Aime, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-010732-SP-23, Section ND 02. April 1, 2019. Natalie Moore, Judge. Counsel: Nancy Fajardo-Sanchez, Progressive PIP House Counsel, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on March 8, 2019, on Defendant's Motion for Summary Judgment. The Court reviewed the motion and supporting documents. No response was filed by Plaintiff, and no materials were provided by Plaintiff is opposition to this motion. The court heard the argument of counsel and reviewed the applicable law. It is hereby:

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted.

Florida law states that an insurer is not required to pay a claim for treatment that is "unbundled" when that treatment should be "bundled". Fla. Stat. § 627.736(5)(b)1e. Unbundling is defined as "an action that submits a billing code that is properly billed under one billing code, but has been separated into two or more billing codes, and would result in payment greater in amount than would be paid using one billing code." Fla. Stat. § 627.732(15).

In its Motion for Summary Judgment, Defendant argues that Plaintiff improperly unbundled the denied CPT codes that are the subject of this case. Five CPT codes were submitted. Code 98960 was paid and is not at issue. Code 99203 is described as an outpatient visit for a new patient and includes a detailed examination. Codes 95831 and 95832 involve manual muscle testing, and code 95851 involves range of motion measurements.

Defendant argues that codes 95831, 95832, and 95851 and the muscle testing and range of motion testing they represent are inappropriately unbundled and are instead encompassed by the new patient visit under code 99203. In support of this contention, Defendant has filed an affidavit of its' Litigation Adjuster and an affidavit of the treating physician. No other materials are before this court.

In his affidavit, the treating physician specifically states that the "musculoskeletal system review performed. . . was part of my detailed examination. The range of motion testing and manual muscle testing are components of the initial evaluation that would not be billed separately." Aff. of Dr. M. Rahat Faderani, D.O., at 2. While the doctor is not an expert in billing or codes, this factual statement about the nature of the initial examination is persuasive. This statement, combined with the affidavit of the Litigation Adjuster, and the relevant portions of the 2013 CPT Current Procedural Terminology Standard Edition are unrebutted evidence that Plaintiff improperly unbundled CPT codes 95831, 95832, and 95851 and therefore those codes are not reimbursable.

For the forgoing reasons, Defendant's Motion for Summary Judgment is granted.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—On rehearing, order granting summary judgment in favor of insurer on EUO no-show defense is vacated where there are factual issues regarding whether insured willfully breached EUO provision of policy

MANUEL V. FEIJOO, M.D., P.A., et al., a/a/o Yiliam Rodriguez Izquierdo, Plaintiffs, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-010931-SP-25, Section CG04. February 17, 2021. Scott M. Janowitz, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Ari Neimand, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR REHEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING THE EUO NO-SHOW DEFENSE

THIS CAUSE having come to before this Court on February 9, 2021, on Plaintiff's Motion for Re-Hearing on Defendant's Motion for Summary Judgment on the EUO No-Show Defense, and after review of the record, hearing argument of counsel, and being otherwise fully advised of its premises, it is hereby **ORDERED AND ADJUDGED** as follows:

Manuel V. Feijoo, MD, and Manual V. Feijoo, MD, PA, (hereinafter Plaintiff) as assignee of Yiliam Rodriguez Izquierdo (hereinafter Assignor) sued United Automobile Insurance Company (hereinafter Defendant or United Auto) for breach of a contract related to unpaid personal injury protection ("PIP") benefits under Florida's No-Fault Law.

The Assignor was allegedly involved in an automobile accident on November 14, 2014 and made a claim for PIP benefits with United Auto. The undisputed facts are United Auto was notified on December 1, 2014 that The Reyes Law Group represented the Assignor in connection with her PIP claim. On or about December 10, 2014, United Auto requested that the Assignor submit to an EUO, scheduling same for December 29, 2014, or alternatively, December 31, 2014. The EUO notice was mailed to the assignor and to her attorney, The Reyes Law Group. On December 22, 2014, The Reyes Law Group contacted United Auto by phone requesting that the EUO be rescheduled because the attorney was not available. A new EUO notice was mailed to the Assignor and to The Reyes Law Group for an

EUO date of January 12, 2015. Ms. Izquierdo did not attend any of the EUO appointments. On February 26, 2015, United Auto notified assignor, through The Reyes Law Group, that coverage was not afforded because she failed to attend the properly scheduled examination under oath and thereby failed to comply with the terms and conditions of the insurance contract. The instant lawsuit followed.

United Auto filed its Revised Motion for Final Summary Judgment Re: EUO No Show on September 18, 2018 attesting to the above facts. In opposition, counsel for Plaintiff filed the affidavit of Adrian Reyes, Esq. Mr. Reyes was the Assignor's attorney at The Reyes Law Group. In his affidavit, Mr. Reyes confirms receipt of the December 10, 2014 EUO notice scheduling said EUO for December 29, 2014, or alternatively, December 31, 2014. Mr. Reyes confirms contacting United Auto to reschedule these EUOs to a different date. Mr. Reyes confirms receipt of the 2nd EUO notice for the January 12, 2015 EUO. Noticeably absent from Mr. Reyes' affidavit is any allegation that he, or anyone from his office, contacted United Auto to reschedule the January 12, 2014 EUO. Rather, the affidavit simply alleges this new date created a schedule conflict and the Assignor was ready, willing, and able to submit to an EUO.

On December 18, 2020, this Court granted Defendant's motion for summary judgment as to the EUO no-show defense. Thereafter, Plaintiff filed its motion for re-hearing, and after careful reconsideration, the Court must grant the motion for reconsideration.

The Court finds that the obligation to submit to an Examination Under Oath (EUO) is a post-loss obligation under the terms of the subject policy and the court finds that there are material issues of fact as to whether the insured willfully breached the EUO provision of the policy, and/or whether the insured cooperated to some degree or provided an explanation for noncompliance, and those issues of fact must be decided by a jury. See, *Himmel v. Avatar Property & Cas.,* 257 So. 3d 488 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2351b], citing *Lewis v. Liberty Mut. Ins. Co.,* 121 So.3d 1136, 1136-37 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1928a] (whether insured's refusal to attend EUO unless it was via telephone or at her attorney's office constituted a willful and material breach was a fact issue precluding summary judgment based on insured's failure to cooperate); and *Haiman v. Federal Ins. Co.,* 978 So. 2d 811 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a].

This ruling should not suggest that any communication stating a claimant will comply with post-loss obligations is all that is needed to defeat a summary judgment. Instead, the Court also notes that 1) there is a disputed fact as to whether the January date was coordinated or unilaterally set; 2) Even though Defendant properly reset the EUO from the last week in December to late December upon being notified the Claimant and attorney were unavailable, Defendant's letter resetting the EUO for January stated that Defendant could require a reasonable justification; and 3) Defendant's denial letter cited that the Claimant did not attend the late December dates despite Defendant agreeing to rescheduling those dates. While the Claimant did not comply with attending the EUO, and given the high standard for forefeiture of benefits, the Court cannot state as a matter of law that Defendant is entitled to summary judgment.

Accordingly, Plaintiff's motion for re-hearing is GRANTED and the Order dated December 18, 2020 granting Defendant's motion for summary judgment as to the EUO no-show defense is hereby vacated *nunc pro tunc*. The Clerk shall re-open the case.

* * *

Landlord-tenant—Commercial lease—Eviction—Deposit of rent into court registry—Tenant must deposit delinquent rent into court registry or vacate premises

SUNSET CENTER CORPORATION, Plaintiff, v. NELSON MARTINEZ, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-023282-CC-25, Section CG02. February 17, 2021. Elijah A. Levitt, Judge.

ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF ORDER REQUIRING DEPOSIT OF RENT

This cause was heard by the Court on February 17, 2021, on Plaintiff, Sunset Center Corporation's Motion to require the Defendant Nelson Martinez Inc., to deposit all past rent due into the Court Registry, the Court having her the testimony of Plaintiff's property manager Nilsa Reynoso, and the Defendant's representative Nelson Martinez, and being fully advised in the premises, it is Ordered and Adjudged as follows:

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

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

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

4. Accordingly, pursuant to section 83.232, by 5:00 P.M. on Wednesday, February 24, 2021, the Defendant shall deposit into the Court Registry the alleged delinquent rent of $7,014.47 or vacate the premises, including the return of all keys and access devices. If the Defendant vacates the premises, then the Plaintiff shall file a voluntary dismissal of this matter.

5. If the Defendant fails to make such timely deposit or vacate the premises, then the Plaintiff, upon the filing of an affidavit confirming that the deposit was not timely made and the premises has not been vacated, shall be entitled to an immediate judgment for possession of the premises. *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.,* 36 So.3d 811 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1192a]; *Kosoy Kendall Assocs. LLC v. Los Latinos Rest., Inc.,* 10 So. 3d 1168 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1075a].

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Relatedness and medical necessity of treatment—Summary judgment—Opposing affidavit filed by insurer does not preclude summary judgment in favor of medical provider on issue of relatedness of treatment where affidavit does not indicate that treatment arose from anything other than motor vehicle accident—Provider is entitled to summary judgment as to medical necessity of CPT codes as to which affiant offers no opinion or opines that treatment "could be beneficial"—Affiant's opinions that certain CPT codes were improperly coded, were unbundled, or had deficient record-keeping are inadmissible and do not create factual issues barring summary judgment where opinions are based on unpled affirmative defenses—Opinions based on speculations do not create factual issue

WEST KENDALL REHAB CENTER, INC., a/a/o Michael Salcedo, Plaintiff, v. STATE FARM MUTUAL AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-013620-SP-25, Section CG03. February 7, 2021. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Scott Danner, Kirwan, Spellacy & Danner, P.A., Ft. Lauderdale, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RELATED AND MEDICALLY NECESSARY TREATMENT

THIS CAUSE came before the Court on 01/25/21 on Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment.

The Court having reviewed Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment with supporting evidence, Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment and Memorandum of Law with supporting evidence, Plaintiff's Memorandum of Law and Response to Affidavit of Dr. Michael Mathesie, D.C., the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order GRANTING in part Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

Michael Salcedo was involved in an automobile accident on 10/16/11 and treated with Plaintiff in relation to injuries he sustained in said accident.

Plaintiff, as assignee of Defendant's policy of insurance, submitted its bills for treatment of Michael Salcedo for payment of Personal Injury Protection ("PIP") benefits to Defendant.

Plaintiff then filed this breach of contract suit against Defendant for PIP benefits pursuant to Fla. Stat. 627.736 alleging its treatment rendered to Michael Salcedo was related to the subject accident and medically necessary.

On 06/13/16, Plaintiff filed an affidavit from Jason Morris Levine, D.C. in support of its contention that the services provided by Plaintiff were related and medically necessary to an accident that occurred on 10/16/11.

Dr. Levine's affidavit details the reported complaints of Mr. Salcedo following his automobile accident of 10/16/11, his diagnosis, and the treatment program consisting of examinations, diagnostic studies, and various physiotherapies. He opines that the examinations, x-rays, as well as treatment and modalities utilized by Plaintiff were related and medically necessary.

On 09/13/16, Plaintiff filed its Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment as the affidavit testimony from Dr. Levine established Plaintiff's prima facie burden of proof on the issues of relatedness and medical necessity. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] (a plaintiff's prima facie case to recover PIP benefits requires proof that its services are related to the subject accident and medically necessary).

The Court finds that Plaintiff has made a prima facie showing as to relatedness and medical necessity of its treatment.

In opposition, Defendant relies upon the affidavit of Michael Mathesie, D.C. As more fully discussed below, Dr. Mathesie's opinion does not create a material issue of fact as to certain treatment and/or modalities rendered by the Plaintiff and same remains uncontested in this action.

LEGAL ANALYSIS

Fla. R. Civ. P. 1.510(c) provides that "judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [citing *Menendez v. Palms West Condominium Ass'n*, 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; *see also Holl v. Talcott,* 191 So.2d 40 (Fla. 1966); *Moore v. Morris,* 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.,* 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the [Plaintiff] need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id.* at 601 [citing *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla. 1965)]; *see also Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach,* 226 So.2d 866 (Fla. 4th DCA 1969).

Relatedness of All Treatment and Dates of Service

Michael Mathesie, D.C.'s affidavit does not purport to opine that Mr. Salcedo was treated for anything other than the injuries he sustained in a motor vehicle accident that occurred on 10/16/11. To the contrary, the medical records on which Dr. Mathesie relies demonstrate that Mr. Salcedo was in a car accident on 10/16/11, and he sustained injuries in that accident.

Accordingly, Dr. Mathesie's affidavit fails to create a fact issue as to the relatedness of all treatment rendered by Plaintiff since same does not indicate that the treatment rendered by Plaintiff to Mr. Salcedo arose out of anything other than *"the ownership, maintenance, or use of a motor vehicle*." *Fla. Stat. 627.736(1).*

In *Sevila Pressley Weston v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 306b (Fla. 11th Cir. App., Nov. 26, 2013), the Eleventh Judicial Circuit, sitting in its appellate capacity, held that *"relatedness is established by showing that injuries and subsequent medical treatment. . .arose out of a subject accident"*:

> With respect to the issue of relatedness in PIP cases, "the medical treatment covered by the insurance policy is treatment that is related to the bodily injury arising out of the ownership, maintenance, or use of the motor vehicle." *See In re Standard Jury Instructions in Civil Cases*, 966 So. 2d 940, 942 (Fla. 2007) [32 Fla. L. Weekly S563a]. In simpler parlance, *relatedness is established by showing that injuries and subsequent medical treatment therefor arose out of a subject accident.*

The *Sevila* Court reversed the trial court's denial of a motion for directed verdict on the issue of relatedness of treatment finding that there was no evidence to show that the injuries and treatment at issue "arose from a difference source other than the subject accident":

> Weston testified that all the injuries for which she was treated arose out of the April 11, 2005 accident. This testimony went unrefuted, in that *there was no evidence that any of these injuries were pre-existent or otherwise arose from a different source other than the subject accident.*
>
> . . .
>
> *In order to refute relatedness, United Auto had to present actual and/or factual evidence which would purport to more or less show that the injuries and subsequent medical treatment did not arise out of the subject accident.*
>
> . . .
>
> [S]ince *there was no legally sufficient evidence presented by United Auto to refute Weston's testimony that her injuries and treatment were related to the accident,* the trial judge should have granted Weston's motion for directed verdict on the issue of relatedness.

The record evidence before this Court reflects that Michael Salcedo was injured as a result of the motor vehicle accident of 10/16/11 and that the treatment and/or services rendered by the Plaintiff were performed in relation to same. Defendant has not come forth with any evidence whatsoever purporting to show that Mr. Salcedo was treated for anything other than the injuries sustained in the 10/16/11 motor vehicle accident as otherwise required by *Sevila. See also American Health & Rehab., Inc. v. United Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 615b (Fla. 17th Cir., Broward Cty. Ct., J. Skolnik, October 16, 2015) ("[t]he mere denial by United Auto that the treatment was related. . .without the demonstration of some intervening act or circumstance eliminating the pre-existing relatedness does not create a genuine issue of material fact"); *A-Plus Medical & Rehab Center v. State Farm,* 27 Fla. L. Weekly Supp. 186a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Diaz, March 19, 2019) (finding affidavit insufficient to create genuine issue of material fact as to relatedness since it failed to set forth "any factual basis to conclude that the claimant was treated for anything other than the injuries in the [subject] accident"); *Coast Chiro. Center v. State Farm,* 26 Fla. L. Weekly Supp. 327a (Fla. 17th Cir., Broward Cty. Ct., J. Benson, June 18, 2018) (same); *Marshall Bronstein, D.C. v. United Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 945b (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Multack, March 11, 2015) ("the term 'related' represents a causal connection between the treated injury and the automobile accident" and does not "hinge[ ] on the benefit or necessity of treatment", that is, "[t]he terms 'related' and 'necessary'. . .must be analyzed independent of one another"); *Silverland Medical Center, LLC., a/a/o Yisander Garcia v. United Auto. Ins. Co.,* 28 Fla. L. Weekly Supp. 720c (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Pedraza, April 30, 2020) (citing to *Sevila* and finding relatedness was undisputed where defense expert furnished a similar affidavit).

The record before this Court reflects that it is undisputed that all treatment rendered by the Plaintiff is related to the 10/16/11 automobile accident and, accordingly, Plaintiff's Motion is GRANTED as to the issue of relatedness.

CPT code 99211

(Date of Service 11/17/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code 99211 (brief examination) on date of service 11/17/11, Michael Mathesie, D.C. does not state an opinion as to this service.[1]

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *99211* is undisputed for date of service 11/17/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97012

(Dates of Service 10/18/11, 10/24/11,10/31/11, 11/03/11 and 11/08/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code 97012 (mechanical traction), Michael Mathesie, D.C. opines that this "passive modalit[y] could be beneficial" (¶26) but does not state any further opinion as to this service beyond his "cut off" opinion (¶¶26, 36) and "consecutive daily treatment" opinion (¶35).[2]

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *97012* is undisputed for dates of service on 10/18/11, 10/24/11, 10/31/11, 11/03/11, and 11/08/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97014

(Dates of Service 10/18/11, 10/24/11, 10/28/11, 10/31/11, 11/03/11, 11/08/11, 11/11/11, and 11/17/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code 97014 (electrical stimulation) Michael Mathesie, D.C. opines that this "passive modalit[y] could be beneficial" (¶26) but does not state any further opinion as to this service beyond his "cut off" opinion (¶¶26, 36) and "consecutive daily treatment" opinion (¶35).

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *97014* is undisputed for dates of service on 10/18/11, 10/24/11, 10/28/11, 10/31/11, 11/03/11, 11/08/11, 11/11/11, and 11/17/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT codes 97035, 97124, and 97112

(Dates of Service 10/18/11, 10/24/11, 10/28/11, 10/31/11, 11/03/11, 11/08/11, 11/11/11, and 11/17/11)

(Inadmissible Testimony Based on Unpled Affirmative Defenses of Improper CPT Coding and Deficient Record Keeping)

As it pertains to treatment rendered and billed by Plaintiff under CPT codes 97035 (ultrasound), 97124 (massage), 97112 (neuromuscular reeducation), Michael Mathesie, D.C. opines that the Plaintiff failed to comply with principles and/or guidelines of "CPT coding" requiring certain documentation to be included in the medical records. Specifically, Dr. Mathesie opines that the "*AMA CPT Editorial Panel dictates that the specific duration of time be documented in the records*" (¶32), and so "*the omission of specific duration of time would be evidence that the provider did not follow or comply with the AMA CPT Editorial Panel*" (¶33).[3]

As more fully set forth below, this Court finds Dr. Mathesie's opinions to be inadmissible and, therefore, do not create a material issue of fact for purposes of summary judgment. *Fla. R. Civ. P. 1.510(e)* (affidavits must "set forth facts as would be *admissible* in evidence").

Michael Mathesie, D.C.'s opinion as to CPT codes 97035, 97124, and 97112 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary"[4] as is otherwise required. Accordingly, this testimony is disallowed. *See e.g. State Farm Mut. Auto. Ins. Co. v. Renfroe,* 915 So.2d 212 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2497a] (court departed from essential requirements of law "in refusing to apply the [statutory] definition of medically necessary"); *Martinez Chiro. Center, Inc. (William Guell) v. State Farm,* 24 Fla. L. Weekly Supp. 190a (Fla. 17th Cir., Broward Cty. Ct., J. Kanner, May 10, 2016) (where insurer's expert did not apply statutory definition of "medically necessary" in rendering opinion, expert's opinion failed to create issue of fact).

Further, rather than relying upon the applicable statutory definition, Dr. Mathesie's opinion is instead premised upon purported "improper CPT coding" and/or "deficient recording keeping" defenses that have not been pled by the Defendant in this case.[5]

Issues pertaining to "improper CPT coding" and/or "deficient recording keeping" which may otherwise serve as grounds for denial of treatment are affirmative defenses that must be pled as a bar to payment of a PIP claim. *See e.g., Progressive v. Craig A. Newman, D.C.,* 15 Fla. L. Weekly Supp. 129a (Fla. 13th Cir. App., July 17, 2007) (holding that upcoding is an affirmative defense that ought to be pled and for which a carrier has the burden of persuasion); *Silverland Medical Center, LLC., a/a/o Yisander Garcia v. United Auto Ins. Co.,* 28 Fla. L. Weekly Supp. 720c (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Pedraza, April 30, 2020) ("[i]ssues pertaining to 'CPT coding' and/or 'upcoding'. . .are affirmative defenses that must be pled"); *A-Plus Medical & Rehab Center v. State Farm,* 27 Fla. L. Weekly Supp. 186a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Linda Diaz, March 19, 2019) (rejecting Mathesie affidavit testimony premised upon unpled issues regarding "the sufficiency of the records, unbundling/upcoding and services not being rendered"); *see also Fla.*

Stat. 627.736(5)(b)(1)(e).

Defendant has not raised any "improper CPT coding" and/or "deficient recording keeping" issues as an affirmative defense in this case. Since no such "improper CPT coding" and/or "deficient recording keeping" affirmative defenses pertaining to CPT codes 97035, 97124, and 97112 have been pled by the Defendant, any such defenses are deemed waived and not an issue in this case. *Fla R. Civ. Pro. 1.140(h)(1).*

This Court will not permit inadmissible testimony of Michael Mathesie, D.C. to serve as a conduit to inject otherwise unpled affirmative defenses into this case. To hold otherwise would implicate due process rights of the Plaintiff and run afoul of well-established binding precedent.

It is reversible error to grant summary judgment on an unpled affirmative defense. *See Couchman v. Goodbody & Co.,* 231 So.2d 842 (Fla. 4th DCA 1970) (reversing summary judgment based on an unpled defense without amendment of the pleadings and holding that on motion for summary judgment issues to be considered are those made by the pleadings); *Strahan Manufacturing Co. v. Pike,* 194 So.2d 277 (Fla. 2d DCA 1967); *H.L. Mills v. Dade County,* 206 So.2d 227 (Fla. 3d DCA 1968); *Goldberger v. Regency Highland Condo. Ass'n, Inc.,* 452 So.2d 583, 585 (Fla. 4th DCA 1984); *Goldschmidt v. Holman,* 571 So.2d 422, 423 (Fla. 1990); *Boca Golf View, Ltd. v. Hughes Hall, Inc.,* 843 So.2d 992, 993 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1070d](reversing trial court's involuntary dismissal that was based on an unpled defense).

Likewise, a party cannot present evidence at trial or summary judgment regarding an unpled affirmative defense. *See e.g., Meigs v. C.F. Lear,* 191 So.2d 286 (Fla. 1st DCA 1966) (dismissing appeal and affirming a denial of motion for summary judgment holding that *summary judgment is not to be used as a substitute for parties' pleadings* and where defenses of estoppel and statute of limitation were not raised in the pleadings *such defenses did not constitute issues in case in which parties could submit evidence either at trial or in summary judgment* proceedings); *Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So.3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (finding error in trial court's consideration of an unpled defense); *B.B.S. v. R.C.B.,* 252 So.2d 837 (Fla. 2d DCA 1971) (an affirmative defense must be pleaded and not raised by motion for summary judgment); *Sunbeam Television Corp. v. Mitzel,* 83 So.3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] (where a party pleads one claim but tries to prove another, it is error for a trial court to allow argument on the unpled issue at trial); *Bloom v. Dorta-Duque,* 743 So.2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] (a party cannot be found liable under a theory that was not specifically pled); *Bank of America v. Asbury,* 165 So.3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"); *Assad v. Mendell,* 550 So.2d 52, 53 (Fla. 3d DCA 1989) (a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings).

Indeed, the Supreme Court of Florida has barred injection of new claims or theories into an action, including in cases where the new claim or theory was devised to evade summary judgment. *Arky, Freed, et al. v. Bowmar Instr. Corp.,* 537 So.2d 561, 563 (Fla. 1988).

Therefore, Michael Mathesie, D.C.'s purported "improper CPT coding" and/or "deficient recording keeping" opinions as to CPT codes 97035, 97124, and 97112 are premised on unpled affirmative defenses rendering same inadmissible testimony that does not create a factual issue for purposes of summary judgment and/or trial.

Additionally, portions of Dr. Mathesie's opinion as to CPT codes 97035, 97124, and 97112 are also improperly premised upon his own speculation, conjecture, and/or surmise. For instance, Dr. Mathesie first finds, in a conclusory fashion, that the Plaintiff "*could have easily performed*" the services for "*only a few minutes*" (¶33), then assumes that is what the Plaintiff did, and then concludes—without providing any further explanation—that "*at least 21 extra units of time therapy. . .were not eligible for submission*" (¶33). Under clear Florida law, speculation of this sort does not create a factual issue as to medical necessity of Plaintiff's treatment. *See e.g. Morgan v. Continental Casualty Company,* 382 So.2d 351 (Fla. 3d DCA 1980) (affidavits based on speculation, surmise, and conjecture are inadmissible at trial and legally insufficient to create a disputed issue of fact in opposition to a motion for summary judgment); *Food Fair Stores, Inc. v. Trusell,* 131 So.2d 730 (Fla. 1961); *M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A.,* 932 So.2d 459 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1524c] ("when the expert's opinion is based on speculation and conjecture, not supported by the facts, or not arrived at by recognized methodology, the testimony will be stricken").

Accordingly, as it pertains to of CPT codes *97035, 97124,* and *97112* the record before this Court does not create a factual issue as to the relatedness and medical necessity on 10/18/11, 10/24/11, 10/28/11, 10/31/11, 11/03/11, 11/08/11, 11/11/11, and 11/17/11, and Plaintiff's Motion is GRANTED as to said treatment.

CPT codes 99203

(Dates of Service 10/18/11)

(Inadmissible Testimony Based on Unpled Affirmative Defenses of Upcoding and Deficient Record Keeping)

As it pertains to treatment rendered and billed by Plaintiff under CPT code 99203 (initial examination), Michael Mathesie, D.C. opines that the Plaintiff "*upcoded*" this service (¶15) and that the "*medical/legal documentation of the initial consultation and examination*" was insufficient and/or defective (¶16).

As more fully set forth below, this Court finds Dr. Mathesie's opinions to be inadmissible and, therefore, do not create a material issue of fact for purposes of summary judgment. *Fla. R. Civ. P. 1.510(e)* (affidavits must "set forth facts as would be *admissible* in evidence").

Michael Mathesie, D.C.'s opinion as to CPT code 99203 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary" as is otherwise required. Accordingly, this testimony is disallowed. *See* case law cited above.

Further, rather than relying upon the applicable statutory definition, Dr. Mathesie's opinion is instead premised upon purported "upcoding" and/or "deficient recording keeping" defenses which have not been pled by the Defendant in this case.

Issues pertaining to "upcoding" and/or "deficient recording keeping" which may otherwise serve as grounds for denial of treatment are affirmative defenses that must be pled as a bar to payment of a PIP claim.[6]

Defendant has not raised any "upcoding" and/or "deficient recording keeping" issues as an affirmative defense in this case. Since no such "upcoding" and/or "deficient recording keeping" affirmative defenses pertaining to CPT code 99203 have been pled by the Defendant, any such defenses are deemed waived and not an issue in this case. *Fla R. Civ. Pro. 1.140(h)(1).*[7]

This Court will not permit inadmissible testimony of Michael Mathesie, D.C. to serve as a conduit to inject otherwise unpled affirmative defenses into this case. To hold otherwise would implicate due process rights of the Plaintiff and run afoul of well-established binding precedent. It is reversible error to grant summary judgment on an unpled affirmative defense and a party cannot present evidence at trial or summary judgment regarding an unpled affirmative defense. *See* case law cited above.

Therefore, Michael Mathesie, D.C.'s purported "upcoding" and/or "deficient recording keeping" opinion as to CPT code 99203 is premised on unpled affirmative defenses rendering same inadmissible testimony that does not create a factual issue for purposes of summary judgment and/or trial.

Accordingly, as it pertains to of CPT code *99203* the record before this Court does not create a factual issue as to the relatedness and medical necessity on 10/18/11, and Plaintiff's Motion is GRANTED as to said treatment.

CPT codes 99213

(Dates of Service 11/30/11)

(Inadmissible Testimony Based on Unpled Affirmative Defenses of Unbundling and/or Improper CPT Coding)

As it pertains to treatment rendered and billed by Plaintiff under CPT code 99213 (follow up examination), Michael Mathesie, D.C. opines that this service was "*properly denied*" since the Plaintiff did not include "*the -25 modifier*" on its bill and so the service was "*unbundled*" (¶¶20, 24).

As more fully set forth below, this Court finds such testimony to be inadmissible and, therefore, does not create a material issue of fact for purposes of summary judgment. *Fla. Ri Civ. P. 1.510(e)* (affidavits must "set forth facts as would be *admissible* in evidence").

Michael Mathesie, D.C.'s opinion as to CPT code 99213 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary" as is otherwise required. Accordingly, this testimony is disallowed. *See* case law cited above.

Further, rather than relying upon the applicable statutory definition, Dr. Mathesie's opinion is instead premised upon a purported "unbundling" defense which has not been pled by the Defendant in this case.

Issues pertaining to "improper CPT coding" and/or "unbundling" which may otherwise serve as grounds for denial of treatment are affirmative defenses that must be pled as a bar to payment of a PIP claim. *See Fla. Stat. 627.736(5)(b)(1)(e)* (footnote # 6 *supra*).

Defendant has not raised any "improper CPT coding" and/or "unbundling" issues as an affirmative defense in this case. Since no such "improper CPT coding" and/or "unbundling" affirmative defenses pertaining to CPT code 99213 have been pled by the Defendant, any such defenses are deemed waived and not an issue in this case. *Fla R. Civ. Pro. 1.140(h)(1)*.[8]

This Court will not permit inadmissible testimony of Michael Mathesie, D.C. to serve as a conduit to inject otherwise unpled affirmative defenses into this case. To hold otherwise would implicate due process rights of the Plaintiff and run afoul of well-established binding precedent. It is reversible error to grant summary judgment on an unpled affirmative defense and a party cannot present evidence at trial or summary judgment regarding an unpled affirmative defense. *See* case law cited above.

Therefore, Michael Mathesie, D.C.'s purported "improper CPT coding" and/or "unbundling" opinion as to CPT code 99213 is premised on unpled affirmative defenses rendering same inadmissible testimony that does not create a factual issue for purposes of summary judgment and/or trial.

Accordingly, as it pertains to of CPT code *99213* the record before this Court does not create a factual issue as to the relatedness and medical necessity on 11/30/11, and Plaintiff's Motion is GRANTED as to said treatment.

Therefore, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment is GRANTED in part as more fully set forth above.

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[1]At the hearing, defense counsel suggested that Dr. Mathesie may have intended to address CPT code 99211 in ¶24 of his affidavit when he made reference to "*CPT E/M Service 992113*"; that is, defense counsel suggested this was a typographical error and that Dr. Mathesie intended to state "*CPT E/M Service 99211*". This Court cannot rely on speculation or conjecture of counsel as same does not constitute record evidence. However, the Court finds that defense counsel's suggestion is also directly belied by the record. Specifically, it is clear that Dr. Mathesie's opinions in ¶¶18-24 of his affidavit all pertain to CPT code 99213, and not 99211. The sole basis set forth in each of these paragraphs, including ¶24, is Dr. Mathesie's assertion that a "*-25 modifier*" is required to be billed in conjunction with CPT code 99213 whenever it is billed on the same day as either CPT code 98940 or 98943. This opinion pertained only to CPT code 99213, and not CPT code 99211. Indeed, it is impossible for this opinion to apply to CPT code 99211 in this case since the record before the Court reflects that Plaintiff did not bill either CPT code 98940 or 98943 on the same date as CPT code 99211.

[2]Dr. Mathesie generally opines that any treatment(s) either rendered after 11/30/11 ("cut off" opinion) or performed on 10/19/11, 11/18/11, 01/26/12, 02/09/12, 03/08/12, and 03/27/12 ("consecutive daily treatment" opinion) are not medically necessary.

[3]As to CPT code 97112 (neuromuscular reeducation), Dr. Mathesie also opines that the "*specific techniques and methods*" used by the Plaintiff to perform this treatment were not "*specifically described and substantiated in the records*" and concludes that the treatment was not "*actually performed*" (¶28). That is, Dr. Mathesie's opinion is premised upon the fact that he apparently could not determine from the documentation in the medical records which specific type of neuromuscular reeducation was performed by the Plaintiff.

[4]Fla. Stat. 627.732(2) specifically defines "medically necessary" as that term is used throughout the No-Fault Act as follows:

> (2) "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:
>
> (a) In accordance with generally accepted standards of medical practice;
>
> (b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and
>
> (c) Not primarily for the convenience of the patient, physician, or other health care provider.

[5]Issues of "improper CPT coding" and/or "deficient recording keeping" are not a basis to contest the medical necessity of treatment. *See Sims v. Brown,* 574 So.2d 131 (Fla. 1991) (affirming the exclusion of evidence of a hospital's alleged deficient medical record keeping on the basis that record keeping is not relevant to a determination of whether medical treatment is rendered within the acceptable standards of care); *Sevila Pressley Weston v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 306b (Fla. 11th Cir. App., Nov. 26, 2013) (allegations of deficient record keeping do not provide a legal basis for contesting compensability of a PIP claim); *United Auto. Ins. Co. v. Auto. Ins. Co. v. Apple Medical Center, L.L.C.,* 18 Fla. L. Weekly Supp. 336b (Fla. 11th Cir. App., Feb. 10, 2011) (holding that expert's conclusory affidavit containing assertion that the physician provider's documentation is deficient does not create an issue of material fact to avoid summary judgment); *South Florida Pain & Rehab., Inc. (Kirk Godfrey) v. United Auto.,* 16 Fla. L. Weekly Supp. 981b (Fla. 17th Cir., Broward Cty. Ct., J. Trachman, August 10, 2009) ("Any opinion regarding the adequacy of the records is not germane to the issue of RRN. An alleged failure to maintain adequate records is not a legal basis to support the finding that the medical services were not RRN."); *Priority Medical Centers, LLC (Arlene Robinson-Rampone) v. State Farm Fire & Cas. Co.,* 21 Fla. L. Weekly Supp. 201b (Fla. 17th Cir., Broward Cty. Ct., J. Lee, June 3, 2013) (detailed discussion of multiple deficiencies in Mathesie affidavit including alleged lack of documentation or record keeping).

[6]Indeed, "upcoding" and/or "unbundling" defenses as well as the requirements for maintaining same are expressly set forth in Fla. Stat. 627.736(5)(b)(1)(e):

> For any treatment or service that is *upcoded,* or that is *unbundled* when such treatment or services should be bundled, in accordance with paragraph (d). To facilitate prompt payment of lawful services, an insurer may change codes that it determines to have been improperly or incorrectly *upcoded* or *unbundled,* and may make payment based on the changed codes, without affecting the right of the provider to dispute the change by the insurer, *provided that before doing so, the insurer must contact the health care provider and discuss the reasons for the insurer's change and the health care provider's reason for the coding,* or make a reasonable good faith effort to do so, as documented in the insurer's file.

[7]Even if this defense had been raised by the Defendant, this Court would find same to be futile as same pertains to CPT code 99203. First, the plain language of Fla. Stat. 627.736(5)(b)(1)(e) provides that an insurer can only assert an "upcoding" defense if it has contacted the insured before asserting same, discussed the reasons for the insurer's change in the coding, or has documented in its claim file that it has made a reasonable good faith effort to do so. The record before the Court is devoid of anything that reflects the Defendant complied with these statutory provisions. Second, Dr. Mathesie's opinion premised on allegations of "deficient record keeping" is directly contradicted by the record before this Court. Notably, Dr. Mathesie attacks the "*accuracy of the records*" by opining that the initial examination did not include documentation as to any "*radiation of pain*" (¶16); however, the initial examination report does in fact include such documentation ("*The low back pain radiates into the hips bilaterally. . .The neck pain radiates into the left shoulder. . .*").

[8]Even if this defense had been raised by the Defendant, this Court would find same to be futile and/or with merit as same pertains to CPT code 99213. The plain language of Fla. Stat. 627.736(5)(b)(1)(e) provides that an insurer can only assert an "unbundling" defense if it has contacted the insured before asserting same, discussed the reasons for the insurer's change in the coding, or has documented in its claim file that it has made a reasonable good faith effort to do so. The record before the Court is devoid of anything that reflects the Defendant complied with these statutory provisions.

* * *

Insurance—Personal injury protection—Coverage—Declaratory action—Fact that medical provider has available remedy through breach of contract action does not preclude declaratory relief

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Nilo Porra, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-011208-CC-25, Section CG01. February 9, 2021. Linda Melendez, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Pablo Arrue, Bronstein & Carmona, P.A., Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT

THIS CAUSE came before the Court for hearing on February 9, 2021, on Defendant's Motion to Dismiss Count II of Plaintiff's Complaint. The Court having reviewed the motion and entire Court file, heard arguments from counsel for each party, and having been sufficiently advised in the premises, finds as follows:

The Plaintiff filed suit against the Defendant in connection with a claim for Personal Injury Protection (PIP) benefits related to an automobile accident which occurred on or about October 24, 2019. In response, the Defendant filed its Motion to Dismiss Count II of Plaintiff's Complaint. Count II of Plaintiff's complaint seeks declaratory relief pursuant to Chapter 86, Florida Statutes.

Defendant contends that Plaintiffs declaratory action is better addressed by way of an action for breach of contract. This Court finds that the Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The mere existence of another remedy at law does not preclude a judgment for declaratory relief. *Maciejewski vs. Holland*, 441 So.2d 703 (1983). See also *Professional Med. Building Group, Inc., a/a/o Daniel Seijas vs. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 1038a; *Professional Med. Building Group, Inc., a/a/o Niurka Zamora vs. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 33a.

Therefore, it is ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss Count II of Plaintiff's Complaint is hereby DENIED.

2. Defendant shall respond to Plaintiff's Complaint within twenty (20) days of this Order.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Pre-litigation adjuster

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Nilo Porra, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-011208-CC-25, Section CG01. February 9, 2021. Linda Melendez, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Pablo Arrue, Bronstein & Carmona, P.A., Fort Lauderdale, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL DEPOSITION DATES OF DEFENDANT'S PRE-LITIGATION ADJUSTER AND FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE came before the Court for hearing on February 9, 2021, on Plaintiff's Motion to Compel Deposition Dates of Defendant's Pre-Litigation Adjuster. The Court having reviewed the motion and entire Court file, heard arguments from counsel for each party, and having been sufficiently advised in the premises, finds as follows:

The Plaintiff filed suit against the Defendant in connection with a claim for Personal Injury Protection (PIP) benefits related to an automobile accident which occurred on or about October 24, 2019. In conjunction with the filing of this action, Plaintiff submitted correspondence to Defendant requesting deposition dates for the Defendant's Pre-Litigation Adjuster. The Defendant failed to respond to Plaintiff's request for deposition dates, as such, the subject motion was filed.

At the subject hearing, Defendant's counsel represented to the Court that Plaintiff should depose the Corporate Representative instead of the Pre-Litigation Adjuster as the latter's testimony would not be binding upon the Defendant. The Plaintiff on the other hand argues that it is within its right to depose the Defendant's Pre-Litigation Adjuster pursuant to Rule 1.280(b)(1) as said individual made the determination as to why Plaintiff's bills were denied.

Therefore, it is ORDERED and ADJUDGED that:

1. Plaintiff's Motion to Compel Deposition Dates of Defendant's Pre-Litigation Adjuster is hereby granted.

2. Defendant shall provide its Pre-Litigation Adjuster with the Most Knowledge of the Claim for deposition.

3. Said deposition shall be mutually coordinate within thirty (30) days of this Order and shall take place within one hundred twenty (120) days of this Order.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—PIP policy that contains "no action clause" that states that lawsuit against insurer is precluded until insured complies with all portions of policy bars suit until EUO requirement of policy is met—Where both PIP statute and policy provide that EUO is condition precedent to receipt of benefits, insured who failed to appear at two scheduled EUOs is not entitled to benefits—Insurer that scheduled EUOs to occur more than thirty days after receipt of medical provider's bills did not thereby waive right to require EUO—Questions certified

PALMETTO PHYSICAL THERAPY INC., a/a/o Alan Mancia, Plaintiff, v. PROGRESSIVE DIRECT INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-000588-CC-26, Section SD03. December 2, 2019. Gloria Gonzalez-Meyer, Judge. Counsel: Christian Carrazana, Christian Carrazana, P.A., Homestead, for Plaintiff. Ann H. King, Beighley, Myrick, Udell & Lynne, P.A., Miami, for Defendant.

AMENDED FINAL JUDGMENT AMENDED FINAL JUDGMENT AND CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE

Pursuant to having granted Defendant's motion for summary judgment in this action, it is **ADJUDGED** that Plaintiff, PALMETTO PHYSICAL THERAPY INC., shall take nothing by this action and shall go hence without day. The Court, however, makes the following findings of fact and law for purposes of certification to the Third District Court of Appeals:

FACTS

1. This is a breach of contract action for personal injury protection insurance benefits governed by the Florida No Fault Law.

2. Defendant Progressive Select Ins. Co., ("Progressive") issued a contract for automobile insurance to Alan Mancia ("Mancia"), which provides among other things, personal injury protection insurance coverage to the policy limit of $10,000.

3. Sometime after the policy was issued, Mancia suffered personal injuries as a result of a motor vehicle accident that occurred on September 25, 2015.

4. Subsequent to the accident, Mancia received treatment and care with the Plaintiff, Palmetto Physical Therapy Inc. ("Palmetto).

5. Mancia incurred medical expenses for said treatment and care.

6. Pursuant to an assignment, Palmetto submitted said expenses to Progressive for payment under said policy of insurance.

7. Progressive received Plaintiff's first set of bills on October 19, 2015 and the last set of bills on November 12, 2015.

8. After the bills were overdue, Mancia was scheduled to appear for an examination under oath ("EUO") on November 17, 2015 and December 12, 2015.

9. After Mancia failed to appear for the EUO appointments, Progressive denied payment on the basis that Mancia breached the policy for failure to cooperate.

PROCEDURAL HISTORY

10. After the claim was denied for Mancia's failure to cooperate, Palmetto filed a breach of contract against Progressive to recover the un-paid pip insurance benefits.

11. In the answer to the complaint, Progressive alleged as an affirmative defense that liability is barred on the grounds that Mancia's breached the policy for failure to attend said appointments.

12. After the pleadings closed, Progressive moved for summary judgment.

13. In support of Progressive's motion for summary judgment, Progressive filed an affidavit of from a corporate representative who attested under oath that Mancia was noticed to attend the EUO appointments but failed to appear. Progressive's corporate representative, however, did not establish that Progressive was prejudiced by Mancia's lack of cooperation.

14. Palmetto did not serve affidavits in opposition to explain why Mancia did not appear.

15. Arguments were heard on Progressive's motion for summary judgment on January 7, 2019.

16. After hearing arguments, this Court granted Progressive's motion and entered a final judgment for Progressive on March 1, 2019.

17. Palmetto moved for rehearing and to amend or alter the final judgment on March 7, 2019.[1]

18. On rehearing, Palmetto asserts that summary judgment should have been denied where Progressive was in breach of contract before the missed EUOs; that Progressive did not establish that it was prejudiced.[2]

ANALYSIS OF LAW

I

NO GENUINE ISSUES OF MATERIAL FACT

19. In moving for summary judgment, Progressive asserts that there is no genuine issue of material fact whether Mancia breached the policy.

20. Under Florida law, failure to submit to an examination under oath is a material breach of the policy which will relieve the insurer of its liability to pay. *Stringer v. Fireman's Fund Ins. Co.*, 622 So.2d 145, 146 (Fla. 3d DCA 1993); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300, 304 (Fla. 4d DCA 1995) [20 Fla. L. Weekly D1844a].

21. Policy provisions that require attendance at examinations under oath are conditions precedent to suit and the insurer need not show prejudice when the insured breaches a condition precedent to suit. *Goldman,* 660 So.2d at 303-04.

22. Under Part VI of the policy at issue, entitled "DUTIES IN CASE OF AN ACCIDENT OR LOSS," it states in relevant part that

> "[a] person seeking coverage must: 1. cooperate with us in any matter concerning a claim or lawsuit. . . . 3. allow us to take signed and recorded statements and examinations under oath, which we may conduct outside the presence of you or any other person claiming coverage, and answer all reasonable questions we may ask . . . ."

Policy, pp. 32-33.[3]

23. The policy, moreover, contains a "no action" clause that states: "We may not be sued unless there is full compliance with all the terms of this policy." *Id.* at 39. A no action clause is a condition precedent. *Wright v. Life Ins. Co., of Georgia*, 762 So.2d 992, 993 (Fla. 4d DCA 2000) [25 Fla. L. Weekly D1527b]

24. In its moving papers, Progressive established that Mancia was noticed to appear for the appointments, and that he failed to appear. Thus, the burden shifted to Palmetto to create a question of fact.[4] No evidence was advanced by Palmetto in opposition to show that Mancia cooperated to some degree or that there is an explanation from Mancia for his lack of cooperation.[5] Against this backdrop, summary judgment for Progressive is proper.

II

AMADOR

25. Nonetheless, Palmetto advances a legal argument to bar summary judgment. Palmetto argues that Mancia's duty to cooperate is discharged where Progressive was in breach of contract before Mancia missed the appointments. In advancing this argument, Palmetto relies on *Amador v. United Auto Ins. Co.*, 748 So. 2d 307 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a]. In *Amador*, the Third District Court held that the insurer may not bar a pip insured's cause of action for failure to attend an EUO where the unpaid benefits, upon which recovery is sought, were "overdue" before the missed appointment.[6] *Id.*; *see also, in accord, January v. State Farm Mut. Ins. Co.*, 838 So.2d 604 (Fla. 5d DCA 2003) [28 Fla. L. Weekly D484a]

26. The Court rejects Palmetto's reliance on *Amador*. Unlike the pip statute that was applicable in *Amador*, the current statute provides that attendance at an EUO is a *condition precedent* to receiving pip benefits:

> "An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. Compliance with this paragraph is a condition precedent to *receiving benefits*."

§ 627.736(6)(g), *Fla. Stat.* (2014) This provision became effective on January 1, 2013. *Laws*, 2012, c. 2012-197, § 10, eff. Jan. 1, 2013.

27. Sister county courts in this circuit have ruled that *Amador* is inapplicable where the current statute governs. *See Caribbean Rehab. Ctr., Inc. as assignee of Reynier Cordoves v. State Farm Mut. Auto. Ins. Co.*, 24 Fla. L. Weekly Supp. 844a (Fla. Dade Cty. Ct. 2016) (Beovides, J.) per. curiam aff'd FLWSUPP 2612COR3 (Fla. 11th Cir. App. 2018); *Gonzalez Medical Ctr., as assignee of Madelayne Interian, v. Infinity Auto. Ins. Co.*, 25 Fla. L. Weekly. Supp. 1039a (Miami Dade Ct. Ct. 2018) (Ortiz, J.); *Savin Medical Group, as assignee of Teresita Machado, v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 762b (Miami Dade Cty. Ct. 2015) (Cannava, J.)

28. The Court, however, recognizes that there is a split among the county courts; some county courts have ruled that *Amador* is applicable notwithstanding the statutory amendment authorizing EUOs. *See Spine Recovery Clinic Inc., as assignee of Nicole Cassaro v. Windhaven Insurance Co.*, 26 Fla. L. Weekly Supp. 225a (Volusia Cty. Ct. 2018)

29. Likewise, disagreement exists at the circuit appellate level. For instance, a panel in the Ninth Circuit in *GEICO Indemnity Co., v. Central Florida Chiropractic Care, as assignee of David Cherry*, 26 Fla. L. Wkly. Supp. 613a (Fla. 9th Cir. App. 2017) affirmed a summary judgment against the insurer and concluded that *Amador* is applicable under the current statute. In contrast, a panel in this circuit ruled inapposite by affirming the summary judgment by Judge Benovides' in *Caribbean*; the affirmance, however, is without a

written opinion. *See Caribbean Rehab. Ctr., Inc. as assignee of Reynier Cordoves v. State Farm Mut. Auto. Ins. Co*., FLWSUPP 2612COR3 (Fla. 11th Cir. App. December 6, 2018)

III

CONDITION SUBSEQUENT

29. Palmetto argues that Progressive is not entitled to summary judgment where Progressive did not establish that it was prejudiced by Mancia's breach. Palmetto's contention raises the question whether the failure to submit to an EUO under § 627.736(6)(g) is a breach of a condition subsequent that requires the insurer to establish that it was prejudiced. *See State Farm Mut. Auto. Ins. Co., Curran*, 135 So.3d 1071 (Fla. 2014) [39 Fla. L. Weekly S122a]

30. Palmetto contends that the duty to submit to an EUO under § 627.736(6)(g) is a condition subsequent, and that while the statute says "condition precedent," context modifies the meaning of the phrase to a condition subsequent.[7] The Court disagrees. Nonetheless, the argument has some traction where another county court in this circuit ruled that the duty is a condition subsequent. *See Benefica Health Ctr. Corp., as assignee of Juan Del Llano*, *v. State Farm Mut. Auto. Ins. Co*., Case no. 16-6852 CC 26 (4) (Miami Dade Cty. Ct., decided May 17, 2018) (King, J.); *Benefica Health Ctr. Corp., as assignee of Nancy Alvarez Lara v. State Farm Mut. Auto. Ins. Co*., Case no. 16-6859 CC 26 (4) (Miami Dade Cty. Ct., decided May 18, 2018) (King, J.) (same).

IV

CERTIFICATION

31. Given the uncertainty that currently exists regarding the legal questions raised by the parties, which has the potential for statewide application given the number of pip cases currently pending in the County Courts throughout the state, precedent is needed to bring certainty to what the law is.[8] Therefore, pursuant to Fla. R. App. P. 9.030(b)(4)(A) and 9.160, this Court certifies the following two questions of great public importance to the Third District Court of Appeals:

IN AMENDING THE FLORIDA PIP STATUTE TO AUTHORIZE EXAMINATIONS UNDER OATH UNDER § 627.736(6)(g), IS THE HOLDING IN *AMADOR v. UNITED AUTO INS. CO.*, 748 So.2d 307 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a] APPLICABLE IN CASES WHERE THE CURRENT STATUTE APPLIES?

IS THE INSURED'S DUTY TO SUBMIT TO EXAMINATION UNDER OATH UNDER § 627.736(6)(g), FLA. STAT., A CONDITION SUBSEQUENT THAT REQUIRES THE INSURER TO ESTABLISH PREJUDICE TO BAR RECOVERY FOR BREACH OF SAID DUTY?

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[1]The Court denied rehearing but granted Palmetto's motion to amend or alter the final judgment for purposes of certification on November 20, 2019.

[2]The Court considered the arguments raised by Palmetto on rehearing and for reasons explained hereafter, the Court rejects them.

[3]The policy at issue is attached as an exhibit to Progressive's motion for summary judgment filed on June 30, 2018.

[4]"The rule simply is that the burden to prove the non-existence of genuine triable issues is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden." *Holl v. Talcott*, 191 So.2d 40, 43-44 (Fla. 1966)

[5]Under Florida law, a question of fact is presented if there is evidence that the insured cooperated to some degree or provides an explanation for non-compliance. *Haiman v. Federal Ins. Co*., 798 So.2d 811, 812 (Fla. 4d DCA 2001) [26 Fla. L. Weekly D2542a]; *Northeast Pain Mgmt., LLC v. United Auto. Ins. Co*., 13 Fla. L. Weekly Supp. 545a (Fla. 11th Jud. Cir. App. 2006) (holding that "reasonableness," "fairness," "explanations," and "excuses" are relevant in making the determination whether the insured breached the policy for non-attendance at an EUO)

[6]Section 627.736(4), *Fla. Stat*., provides that "[b]enefits due from an insurer under ss. 627.730-627.7405 are . . . due and payable as loss accrues upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405. The statute also provides that pip benefits are "overdue" if not paid within 30 days. *See* § 627.736(4)(b) ("Personal injury protection insurance benefits paid pursuant to this section are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.")

[7]"Conditions subsequent are those that pertain not to the attachment of the risk and the inception of the policy but to the contract of insurance after the risk has attached and during the existence thereof." *Curran*, 135 So.3d at 1078 (*quoting* 31 Fla. Jur.2d *Insurance* § 2686 (2013))

[8]Section 34.017(1), *Fla. Stat*., provides that "[a] county court is permitted to certify a question to the district court of appeal in a final judgment if the question may have statewide application, and: (a) Is of great public importance; or (b) Will affect the uniform administration of justice."

* * *

Criminal law—Driving under influence—Evidence—Field sobriety exercises—State may present deputy's lay testimony regarding observations of defendant's performance of field sobriety exercises—Defendant may not present expert witness testimony opining that exercises were administered improperly or cross-examine deputy with evidence of improper administration

STATE OF FLORIDA, v. JITEN PATEL, Defendant. County Court,12th Judicial Circuit in and for Manatee County. Case No. 2019 CT 3539. January 25, 2021. Heather Doyle, Judge.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE AND GRANTING STATE'S MOTION TO PRECLUDE EXPERT TESTIMONY

THIS CAUSE came on to be heard on January 15, 2021, and upon Defendant's Motion in Limine and the State's Motion to Preclude Expert Testimony, and the Court having heard testimony of witnesses, and having heard argument of counsel, reviewing authority provided, and being otherwise fully advised in the premises, the Court finds as follows:

FACTS

1. The State alleges that on October 29, 2019, the Defendant was stopped by law enforcement for speeding. A DUI investigation ensued, which included the Defendant submitting to Field Sobriety Exercises. The Defendant was arrested for DUI shortly thereafter.

2. On October 5, 2020, Defendant filed "Defendant's Motion in Limine, Request for Evidentiary Hearing and Incorporated Memorandum of Law". In the Motion, the Defendant seeks to exclude "any and all testimony and/or evidence of Field Sobriety Exercises". The Motion alleges the Deputy who administered the Field Sobriety Exercises (hereinafter referred to as "FSE's") to the Defendant performed the exercises improperly and therefore evidence of their performance should be excluded.

3. On October 29, 2020, the State filed "State's Motion to Strike Defendant's Motion in Limine and Preclude Expert Testimony." In the State's Motion, the State counters by arguing that the State will not be entering into evidence any scientific results of the Defendant's performance on the Horizontal Gaze Nystagmus (HGN) exercise, and instead plans to elicit lay observation testimony. Further, the State advised that it intends to follow the holding in *State v. Meador,* which the State contends is controlling and allows for lay testimony regarding the One Leg Stand (OLS) exercise as well as the Walk and Turn (WAT) exercise. *See* 674 So.2d 826 (4th DCA 1996) [21 Fla. L. Weekly D1152a].

4. On January 15, 2021, the Court heard the Motion, and the testimony of Dr. Rick Swope. As articulated in the Defendant's Motion, and stated generally, Dr. Swope opined that the HGN exercise was not administered properly. Further, Dr. Swope opined that the WAT and OLS validity, reliability, and results were compromised due to the location and environment of where the exercises were administered.

5. It should be noted that both the State and the Defense acknowl-

edged that there is some evidence indicating the Defendant suffers from a medical condition (diabetes) and advised law enforcement of such during the DUI investigation and some form of a medical evaluation ensued roadside. The parties appeared to disagree as to whether there was evidence the Defendant was having a medical episode on the date in question. Dr. Swope advised on cross examination that he is not a medical professional and would not qualify as an expert in the "medical field".

Conclusions of Law and Findings

1. Florida law holds that FSE's are not "scientific" in nature. Rather, they are "simple physical activities designed to test coordination." *Id.* at. 830. Because of this, observations of police officers that are within "the common experience of the ordinary citizen, such evidence and observations are admissible as lay-opinion testimony." *State v. Fernandes,* 21 Fla. L. Weekly Supp. 191(a) (2013) (citing to *Meador).* Therefore, *Meador* held that "[a]s long as the testimony of the officers is restricted to lay observations. . . .the probative value of the psychomotor testing is not outweighed by the danger of unfair prejudice." *Id.* at 832. However, *Meador* cautioned that this would be the case "as long as the testimony by the officers is restricted to lay observations". *Id*.

2. Defense counsel accurately points out that *Meador* further states "[w]e make this broad statement because the county court presented the certified question without regard to the individual facts of any particular case. Certainly, in an individual case, depending on the totality of the facts and the nature of the testimony, a trial court might very well be within its discretion to exclude such evidence under 90.403". *Id*.

3. Defense therefore asks this Court to evaluate this case based on its unique facts, and exclude evidence of the field sobriety exercises under Florida Statute 90.403.

4. In reviewing all the testimony and evidence presented, including the totality of the facts and nature of the testimony, this Court finds that the State may elicit testimony regarding the field sobriety exercises and the probative value is *not* outweighed by the danger of unfair prejudice, so long as the testimony is consistent with the boundaries of *Meador*. *See Meador*; *See also, Godwin v. State,* 9 Fla. L. Weekly Supp. 725b (Fla. 4th Cir. Ct. 2002)(Officer's testimony as to defendant's performance on FSEs was relevant and admissible even though there may be a medical reason for the Defendant's problems as the claim went to weight, not to admissibility).

5. Next the Court rules on Defendant's second argument—that the Defendant should nevertheless be entitled to present the testimony of Dr. Swope and/or cross examine the Deputy with evidence that the exercises were administered improperly. The Court finds that to admit such testimony would invade the province of the jury and therefore said testimony is irrelevant and inadmissible. *See Meador; Fernandes (*supra). This ruling does not in any way impede the Defense from eliciting medical testimony/ evidence from a qualified witness.

THEREFORE IT IS ORDERED AND ADJUDGED that Defendant's Motion in Limine is ***DENIED***.

IT IS ALSO ORDERED AND ADJUDGED THAT the State's Motion to Preclude Defense Witness and testimony is ***GRANTED.***

* * *

Insurance—Continuance—Parental leave of insurer's lead attorney

PHYSICIANS GROUP, LLC., a/a/o Sheri Pipp, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, County Civil. Case No. 2020-SC-003274-NC. October 26, 2020. David Lee Denkin, Judge. Counsel: Nicholas Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Marsha M. Moses, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S EMERGENCY MOTION FOR CONTINUANCE

THIS CAUSE having come on to be heard on Defendant's Emergency Motion for Continuance of Hearing on Defendant's Motion to Dismiss Regarding Improper Venue (the "Motion"), and the Court having heard arguments on October 15, 2020, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED

1. Defendant's Motion for Continuance is hereby GRANTED.

2. The Court is bound by Florida Rule of Judicial Administration 2.570 (the "Rule") that requires absent a finding of one or more of the reasons listed in the Rule, a court must grant a timely motion for continuance based on the parental leave of the movant's lead attorney, Marsha M. Moses, Esq., due to the birth or adoption of a child.

3. The Court finds the Rule establishes that the lead attorney must file the Motion within a reasonable time after the movant's lead attorney learning of the basis of the continuance for which a continuance is sought.

4. The Court also finds the Motion was timely filed upon learning of the basis of the continuance and the three months requested is the presumed length of the continuance absent any substantial prejudice.

5. The Court finds the requested continuance would not unreasonably delay the proceedings.

6. Plaintiff failed to provide a prima facie demonstration of substantial prejudice and the burden did not shift to the movant to demonstrate that the prejudice to the requesting party caused by the denial of the motion exceeded the prejudice that would be caused to the objecting party if the requested continuance were granted.

7. Therefore, in compliance with the Rule, the Court grants the continuance for three months from the date of the order.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount

PHYSICIANS GROUP, LLC, a/a/o Marquis Cobb, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2017-SC-5352 NC. January 21, 2021. Phyllis Galen, Judge. Counsel: George Milev, Milev Law, LLC, Key Biscayne, for Plaintiff. Gibelle Salomon, Ft. Myers, for Defendant.

FINAL JUDGMENT AWARDING ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before this Court on Plaintiff's Motion to Tax Attorney's Fees and Costs with Interest, the Court having reviewed the file, having received expert testimony, having received testimony from the litigating attorneys, and having heard argument presented by both parties, hereby FINDS, ORDERS and ADJUDGES as follows:

1. Plaintiff's counsel is entitled to fees, costs and interest in accordance with Florida Statutes 627.428 and 627.736, the Agreed Final Judgment on Damages with Entitlement to Fees/Costs entered on August 25, 2019, and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), *Standard Guarantee Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2. The reasonable costs due to Plaintiff are $115.00.

3. Plaintiff's counsel George Milev reasonably expended 42 hours.

4. The reasonable hourly rate for attorney George Milev is $500.00/hour.

5. Thus the reasonable reimbursement for attorney George Milev is, 42 hours at $500.00/hour = $ 21,000.00

6. Plaintiff is entitled to recover the expert witness fees of attorney Ray Seaford based upon the holding and reasoning contained in the

cases *Stokus v. Phillips,* 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and that attorney Seaford reasonably expended 9.75 hours. The Court finds that a rate of $550.00/hour is a reasonable hourly rate for the services of Mr. Seaford. Thus, the total award for Mr. Seaford is 9.75 hours at $550.00/h = $5,362.50

7. The Court finds that the pre-judgment interest is due to Plaintiff's counsel on the amount of attorney's fees at a rate of 4.81% as aplicable, set by the Florida Chief Financial Officer from the date of the Agreed Final Judgment on Damages with Entitlement to Fees/Costs on August 25, 2019 until the entry of this Final Judgment pursuant to *Quality Engineering v. Higley South,* 670 So. 2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a]. The pre-judgment interest iscalculated to be $1,422.44

8. Therefore, Plaintiff recover from the Defendant the following:

a. Reasonable attorney's fees in the amount of $21,000.00

b. Costs in the amount of $115.00

c. Interest from the Agreed Final Judgment on Damages with Entitlement to Fees/Costs in the amount of $1,422.44

d. Expert witness fees for Ray Seaford in the amount of $5,362.50

e. For a total sum of $27,899.94 together with post-judgment interest at the rate of 5.37% per annum until payment in full of the judgment for which let execution issue forthwith.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Nurse practitioners—PIP statute permits insurer that has properly elected use of permissive statutory fee schedules and Medicare coding policies to use nurse practitioner reduction as Medicare payment methodology for reimbursement of services rendered by nurse practitioner

CRESPO & ASSOCIATES, P.A., a/a/o Erick Candamo, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 15-CC-018732, Division I. June 20, 2016. Rehearing denied May 9, 2017. Joelle Ann Ober, Judge. Counsel: Anthony T. Prieto, Prieto, Prieto & Goan, PA, Tampa, for Plaintiff. Miguel Roura and Michelle M. Wasielewski, ROIG Lawyers, Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before this Court at a hearing on May 5, 2016, on Plaintiff's Amended Motion for Summary Judgment filed February 29, 2016. Having considered the Plaintiff's Amended Motion, Defendant's Response, argument of counsel, relevant case law, and being otherwise fully advised, the Court finds:

1. This is an action for payment of personal injury protection (PIP) benefits Plaintiff alleges have not been properly paid by the Defendant. Specifically, Plaintiff contends that Florida Statutes section 627.736 does not permit the Defendant to reduce reimbursement pursuant to a Medicare payment methodology for the January 12, 2015 date of service because services were rendered by a nurse practitioner and not a physician. Alternatively, the Plaintiff argues that if such reductions are allowed by the PIP statute, the subject insurance policy does not properly elect the use of the nurse practitioner reduction.

2. The Plaintiff has stipulated for purposes of this Motion that the Defendant has properly elected use of the permissive fee schedule provided in Florida Statutes section 627.736(5)(a)1 and that the nurse practitioner reduction is a Medicare payment methodology and was not a utilization limit.

3. Florida Statutes section 627.736(5)(a)3 provides:

> An insurer that applies the allowable payment limitation of subparagraph 1. must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider is entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes. However, subparagraph 1. does not prohibit an insurer from using the Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount of reimbursement for medical services, supplies, or care if the coding policy or payment methodology does not constitute a utilization limit.

4. The Court finds that Florida Statutes section 627.736(5)(a)3, taken as a whole, permits the use of the nurse practitioner reduction as a Medicare payment methodology. Subsection (5)(a)3 prevents an insurer from refusing to reimburse a provider who has provided a service lawfully under their license because Medicare would not reimburse that provider for that service; however, subsection (5)(a)3 goes on to allow an insurer to use Medicare coding policies and payment methodologies in determining the appropriate amount of that reimbursement. Defendant has not refused to reimburse for the service provided by the nurse practitioner, but rather has permissibly used Medicare methodology to determine the appropriate amount of reimbursement when the service is provided by a nurse practitioner and not a physician.

5. Subsection F of the Insuring Agreement contained in Part B-1 of Defendant's policy of insurance mimics the statutory language provided in section 627.736(5)(a)3 relative to the insurer's potential use of Medicare coding policies and payment methodologies. The policy provides: "**We** may utilize Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount of reimbursement for medical services, supplies or care if the coding policy or payment methodology does not constitute a utilization limit." (emphasis in original). The Court finds this to be sufficient notice that the Defendant elected the use of Medicare coding policies and payment methodologies, which includes the nurse practitioner reduction, in determining reimbursement amounts as permitted under section 627.736(5)(a)3. *See Millennium Radiology, LLC a/a/o Angela Renteria v. State Farm Fire and Casualty Company,* 23 Fla. L. Weekly Supp. 360a (Fla. Miami-Dade Cty. Ct. July 1, 2015); *see also Allstate Indemnity Company v. Markley Chiropractic & Acupuncture*, 226 So. 3d 262, 41 Fla. L. Weekly D793b, 2016 WL 1238533 (Fla. 2d DCA March 30, 2016).

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** Plaintiff's Amended Motion for Summary Judgment is hereby **DENIED**.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR REHEARING

THIS MATTER came before the Court a hearing on March 28, 2017 on Plaintiff's Motion for Reconsideration and/or Rehearing filed on June 22, 2016. The Court has reviewed and considered Plaintiff's Motion, Defendant's Response to Plaintiff's Motion for Reconsideration and/or Rehearing with Supportive Memorandum of Law filed August 24, 2016, supplemental authority filed by the parties, the arguments presented by counsel, and the applicable law. The Court stands by its interpretation of Florida Statutes section 627.736(5)(a)3 and its finding that subsection (5)(a)3, taken as whole and giving effect to each sentence, permits an insurer to use the nurse practitioner reduction as a Medicare payment methodology.

It is therefore **ORDERED and ADJUDGED** that Plaintiff's Motion for Reconsideration and/or Rehearing is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Declaratory actions—Standing—Insurer is not entitled to summary judgment on claim that insured lacks standing to bring declaratory action because she has assigned her benefits to medical providers where insurer's corporate representative is not competent to authenticate assignments of benefits or establish assignments as business records—Complaint seeking resolution of questions regarding whether claims were properly processed and paid under policy terms fails to state claim showing entitlement to declaratory relief—Final judgment is entered for insurer

CRYSTAL JACKSON, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-004021, Division I. March 6, 2020. Joelle Ann Ober, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha M. Moses, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S AMENDED MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS and FINAL JUDGMENT FOR DEFENDANT

THIS MATTER came before this Court at a hearing on November 19, 2019, on Defendant's Amended Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings filed November 12, 2019.[1] Having reviewed and considered Defendant's Motion, Plaintiff's Opposition to Defendant's Motion filed November 18, 2019, the summary judgment evidence, argument of counsel, relevant case law, and being otherwise fully advised, the Court finds:

1. On January 19, 2018, Plaintiff instituted this action for declaratory judgment seeking a judicial determination regarding coverage under a policy of insurance for losses sustained in two separate automobile accidents on the same day. In its initial action, Plaintiff asserted that Defendant failed to open a claim and extend coverage to Plaintiff for the second accident.

2. On February 14, 2019, after participating in discovery, Plaintiff sought leave to amend her declaratory judgment action. Plaintiff's amended action was deemed filed on April 16, 2019.

3. Defendant's Amended Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings argues Plaintiff lacks standing because she has assigned her benefits under the policy to various medical providers with regard to these claims and there is no documentation that those assignments have been revoked. Defendant argues that only one party, the insured or the medical provider, can "own" the right to bring a cause of action against the Defendant at a time and Plaintiff, by virtue of the assignments, no longer has the right to pursue an action against the Defendant. In addition, Defendant argues that there is no justiciable controversy for the Court to decide and Plaintiff has failed to assert an appropriate declaratory judgment action. Defendant argues that there is no coverage issue in this matter and "Plaintiff is incorrectly seeking . . . a determination for a breach of contract under the purview of a declaratory judgment." Def.'s Amended Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings ¶ 49.

4. In opposition to Defendant's Motion, Plaintiff argues that standing is not an issue and that this is not a PIP breach of contract action, but rather a proper matter for declaratory relief. With regard to standing, Plaintiff argues that the assignments of benefits Defendant relies upon to show lack of standing are not admissible as business records citing to *Whitney v. State Farm Mutual Automobile Insurance Company*, 7 Fla. L. Weekly Supp. 87a (Fla. 13 Cir. Ct. (appellate) Nov. 16, 1999).

5. With regard to Defendant's Motion based on lack of standing due to the alleged assignment of Plaintiff's rights and benefits under the policy of insurance to various medical providers, the Court finds that Defendant has not met its burden as movant on summary judgment. As presented, the assignments provided by Defendant as summary judgment evidence to show assignment of Plaintiff's rights and benefits under the policy to various medical providers are not admissible as business records in this matter as presented. *See Whitney v. State Farm Mutual Automobile Insurance Company*, 7 Fla. L. Weekly Supp. 87a (Fla. 13 Cir. Ct. (appellate) Nov. 16, 1999).

6. In *Whitney*, the circuit court found that the insurer's representative was not competent to authenticate, or establish as business records, the insurance claim forms upon which the trial court made a determination of a de facto assignment to the health care providers. As established in *Whitney*, and binding on this Court, Defendant's corporate representative is not competent to authenticate the assignments of benefits or establish the assignments of benefits as business records of the Defendant. As such, the assignments are not competent summary judgment evidence. The Defendant therefore lacks evidence of assignment of the claims at issue in this matter and has failed to meet its burden as the movant on summary judgment as to this issue.

7. Turning to Defendant's Motion with regard to Plaintiff's alleged failure to assert a justiciable controversy within the purview of an action declaratory relief, the Court finds Plaintiff's Amended Complaint fails to state a claim showing entitlement to declaratory relief under Florida Statutes section 86.011.

8. Florida Statutes section 86.011 provides that "[t]he court may render declaratory judgments on the existence, or nonexistence: (1) Of any immunity, power, privilege, or right; or (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend. . ."

9. "[T]o activate jurisdiction the party seeking a declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed." *X Corp. v. Y Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993). There must be "a bona fide, actual, present, and practical need for the declaration." *Id.* "[D]isagreements concerning coverage under insurance policies are proper subject for a declaratory judgment." *Prudential Property & Casualty Insurance Company v. Castellano*, 571 So. 2d 598, 599 (Fla. 2d DCA 1990) (citation omitted).

10. Although declaratory actions can involve determinations regarding questions of fact "if necessary to a construction of legal rights," "a declaratory action is not available where the object of the action is to try disputed questions of fact as the determinative issue rather than to seek a construction of definite stated rights, status, or other relations." *X Corp.*, 622 So. at 1101; *see also MRI Associates of St. Pete, Inc. v. State Farm Mutual Automobile Insurance Company*, 755 F. Supp. 2d 1205, 1210 (M.D. Fla. 2010) (stating "[d]eclaratory relief is not available where the issue is whether an unambiguous contract has been breached") (citation omitted).

11. This Court has previously found that causes of action seeking a declaration of coverage are valid and are distinguishable from PIP breach of contract actions. While coverage determinations and the construction of ambiguous policy language may be appropriate for an action for declaratory judgment, the issues for which Plaintiff seeks a declaration in her Amended Complaint are not of that nature. Plaintiff's Amended Complaint seeks resolution of disputed questions of fact that amount to breach of contract issues, not a coverage determination—whether claims were properly processed and paid under the terms of policy. Plaintiff's Amended Complaint does not assert a coverage dispute[2] or any other present need for construction of the policy to determine Plaintiff's rights thereunder. As such, the Court finds Plaintiff's Amended Complaint fails to state a claim showing entitlement to declaratory relief under Florida Statutes

section 86.011 and judgment on the pleadings in favor of the Defendant is proper.[3]

Based on the foregoing, it is therefore ORDERED AND ADJUDGED:

1. Defendant's Amended Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings is hereby **GRANTED in part and DENIED in part**.

2. Defendant's Amended Motion is **DENIED** as to the issue of lack of standing due to the alleged assignment of Plaintiff's rights and benefits under the policy.

3. Defendant's Motion for Judgment on the Pleadings is **GRANTED** with respect to Plaintiff's Amended Complaint failing to state a proper cause of action for declaratory relief.

4. Final Judgment is hereby entered in favor of Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. Plaintiff shall take nothing by this action and Defendant shall go hence without day. The Court reserves jurisdiction relative to entitlement to and amount of attorney's fees and costs, if any.

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[1]Defendant's Motion was originally filed on October 30, 2019, with the amended version contained in Defendant's Opposition to Plaintiff's Motion for Summary Judgment. The parties agreed to hear Defendant's motion at the November 19, 2019 hearing.

[2]Paragraph 8 of Plaintiff's Amended Complaint alleges that at the time of the original filing, Defendant failed to extend coverage and process claim number 59-1676-W97 on behalf of Plaintiff; however, paragraph 16 goes on to admit coverage was extended on the claim. Therefore, coverage is not at issue and the need for a determination on that issue is not presented in this matter.

[3]Judgment on the pleadings "is appropriate where the complaint fails to state a cause of action against the defendant or where the answer fails to state a defense or tender any issue of fact." *Venditti-Sirava, Inc. v. City of Hollywood, Florida*, 418 So. 2d 1251 (Fla. 4th DCA 1982).

* * *

Attorney's fees—Insurance—Automobile—Prevailing windshield repair shop—Amount—Contingency risk multiplier of 1.5 is appropriate where evidence demonstrated that relevant market required multiplier to obtain competent counsel in case involving low amount in controversy, that plaintiff's counsel were retained on contingency fee basis and were unable to mitigate risk of non-payment if claim did not succeed, that *Quanstrom* and *Rowe* factors weigh heavily in favor of awarding multiplier, and that likelihood of success at outset was even—Costs, expert witness fee and pre- and post-judgment interest awarded

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Jeremy Benton, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 16-CC-008433, Division U. February 6, 2021. Frances M. Perrone, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa; Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, P.A., Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. Lindsay Trowell, Steven Brust, Kristen W. Bracken, and Lance T. Davies, Smith Gambrell & Russell, LLP, Jacksonville, for Defendant.

FINAL JUDGMENT ON PLAINTIFF'S CLAIM FOR REASONABLE ATTORNEYS' FEES AND COSTS

THIS CAUSE came before the Court on August 26, 2020 and September 30, 2020 for an evidentiary hearing on the "Motion to Tax Attorney's Fees and Costs" filed on October 30, 2018 by the Plaintiff, Superior Auto Glass of Tampa Bay, Inc., as assignee of Jeremy Benton. After considering the demeanor and credibility of the witnesses, and the weight of the evidence presented, the arguments of counsel, the record, and the applicable legal authorities, and being otherwise fully advised in the premises, the Court hereby makes the following findings of fact and conclusions of law, and

ORDERS AND ADJUDGES as follows:

A. Introduction

1. This case is one of many lawsuits between these parties for underpaid insurance benefits arising from the Plaintiff's replacement of damaged windshields to customers insured by the Defendant and other affiliated "Geico" insurance companies. As in most of these lawsuits, the primary issue in this case was whether the Plaintiff's charge exceeded the "prevailing competitive price" as described in the insurance policy's limitation of liability provision. Despite the small amount in controversy in such lawsuits, the "prevailing competitive price" is a hotly contested issue that has generated a significant amount of litigation in Hillsborough County, and in various other counties in Florida.[1]

2. This particular lawsuit was originally filed on March 14, 2016, and sought damages of $216.67, plus interest, costs, and attorneys' fees. The case was scheduled for pre-trial hearing on October 23, 2018, to be followed by a non-jury trial commencing on November 5, 2018. On October 22, 2018 (i.e., the eve of the pre-trial hearing), the Defendant filed a "Confession of Judgment and Acknowledgement of Entitlement to Reasonable Attorneys' Fees and Costs." The Plaintiff subsequently filed its timely "Motion to Tax Attorney's Fees and Costs" on October 30, 2018.

3. On August 26, 2020 and September 30, 2020, this Court conducted an evidentiary hearing on the Plaintiff's motion. The Plaintiff presented the testimony of three witnesses (i.e., Anthony T. Prieto, Esquire, counsel of record, Christopher P. Calkin, Esquire, counsel of record, and Herbert M. Berkowitz, Esquire, as an expert witness) and 10 exhibits. The Defendant presented the testimony of two witness (i.e., Lindsey Trowell, Esquire, counsel of record, and George Nader, Esquire, as an expert witness) and 14 exhibits.

4. In reaching the findings of fact and conclusions of law contained herein, this Court considered the demeanor and credibility of the witnesses, and the weight of the evidence presented, as well as Florida Rule of Professional Conduct 4-1.5(b)(1) and (2), the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and applicable case law.

B. Plaintiff's entitlement to award of attorneys' fees and costs

5. As the assignee of the Defendant's insured, the Plaintiff seeks an award of attorneys' fees pursuant to Section 627.428(1), Florida Statutes, which states, "Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

6. Well-settled case law confirms that the Defendant's confession of judgment was the functional equivalent of a verdict in favor of the Plaintiff, and triggered the Plaintiff's entitlement to attorney's fees. *See, e.g., Wollard v. Lloyd's & Companies of Lloyd's*, 439 So.2d 217, 218 (Fla. 1983). In this case, the Defendant's confession of judgment acknowledged that the Plaintiff is entitled to an award of attorneys' fees and costs.

7. As such, the Plaintiff is the prevailing party in this lawsuit, and as acknowledged by the Defendant, the Plaintiff is entitled to an award of reasonable attorneys' fees and costs. Therefore, the Plaintiff's "Motion to Tax Attorney's Fees and Costs" is hereby **GRANTED.**

C. Reasonable "lodestar" amount

8. In *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), the Florida Supreme Court adopted the federal "lodestar" approach for awarding reasonable attorneys' fees. "The number of hours reasonably expended . . . multiplied by a reasonable hourly rate . . . produces the lodestar[.]" *Id.*, 472 So.2d at 1151.

9. Based on the greater weight of the evidence and the applicable criteria set forth in *Rowe* and Rule 4-1.5(b)1, the Court determines the reasonable amount of time worked by Plaintiff's counsel in this case through October 22, 2018 (i.e., the date of the Defendant's confession of judgment) and the reasonable hourly rates are as follows:

Timekeeper	Actual Amount of Time Billed	Reasonable Amount of Time Awarded	Reasonable Hourly Rates Awarded	Product
Anthony T. Prieto, Esquire • Paralegal-level work	65.3 hrs.	58.6 hrs. .4 hrs.	$525.00 $140.00	$30,765.00 $56.00
Amy T. Sullivan, Esquire	.4 hrs.	.4 hrs.	$350.00	$140.00
Christopher P. Calkin, Esquire	53.9 hrs.	43.9 hrs.	$525.00	$23,047.50
Mike N. Koulianos, Esquire	39.1 hrs.	22.1 hrs.	$400.00	$8,840.00
David M. Caldevilla, Esquire	10.0 hrs.	8.3 hrs.	$600.00	$4,980.00
Amelia Floyd, Paralegal	8.9 hrs.	3.5 hrs.	$140.00	$490.00
Syrenia Hamilton, Paralegal	.3 hrs.	0.0 hrs.	N.A.	$0.00
Total Lodestar Amount				**$68,318.50**

10. The Court finds Plaintiff's expert Herbert M. Berkowitz, Esq. opined reasonable hourly rates as follows: Anthony T. Prieto, Esq., $550, Amy T. Sullivan, Esq., $350, Christopher P. Calkin, Esq., $550, Mike N. Koulianos, Esq., $425, David M. Caldevilla, Esq., $600, Paralegal Amelia Floyd, $140. The Court finds Defendant's expert George Nader, Esq. opined reasonable hourly rates as follows: Anthony T. Prieto, Esq., $500, Amy T. Sullivan, Esq., $350, Christopher P. Calkin, Esq., $500, Mike N. Koulianos, Esq., $350, David M. Caldevilla, Esq., $600. The Court finds the appropriate hourly rates as set forth in the above chart.

11. The Court further finds the demeanor and credibility of the witnesses and the greater weight of the evidence demonstrated that, irrespective of counsel's representation of the Plaintiff in multiple similar or identical lawsuits, Plaintiff's counsel reasonably allocated to this particular case the time they worked on the tasks described in their time records, as reduced and limited by the Court's reasonable amount determinations set forth in the foregoing table. The Court further finds the time records reflect Plaintiff's counsel would have worked on this case for the same reasonable amounts of time awarded above, regardless of whether the fruits of their labor could be also be relied upon in another similar or identical lawsuit. *See generally, Franzen v. Lacuna Golf Ltd. Partnership,* 717 So.2d 1090, 1093 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2081a] ("trial court is not required to apportion attorney's fees where work for one claim cannot be distinguished from work on other claims"); *State Farm Fire & Cas. Co. v. Becraft*, 501 So. 2d 1316, 1319 (Fla. 4th DCA 1986) ("where the bulk of the work involved was intertwined with both issues, so as to make it difficult to separate the time spent, the allowance of fees for the entire service furnished is not error"); *Plaza La Mer, Inc. v. Delray Prop. Investments, Inc.,* 275 So. 3d 640, 642 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1245b] (in litigation involving "two similar but mis-joined cases" where it was "nearly impossible to apportion fees," trial court did not abuse its discretion in its allocation of attorneys' fees and costs award between two non-prevailing parties). Moreover, the credible testimony of Plaintiff's counsel and their expert witness confirmed they are not replicating the same time entries in other cases to achieve multiple or duplicative fee awards which would cumulatively represent more time than they actually worked.

12. Further, the Court conducted a pre-hearing Case Management Conference on July 9, 2020 and subsequently entered a pre-hearing Case Management Conference Order Regarding Attorneys' Fees and Costs Dispute on July 15, 2020. Paragraph 3(e) of said Order required,

> Defendant's Response. No later than July 21, 2020, the Defendant shall file and serve a written response to the Plaintiff's time and billing records and supporting affidavits. The Defendant's response shall state with particularity all disagreements, disputes, and/or objections concerning any and all items contained in the Plaintiff's time and billing records and supporting affidavits, including (i) specific explanations or objections as to each particular disputed item, and (ii) any objection that a time entry or cost entry is excessive or unreasonable shall state the amount, if any, that the Defendant contends is reasonable and why. The defendant's failure to timely file and serve a response to any particular item shall be deemed an admission by the Defendant that the Plaintiff is entitled to an award on that particular item and that the amount of that particular item is valid and reasonable.

Defendant failed to file any such objection at any time between the July 15, 2020 order and the conclusion of the hearing on September 30, 2020. The Defendant failed to present any credible and nonspeculative evidence to rebut the Plaintiff's evidence or otherwise prove Plaintiff's counsel did not actually perform the tasks described in their billing records for purposes of this case, or that the amount of time Plaintiff's counsel billed for any particular task reflected in their billing records is inflated or otherwise inaccurate, or that Plaintiff's counsel have falsely replicated the same time entries to their fee claims in any other cases.

13. Based on the foregoing reasonable amount of time and hourly rates, this Court determines that the reasonable "lodestar" figure (before applying any lodestar multiplier) for the legal services performed by the Plaintiff's counsel through October 22, 2018 is $68,318.50.

D. Entitlement to a lodestar multiplier

14. The Florida Supreme Court first addressed the ability to recover a lodestar multiplier in *Rowe,* and subsequently refined the standards for recovering a multiplier in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla.1990).

15. There is no "rare" and "exceptional" circumstances requirement that must be satisfied before a trial court may apply a multiplier. *See, Joyce v. Federated National Ins. Co.,* 228 So.3d 1122, 1125-28 (Fla. 2017) [42 Fla. L. Weekly S852a]. Indeed, the Florida Supreme Court has confirmed a multiplier can be awarded in cases, like this one, which involve very small amounts in controversy. For example, in *State Farm Fire & Casualty Co. v. Palma*, 555 So.2d 836 (Fla. 1990), the Court held the trial court properly applied a multiplier, resulting in an attorney's fees award of $253,500, in a case where the amount of damages in controversy was merely $600. *Id.,* 555 So.2d at 836-37.

16. Even though this particular case involves a small amount of damages in controversy, there are thousands of windshield lawsuit cases like this one, pending against this Defendant and its affiliated Geico insurance companies, where the "prevailing competitive price" provision of the insurance policy lies at the crux of the dispute. The huge volume of thousands of windshield cases pending against the Geico companies confirms that, as in *Palma*, these are cases where the Geico insurance companies have decided to firmly challenge a hotly contested issue that is very important to them. *See* 555 So.2d at 837. "Having chosen to stand and fight over" these thousands of windshield claims, the Defendant has "made a business judgment for which it should have known a day of reckoning would come should it lose in the end." *Id.* As in *Palma*, the Plaintiff "did not inflate this small case into a larger one[.]" *Id.* Rather, the "protraction resulted from the stalwart defense" Geico was entitled to pursue. *Id.* As explained in *Palma*, "although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost." *Id.* This case illustrates that point.

17. The *Quanstrom* decision identified three categories of cases, for purposes of deciding when it is and is not appropriate to apply a lodestar multiplier: (a) public policy enforcement cases, (b) tort and contract cases, and (c) family law, eminent domain, and estate and trust proceedings. *Id.,* 555 So.2d at 833-835.

18. The second category (tort and contract cases) applies to insurance disputes. *Joyce,* 228 So.3d at 1128. Under that second category, the trial court must consider the following three factors in deciding whether to award a multiplier:

> The second category concerns principally tort and contract cases. Here, we reaffirm the principles set forth in *Rowe*, . . . and find that the trial court should consider the following factors in determining whether a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the utilization of a multiplier. We find that the multiplier is still a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of nonpayment is established.

Quanstrom 555 So.2d at 834. *Accord, Joyce,* 228 So.3d at 1128; *Bell v. U.S.B. Acquisition Co*., 734 So.2d 403, 412 (Fla.1999) [24 Fla. L. Weekly S220a].

19. With respect to the first factor, case law has explained how to go about proving the relevant market requires a contingency fee multiplier to obtain competent counsel. To prove that factor, "there must be evidence that a contingent fee arrangement was necessary in order for the prevailing party to have obtained competent counsel if a multiplier is to be imposed on the nonprevailing party." *Simmons v. Royal Floral Distributors, Inc.,* 724 So.2d 99, 99 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1181a]. This holding from *Simmons* was subsequently quoted with approval by the Florida Supreme Court in *Bell*, 734 So.2d at 410. Similarly, in *TransFlorida Bank v. Miller*, 576 So.2d 752, 753 (Fla. 4th DCA 1991) and *Pompano Ledger, Inc. v. Greater Pompano Beach Chamber of Commerce, Inc*., 802 So.2d 438, 439 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2909c], the Fourth DCA explained this factor requires the court to consider "whether contingency agreements are customarily used in the type of circumstances involved and whether there is support in the record for a conclusion that the prevailing party would otherwise be unable to afford competent counsel."

20. The first factor can be established through expert testimony. In *Massie v. Progressive Express Ins. Co*., 25 So.3d 584, 585 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2364b], *rev. dism.,* 32 So.3d 60 (Fla. 2010), the First DCA held a client's testimony is unnecessary to prove the first factor, because "expert testimony that a party would have difficulty securing counsel without the opportunity for a multiplier supports a multiplier's imposition." Likewise, in *McCarthy Brothers Co. v. Tilbury Construction Inc*., 849 So.2d 7, 10 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D736b], the First DCA held a trial court appropriately applied a multiplier because the prevailing party "presented expert testimony that it would have been difficult to find an attorney willing to take its case without the opportunity for a multiplier."

21. In cases where the amount in controversy is very low, the possibility of being awarded a multiplier "will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee." *See, e.g., Lane v. Head*, 566 So.2d 508, 511 (Fla. 1990). That possibility "assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis," "levels the playing field between parties with unequal abilities to secure legal representation," and is important "in ensuring access to courts." *Bell*, 734 So.2d at 411. Consequently, the Florida Supreme Court has "emphasized the importance of contingency fee multipliers to those in need of legal counsel and made clear trial courts could consider contingency fee multipliers any time the requirements for a multiplier were met." *Joyce*, 228 So.3d at 1132, citing *Bell,* 734 So.2d at 412 and *Quanstrom*, 555 So.2d at 834.

22. Here, the greater weight of the evidence established the Plaintiff and similarly situated windshield repair shops are unable to afford to retain counsel on an hourly rate or flat fee basis in litigation such as this, where the amount in controversy is very small. In this particular case, the Defendant underpaid the Plaintiff's invoice by $216.67. No windshield shop could ever sensibly or economically afford to pay an attorney to sue an insurance company for such a small amount of money, much less multiple times over, absent the attorney's contingency fee contract agreeing to seek recovery of his or her attorneys' fees and costs pursuant to Section 627.428 together with the opportunity to seek a multiplier. The evidence also demonstrated that there is a relatively small number of competent attorneys handling windshield litigation, especially when that number of competent attorneys is measured against the relevant community and the tens of thousands of windshield insurance disputes in litigation. Plaintiff's expert, Herbert Berkowitz, Esq., testified competent counsel in the relevant market would not take such a case without the potential for a contingency fee multiplier. Though plaintiff's counsel took on multiple such claims, there was no guarantee of a positive outcome at the outset. Accordingly, the greater weight of the evidence demonstrated that the relevant market required a contingency fee multiplier to obtain competent counsel in this case, as that factor is described in *Quanstrom, Bell, Simmons, TransFlorida, Pompano Ledger, Massie,* and *McCarthy Brothers*.

23. With respect to the second factor identified in *Quanstrom,* the greater weight of the evidence also clearly demonstrated Plaintiff's counsel were retained on a contingency fee basis, and they were unable to mitigate the risk of non-payment if the claim did not succeed. This windshield case is not like a personal injury case or a medical malpractice case, where the plaintiff's attorney recovers a contingency fee based on a percentage of a potentially large recovery. Attorneys typically agree to take on personal injury and medical malpractice cases with the expectation their contingent percentage of the client's recovery will, on average, exceed the attorneys' actual time and expense actually incurred, and as a result, the risk of losing a single case can be potentially mitigated by handling many of those cases and winning a good portion of them. However, in a windshield case, the same model does not work, because obtaining a percentage of the client's recovery will always yield a *de minimus* amount compared to the value of the legal services and the costs needed to secure a victory.[2] Instead of taking a percentage of the recovery, a plaintiff's attorney in a windshield dispute must rely on Section 627.428 to "break even" by covering his or her reasonable amount of time for each case he or she wins. However, without the opportunity to recover a multiplier, merely "breaking even" on the winning cases will never provide any opportunity to mitigate any of the uncollectable time and expenses sustained by that attorney on any windshield cases that are lost.

24. With respect to the third factor identified in *Quanstrom,* the greater weight of the evidence also clearly demonstrated the factors outlined in *Rowe* and Rule 4-1.5(b) (including but not limited to the amount involved, the results obtained, and the existence of a contingency fee arrangement between the Plaintiff and its counsel), weigh heavily in favor of awarding a multiplier to the Plaintiff in this case.

25. Accordingly, the Court determines the Plaintiff is entitled to a lodestar multiplier in this case.

E. Amount of the multiplier

26. According to *Quanstrom,* the amount of the multiplier awarded is determined as follows:

> (a) If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1.0 to 1.5;
>
> (b) If the trial court determines that the likelihood of success was approximately even at the outset, it may apply a multiplier of 1.5 to 2.0; and

(c) If the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5.

27. In this case, based on the greater weight of the evidence, the Court determines at best, the Plaintiff's likelihood of success at the outset was approximately even, and a corresponding lodestar multiplier of 1.5 is reasonable and appropriate.

F. Total reasonable attorneys' fees:

28. Based on the lodestar figure of $68,318.50 and the multiplier of 1.5, this Court finds that the amount of $102,477.75 is the reasonable amount of attorneys' fees to be awarded to the Plaintiff.

G. Reasonable costs (excluding expert witness fees)

29. Based on the greater weight of the evidence, the Florida Rule of Professional Conduct 4-1.5(b)(2), and the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, the Court determines the following amounts of taxable costs incurred by the Plaintiff's counsel (excluding expert witness fees) through October 22, 2018 (i.e., the date of the Defendant's confession of judgment) were reasonable, necessary, and served a useful purpose:

Items Requested	Amount Incurred	Reasonable and Necessary Amount Awarded
Filing fee	$95.00	$95.00
Summons	$10.00	$10.00
Service of Process	$15.00	$15.00
Copy costs	$46.35	$46.35
Referring atty. costs	$368.24	$0.00
Total		**$166.35**

H. Attorneys' fee expert

30. The Plaintiff also seeks an award of taxable costs for the fees charged by its attorneys' fees expert witness, Herbert M. Berkowitz, Esquire.

31. "Florida has a long-standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees." *Snow v. Harlan Bakeries, Inc.*, 932 So. 2d 411, 412 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1128a].

32. The fee charged by an attorney to appear as an expert witness is considered a cost, not an attorney's fee. *In re Estate of Assimakopoulos*, 228 So.3d 709, 713 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2232c].

33. It is well settled, an award of expert witness fees for an attorney who testifies as an expert in support of an attorneys' fees and costs claim is not discretionary if the testifying attorney expects to be compensated for his testimony. *Stokus v. Phillips*, 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D627c]; *In re Estate of McQueen*, 699 So. 2d 747, 751-52 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2131a].

34. In this case, Mr. Berkowitz does expect to be paid for his services, and the amount of time required for his preparation and testifying as an expert witness was burdensome. Accordingly, the Court concludes the Plaintiff is entitled to recover taxable costs for Mr. Berkowitz's expert witness fee.

35. Based on the greater weight of the evidence, the Court finds a reasonable hourly rate for Mr. Berkowitz's services as an expert is $600.00 per hour, and the reasonable amount of time for the services he rendered through the termination of his testimony at the fee hearing is 29.85 hours (which excludes the time for which the Defendant paid him to appear at a deposition). Therefore, the Court determines an award of taxable costs in the amount of $17,910.00 is reasonable for the expert witness services provided by Mr. Berkowitz.

I. Final Judgment

36. Based on the foregoing findings of fact and conclusions of law, a summary of the reasonable amounts awarded to the Plaintiff are as follows:

Attorneys' Fees	$102,477.75
Expert Witness Fees	$17,910.00
Other Taxable Costs	$166.35
Total	**$120,554.10**

37. Accordingly, final judgment is hereby entered in favor of the Plaintiff, Superior Auto Glass of Tampa Bay, Inc., and against the Defendant, Geico General Insurance Company. The Plaintiff shall recover from the Defendant the total amount of **$120,554.10** plus prejudgment interest since October 22, 2018 (i.e., the date of the Defendant's confession of judgment), plus post-judgment interest on that combined sum from the date of this final judgment, and all interest shall calculated at the rates established by the Florida Department of Financial Services pursuant to Section 55.03, Florida Statutes (*www.myfloridacfo.com/Division/AA/LocalGovernments/Current.htm; www.myfloridacfo.com/Division/AA/LocalGovernments/Historical.htm*), for which sum, let execution issue.

38. The Defendant's payment shall be by check made payable to the "Morgan & Morgan IOTA Trust Account," and delivered in care of Anthony T. Prieto, Esquire, who shall be responsible for disbursing the proceeds.

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[1]*See, e.g. Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Jud. Cir. Ct. App. Div. March 27, 2018) (consolidated appeals concerning Geico's "prevailing competitive price" provision).

[2]*See*, Fla. R. Prof. Cond. 4-1.5(e)(4)(B)(i)a-c (identifying the range of contingency fee percentages authorized for personal injury cases, starting at 33 1/3% for any recover up to $1 million and incrementally increasing for various different scenarios). In this case, 33 1/3% of $216.67 would yield attorneys' fees of merely $72.22. Clearly, such an amount is not an economically viable fee for any competent attorney to represent the Plaintiff in this lawsuit.

* * *

Insurance—Personal injury protection—Coverage—Declaratory action—Complaint seeking declaration that insurer wrongfully changed CPT code—Motion to dismiss is denied

CIELO SPORTS AND FAMILY CHIROPRACTIC CENTRE, LLC., a/a/o Cynthia Bishop, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-039767 (J). February 18, 2021. Monique M. Scott, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the court on January 20, 2021 on Defendant's Motion to Dismiss. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Plaintiff filed this Declaratory action seeking declarations that Defendant wrongfully changed Plaintiff's CPT code from 76499 to 76120, along with a declaration that Defendant failed to timely investigate and process Plaintiff's medical bills pursuant to. F.S. 627.736(4)(i).

2. At hearing, the Plaintiff withdrew from the Complaint its request for a declaration as to whether the Defendant failed to timely investigate and process Plaintiff's medical bills pursuant to. F.S. 627.736(4)(i). As such, the Court need not rule on this issue.

3. Defendant's Motion to Dismiss alleges that Plaintiff's Complaint essentially seeks an advisory opinion as to whether or not Defendant breached the contract of insurance and Defendant argued that the declaration sought does not seek a determination as to a right or privilege under the policy or PIP statute, but simply asks the Court to opine on an unambiguous insurance contract.

4. The Court must take all allegations of the Plaintiff's Complaint to be true and must also assume all inferences in favor of the non-moving party.

5. The Court finds the controlling authority to be the Florida Supreme Court case of *Higgins v. State Farm Fire & Cas. Co.*, 894 So.2d 5 (Fla. 2004) [29 Fla. L. Weekly S630a], which held that the purpose of the declaratory judgment act was to provide litigants with relief from insecurity and uncertainly with respect to rights, status, and other equitable or legal relations.

6. The Court relies, in part, on Judge Margaret T. Courtney's opinion in *Health-Aide Pain & Weight Mgmt., Inc. (a/a/o Olga Betancourt) v. Allstate Pro. & Cas. Ins. Co*., 20 Fla. L. Weekly Supp. 287a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., March 1, 2012), which stated that the purpose of a declaratory judgment "is to settle and afford relief from insecurity and uncertainty with respect to rights, status, and other equitable and legal relations and is to be liberally administrated and construed."

7. Defendant cited to *Legions Ins. Co. v. Frances Moore*, 28 Fla. L. Weekly D1195a (Fla. 4th DCA 2003). However, *Legions* held that the necessity to determine a factual dispute does not alone defeat an action for declaratory judgment

8. Defendant's Motion is hereby **DENIED**. Defendant shall have twenty (20) days from the entry of this Order to file a response to the Plaintiff's Complaint.

* * *

Insurance—Declaratory action—Motion to dismiss denied

FLORIDA WELLNESS CENTER, INC., (a/a/o Justin Fernandez), Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-052807, Division J. February 4, 2021. Monique Scott, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER, having come before the Court on Defendant's Motion to Dismiss Plaintiff's Declaratory Action. The Court having reviewed the file, considering the motion, applicable law, and being otherwise fully advised, finds:

1. Plaintiff filed this Declaratory Action seeking a declaration of coverage.

2. Defendant's Motion to Dismiss alleges the proper cause of action for Plaintiff is a breach of contract action and that Plaintiff's Complaint is not plead with the required specificity.

3. Accepting all allegation of the Complaint to be true, the Court finds Plaintiff's Complaint to be proper and Defendant's Motion to Dismiss is **HEREBY DENIED.**

4. Defendant shall file its answer within twenty (20) days of this Order.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Presuit exhaustion of policy limits

CENTRAL PALM BEACH PHYSICIANS & URGENT CARE INC., d/b/a TOTAL MD (Patient: Raysa P. Soto), Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502020SC006716XXXXSB. February 9, 2021. Marni A. Bryson, Judge. Counsel: Manshi Shah, The Law Office of Jeffrey R. Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105, FLORIDA STATUTES

THIS CAUSE having come on to be heard on February 4, 2021, on Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, the Court having reviewed the aforementioned motion, the relevant legal authority, heard argument of counsel, and been sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, is **GRANTED**.

2. On May 1, 2019, in Defendant's demand response, Defendant informed Plaintiff's counsel that the Personal Injury Protection ("PIP") benefits were exhausted for assignor Raysa Soto.

3 .On April 12, 2020, Plaintiff filed a complaint seeking PIP benefits for treatment rendered to assignor Raysa Soto.

4. On June 21, 2020, Defendant raised the affirmative defense "Defendant states all benefits have been exhausted and the Plaintiff has no cause of action against the Defendant. The Plaintiff's Complaint should be dismissed with prejudice."

5. On July 13, 2020, Defendant provided the Explanation of Benefits and PIP Log to Plaintiff.

6. On July 13, 2020, Defendant served Plaintiff with Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, because the benefits were exhausted.

7 . Plaintiff failed to dismiss the instant suit, and on August 7, 2020, Defendant filed their Motion for Sanctions Pursuant to Section 57.105, Florida Statutes.

8. The Plaintiff knew or should have known that its claim was not supported by the material facts or then existing law because the PIP benefits were exhausted under the policy. As such, there was a complete absence of a justiciable issue of law or fact raised by the Plaintiff in this matter.

9. In *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.,* the Court held "Once the PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims, absent bad faith in the handling of the claim by the insurance company." 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a].

10. In *Coral Imaging Servs. v. GEICO Indemnity Co.,* the Court ruled when an insurer paid untimely PIP bills, then those payments were "gratuitous payments" and did not count toward the $10,000.00 in PIP benefits. 955 So.2d 11 (Fla. 3rd DCA 2006) [31 Fla. L. Weekly D2478a]. See also *GEICO Indem. Co. v. Gables Ins. Recovery,* 159 So.3d 151 (3rd DCA 2014) [39 Fla. L. Weekly D2561a] (wherein the 3rd DCA narrowed its own ruling in *Coral Imaging*).

11. Here, there is no allegation that the Defendant paid untimely bills, and therefore, there are no "gratuitous payments."

12. In this matter, Defendant's Motion for Final Summary Judgment—Exhaustion of PIP Benefits was set for December 17, 2020.

13. On December 17, 2020, the day Defendant's Motion for Summary Judgment—Exhaustion of PIP Benefits was set to be heard, Plaintiff filed a Notice of Voluntary Dismissal without Prejudice.

14. "In general, when plaintiff voluntarily dismisses action, defendant is prevailing party for purpose of awarding attorney's fees." *Thornber v. City of Ft. Walton Beach,* 568 So. 2d 914, 919 (1990).

15. Therefore, this Court finds the Defendant is entitled to award of attorneys' fees under section 57.105, Florida Statutes.

16. The Court reserves jurisdiction to determine Defendant's amount of attorneys' fees.

* * *

Criminal law—Driving under influence—Discovery—Medical records—Investigative subpoena—Where hospital and emergency medical service records are directly related to DUI charge against defendant and ongoing criminal investigation, state has met burden to establish that records are likely to contain relevant information regarding charge—Fact that state has legal blood test results does not preclude it from gathering additional evidence—No merit to argument that accident report privilege bars state from obtaining EMS records—Health Insurance Portability and Accountability Act does not bar state from gathering evidence sought through lawful legal process—Motion to subpoena records is granted

STATE OF FLORIDA, v. MICHAEL PATRICK GIOIA, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division. Case No. 2020CT013432AMB, Division P. February 1, 2021. Sherri L. Collins, Judge.

ORDER GRANTING STATE'S MOTION FOR AUTHORIZATION TO EXECUTE INVESTIGATED SUBPOENA

THIS CAUSE having come before the Court upon the State's Motion for Reconsideration, which this Court granted[1] (D.E. 53); it is hereby

ORDERED AND ADJUDGED that the State's Motion for Authorization to Execute Investigative Subpoena (D.E. 28) is GRANTED.

The Defendant is charged with Driving Under the Influence. He was involved in a single-car accident on Florida's Turnpike. According to the probable cause affidavit (D.E.8), Florida Highway Patrol Trooper Cole Kuebler arrived on scene to find the Defendant inside a Palm Beach County Fire Rescue ambulance.[2] Trooper Kuebler met with EMS providers, who stated that the Defendant was found unconscious in the driver's seat of the crashed vehicle. The EMS provider also informed Trooper Kuebler that the Defendant was a possible overdose. The Defendant was then taken to Wellington Regional Hospital for medical treatment.

Trooper Kuebler met with the Defendant at the hospital. While speaking with the Defendant, Trooper Kuebler noticed that the Defendant was not sure what had happened and that he seemed confused. Additionally, a nurse notified Trooper Kuebler that the EMS providers administered "Narcan" to the Defendant prior to his arrival at the hospital. The Defendant eventually consented to a blood draw, the results of which indicated the presence of controlled substances.

The State seeks the Defendant's patient records from Palm Beach County Fire Rescue and Wellington Regional Hospital. The Defendant raised three primary objections. First, the Defendant asserted that because the State already obtained legal blood results, it was not entitled to the production of additional evidence—i.e., the hospital records—which may contain medical blood results. Second, the Defendant claimed that the State should be precluded from obtaining the Palm Beach County Fire Rescue patient reports because crash report investigations are not admissible into evidence under the Accident Reporting Privilege, Florida Statutes § 316.066(4). Finally, the Defendant argued the information contained in the fire rescue and hospital records are protected by the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d *et seq*. The Defendant's claims do not withstand scrutiny.

Initially, this Court finds that the State established a sufficient nexus between the ongoing criminal investigation and the records sought. *Hunter v. State*, 639 So. 2d 72, 74 (Fla. 5th DCA 1994). The fire rescue and hospital records in this case are "directly related to the incident which led to the charges against [the Defendant] and to the ongoing criminal investigation." *State v. Rivers*, 787 So. 2d 952, 953-54 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1512a]. While the Defendant has a right to privacy in his medical records, that "right to privacy may be overcome by the showing of a compelling state interest." *Id.* at 953. "Such an interest exists where there is a reasonable founded suspicion that the materials contain information relevant to an ongoing criminal investigation." *Id.* This Count finds that the State has met its burden in establishing that the fire rescue and hospital records are likely to contain relevant information regarding the charge against the defendant. "The concept of relevancy is broader in the discovery context than in the trial context." *McAlevy v. State*, 947 So. 2d 525, 530 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c].

Next, the fact that the State has legal blood as evidence does not preclude the State from obtaining additional evidence including but not limited to the hospital records, which may include additional lab results and other relevant information In *Rivers*, the defendant was charged with DUI causing serious bodily injury, and the State sought authorization from the trial court to execute an investigative subpoena for emergency room medical records and toxicology reports. 787 So. 2d at 953. The defendant opposed, arguing that discovery should be limited because the State already possessed legal blood evidence. *Id.* The trial court denied the State's motion, reasoning that since the State already had legal blood results discovery of the medical records was unnecessary. *Id.* The Second District Court of Appeal quashed the order denying the State's motion, remanded with directions to the trial court to enter an order authorizing the State's "subpoena to obtain the requested records and reports," and held that "[t]he fact that the State had other incriminating evidence against [a defendant] was not a proper basis to prevent execution and issuance of the investigative subpoena." *Id.* at 954; *see also State v. Rebholz*, 24 Fla. L. Weekly Supp. 213b (Fla 17th Cir. Ct. (App.) June 10, 2016) (applying *Rivers*). Under *Rivers*, the fact that the State has legal blood results does not preclude the State from gathering additional relevant evidence, such as hospital records related to the treatment the Defendant received as a result of his alleged criminal conduct. . The *Rivers* case is directly on point with the facts in the instant case and is binding on this Court.[3]

Additionally, Florida Statute Section 316.066(4) makes inadmissible at trial "any statement made . . . to a law enforcement officer for the purpose of completing a crash report[.]" On its face, the Accident Reporting Privilege relates to trial admissibility and applies only to statements made to law enforcement officers for the purpose of completing a traffic crash report. *State v. Cino*, 931 So. 2d 164, 167 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a] ("[S]ection 316.066(4) only prohibits the State from using as evidence at trial either the crash report or *statements made to law enforcement* during a traffic investigation by persons involved in the crash.") (emphasis original). This Court finds that the Accident Reporting Privilege does not bar the State from obtaining the fire rescue report. The issue of statements that would be barred for admission in evidence under the Accident Report Privilege is not yet ripe.

Finally, this Court finds that HIPAA does not bar the State from gathering of evidence in a criminal case when the evidence is sought through lawful legal process. *See* 45 CFR §§ 164.103, 164.512(f), and 164.512(f)(1)(ii)(C)(1); *see also Rivers*, 787 So. 2d at 953 (**"**The right to privacy may be overcome by the showing of a compelling state interest."). "HIPAA was passed to ensure an individual's right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings." *United States v. Zamora*, 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006).

Based on the forgoing, the Court GRANTS the State's Motion to subpoena the fire rescue report from Palm Beach County Fire Rescue and the patient records from Wellington Regional Hospital, including 1) any toxicology or lab reports indicating the presence of alcohol and/or the presence of chemical or controlled substances, 2) any records containing admissions by the Defendant as to the use of

alcohol and/or chemical or controlled substances consumption, 3) any records containing descriptions of the Defendant's physical appearance and/or his impaired physical/mental state, and 4) any reports from doctors or nurses who treated the Defendant.

[1]*State v. Jackson*, No. SC20-257, 2020 WL 6948842, *2 (Fla. Nov. 25, 2020) [45 Fla. L. Weekly S299b] ("[A] 'trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action[.]' ") (quoting *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998) [23 Fla. L. Weekly S625a]).

[2]A court may rely solely on the State's argument and the probable cause affidavit at a *Hunter* hearing. *McAlevy v. State*, 947 So. 2d 525, 529-30 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c].

[3]*Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("This Court has stated that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court. Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts.") (internal quotation marks, alterations, and citations omitted).

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Insurer is entitled to fee award where medical provider knew or should have known that there was no PIP coverage under New Hampshire policy, and its bills were paid at 100% of charged amount under medical payments coverage

PGA CHIROPRACTIC HEALTH CENTER, P.A., a/a/o Michael Peragine, Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019SC005085XXXXSB. January 15, 2021. Reginald R. Corlew, Judge. Counsel: Manshi Shah, Law Office of Jeffrey R. Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105, FLORIDA STATUTES

THIS CAUSE having come on to be heard on January 14, 2021, on Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, the Court having reviewed the aforementioned motion, the relevant legal authority, heard argument of Defense counsel as Plaintiff failed to appear, and been sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, is **GRANTED**.

2. On February 25, 2019, Plaintiff filed a complaint seeking Personal Injury Protection ("PIP") benefits for treatment rendered to assignor Michael Peragine.

3. On May 16, 2019, Defendant raised the affirmative defense "Defendant states the policy of insurance in this matter is a New Hampshire policy of insurance, and therefore, the policy of insurance does not include PIP coverage."

4. On June 3, 2019, Defendant served Plaintiff with Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, because Plaintiff filed a Complaint seeking PIP and there was no PIP coverage under the applicable New Hampshire policy.

5. Plaintiff failed to dismiss the instant suit, and on July 1, 2019, Defendant filed their Motion for Sanctions Pursuant to Section 57.105, Florida Statutes.

6. The Plaintiff knew or should have known that its claim was not supported by the material facts or then existing law because there was no PIP coverage under the applicable New Hampshire policy. As such, there was a complete absence of a justiciable issue of law or fact raised by the Plaintiff in this matter.

7. Additionally, the New Hampshire Policy did provide Medical Payments coverage, and Plaintiff's bills were paid at 100% of the charged amount pursuant to the Medical Payments coverage.

8. Defendant's Motion for Summary Judgment was set for November 12, 2020.

9. On November 11, 2020, the day before the hearing on Defendant's Motion for Summary Judgment, Plaintiff filed a Notice of Voluntary Dismissal with Prejudice.

10. "In general, when plaintiff voluntarily dismisses action, defendant is prevailing party for purpose of awarding attorney's fees." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (1990).

11. Therefore, this Court finds the Defendant is entitled to award of attorneys' fees under section 57.105, Florida Statutes.

12. The Court reserves jurisdiction to determine Defendant's amount of attorneys' fees.

* * *

Criminal law—Driving under influence—Objective entrapment—Officer's actions in deciding not to pursue DUI investigation of defendant whom he stopped for speeding, issuing speeding citation, and allowing defendant to drive away, and subsequently arresting defendant for DUI when fellow officer stopped defendant for speeding and failing to maintain single lane several minutes later did not constitute objective entrapment—Motion to dismiss is denied

STATE OF FLORIDA, Plaintiff, v. BRIAN WAYNE BURGESS, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Misdemeanor Division P. Case No. 50-2020-CT-007874-AXXX-SB. February 11, 2021. Sherri L. Collins, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Court upon the Defendant's Motion to Dismiss Based on Objective Entrapment, D.E. # 82, and having reviewed the State's Response, D.E. 116, and having taken evidence and heard argument; it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion is **DENIED**. The Court finds as follows:

1. The Court viewed Defense Exhibit #1 the in-car video where Officer Ngin Tuang of the Lantana Police Department stopped the Defendant for speeding 32 miles over the speed limit and failing to maintain a single lane. Upon running Defendant's license, he learned Defendant was on supervision that restricted him from consuming alcohol or controlled substances. Officer indicated that Defendant must either be "Signal 1" (driving impaired) or stupid but stated he was going to be lenient. Officer Tuang requested Defendant step to the rear of the vehicle and asked if he was drinking or doing any drugs. After Defendant replied he was not, Officer Tuang issued a speeding citation for only nine (9) miles over the limit instead of thirty-two (32) miles over the speed limit and released him.

2. The parties stipulate Defendant was stopped again for speeding and failing to maintain a single lane by Sgt. Troy Schaaf within 3 minutes. Sgt. Schaaf contacted Office Tuang to conduct a DUI investigation. The Defendant was subsequently arrested and charged with DUI.

3. The Defendant moved to dismiss claiming objective entrapment. The Defendant argued that Officer Tuang violated due process by allowing the Defendant to drive away after commenting about the Defendant being impaired or stupid and then arresting him for DUI minutes later. The Defendant claimed that this conduct was so outrageous that it offended any sense of justice. The Court disagrees.

4. Objective entrapment involves situation where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction[.]" *United States v. Russell*, 411 U.S. 423, 431-32 (1973). "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells v. United States*, 287 U.S. 435, 441 (1932). Objective entrapment only occurs "when the Government's deception actually implants the criminal design in the mind of the defendant." *Russell*,

411 U.S. at 436. "Objective entrapment seeks to bar prosecution in cases where "there is no crime at all without the government involvement." *State v. Finno*, 643 So. 2d 1166, 1169 (Fla. 4th DCA 1994).

5. This is not a case where law enforcement manufactured the crime, *see State v. Williams*, 623 So. 2d 462, 463 (Fla. 1993), or is it a case where the government induced the Defendant into committing a crime, *see Curry v. State*, 876 So. 2d 29, 31 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1262a]; *Madera v. State*, 943 So. 2d 960, 962 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3062b]. To be clear, even "creating nothing more than an opportunity to commit a crime is not prohibited." *State v. Laing*, 182 So. 3d 812, 817 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D93a].

6. The Court determines that under the totality of the circumstances, Office Tuang actions did not violate the Defendant's due process right by way of objective entrapment. For whatever reason, Officer Tuang decided not to pursue a DUI investigation during the initial stop. His decision to issue the Defendant a citation and allow him to leave is not "outrageous" conduct.

7. Moreover, even if Officer Tuang's conduct "offend[ed] decency or a sense of justice," *State v. Blanco*, 896 So.2d 900, 901 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D616a], and the Court finds it did not, Sgt. Schaaf's act of stopping the Defendant for speeding and failing to maintain a single lane was an "intervening circumstance that was sufficiently distinguishable from the prior police misconduct so as to dissipate the taint of that 'primary illegality.' " *Tercero v. State*, 963 So. 2d 878, 884 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1990a].

* * *

Attorneys—Sanctions—Bad faith conduct—Discovery—Non-compliance with court orders

CLAIMCAP, LLC., Plaintiff, v. SAFEPOINT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE17-011131 (49). January 24, 2020. Nina W. Di Pietro, Judge.

ORDER SANCTIONING BUTLER, WEIHMULLER, KATZ, CRAIG, LLP FOR BAD FAITH CONDUCT

THIS CAUSE having come on to be considered on January 14, 2020, regarding the Court's Order to Show Cause, the Court having reviewed the court file, having heard from all parties, and being otherwise advised in the Premises, the Court finds as follows:

On January 8, 2020, this Court issued an Order to Show Cause requiring Defendant's counsel to show cause why the Court should not find that Defendant, through its counsel, has engaged in bad faith conduct, and impose sanctions. On January 14, 2020, a hearing on the Order to Show Cause took place with Leo Manon III., Esq. present as counsel for Plaintiff and Christopher M. Ballard, Esq. present as counsel for Defendant. The Court, Mr. Manon, and Mr. Ballard undertook a lengthy and detailed discussion on the record regarding Defendant's counsel's conduct throughout the pendency of this matter. It should be noted that while Mr. Ballard was present in Court to handle the Show Cause proceeding, he is the eighth attorney from Butler, Weihmuller, Katz, Craig, LLP to appear for a hearing in this matter[1],[2].

Based upon the detailed factual findings describing the specific acts undertaken by Defendant's counsel throughout the pendency of this matter, all stated on the record at the January 14, 2020 hearing, the transcript[3] of which is hereby incorporated into this Order, the Court finds that Defendant's counsel has engaged in a pattern of bad faith conduct. As discussed more fully on the record, this conduct has prevented Plaintiff from completing discovery, required Plaintiff to seek court intervention, required the Court to enter orders compelling Defendant to comply with prior orders, and required the Court to reset hearings due to Defendant's full or partial non-compliance with court orders. This conduct has continued to occur in spite of the Court previously issuing sanctions against Defendant on November 7, 2019. *See* November 7, 2019 Order Granting in part Plaintiff's Amended Motion to Enforce Court Order and for Sanctions.

Additionally, the Court finds that while Mr. Ballard reviewed the court file, reviewed transcripts of prior hearings, reviewed prior court orders, and undertook steps to partially comply with the January 6, 2020 Order, that order was still not complied with in full (detailed below). Further, Mr. Ballard could not provide any explanation for that or for Defendant's counsel's other and prior non-compliances. Defendant could have sent one of the attorneys who handled the December 12, 2019 or January 6, 2020 hearings, and/or prepared an attorney who could adequately address the issues outlined in the Order to Show Cause. Instead, Defendant's counsel deliberately sent someone who was not given the necessary information to answer the Court's questions. This conduct exemplifies the exact bad faith pattern of behavior noted in the January 8, 2020 Order to Show Cause.

Finally, the Court finds that Defendant, to this day, has failed to fully comply with this Court's December 12, 2019 oral pronouncement, subsequent written order (Order on Plaintiff's Motion to Overrule Defendant's Objections in Deposition and Compel Deposition of Defendant's Corporate Representative and for Sanctions), and January 6, 2020 Order on Plaintiff's Motion to Overrule Objections in Deposition and Compel Deposition. Specifically, Defendant's December 20, 2019 Exhibit List and January 10, 2020 Amended Exhibit List are not in compliance with the requirement in paragraph 4(d) of the Court's January 29, 2019 Uniform Pretrial Deadline Order which states that each exhibit must be separately listed and described[4]. *See* January 29, 2019 Uniform Pretrial Deadline Order; *see also* Defendant's December 20, 2019 Exhibit List, exhibits 60 to 64 and Defendant's January 10, 2020 Amended Exhibit List, exhibits 60 to 64. The Court ordered Defendant to disclose its trial exhibits for the purpose of narrowing down what documents/information might still be subject to Defendant's work product privilege objections and what objections are waived. Defendant's ongoing non-compliance of the aforementioned Court orders has fully frustrated the Court's attempts to streamline the remaining discovery issues in this case. As a result, this matter is still in a position where it is premature to make rulings on the work product objections raised by Defendant's counsel at the deposition of Defendant's corporate representative.

Based upon the Court's inherent authority to impose sanctions against a party's attorney for bad faith conduct[5], and the Court's finding that Butler, Weihmuller, Katz, Craig, LLP has engaged in bad faith conduct, the Court hereby imposes sanctions in the following form. Defendant's counsel shall pay to Plaintiff (in an amount to be determined at an evidentiary hearing) for the following: 1. the time incurred by Plaintiff's counsel's to be present at the hearing on January 6, 2020; 2. the cost of the court reporter (if paid for by Plaintiff) for the January 6, 2020 hearing; 3. the time incurred by Plaintiff's counsel's to be present at the hearing on January 14, 2020; 4. the cost of the court reporter (if paid for by Plaintiff) for the January 14, 2020 hearing; 5. the time that has been or that will be incurred by Plaintiff's counsel to draft motions, prepare for hearings, and to be present for any further hearings related to continuing violations of this Court's December 12, 2019 oral pronouncement, subsequent written order, and January 6, 2020 Order; 6. the time incurred by Plaintiff's counsel's to be present at the continued deposition of Defendant's corporate representative; 7. the cost of the court reporter (if paid for by Plaintiff) for the continued deposition of Defendant's corporate representative.

Going forward, Defendant's counsel shall be accompanied at each hearing for this matter by at least one of the following persons: Defendant's corporate representative, Nichole Haupt, Defendant's

chief executive officer, Defendant's chief financial officer, Defendant's chief operating officer, Defendant's chief underwriting officer, Defendant's chief claims officer, or Defendant's chairman/chief investment principal. Defendant is hereby warned that any further bad faith conduct exhibited by Defendant or Defendant's counsel will result in the Court striking all of Defendant's defense and affirmative defenses, and entry of a Default against Defendant for this matter.

The continued deposition of Defendant's corporate representative shall be coordinated within 15 days of this Order to occur within 45 days of this Order. At that deposition, Defendant's corporate representative shall be prepared to answer all questions asked by Plaintiff's counsel, except as noted below. If Defendant's counsel raises a work product privilege based objection, Defendant's corporate representative shall proffer a *full and complete answer* to that question on the record in the absence of Plaintiff and Plaintiff's counsel, with that portion of the transcript to be sealed for an in camera review by the Court. If Defendant's counsel raises an objection based on the attorney-client privilege, Defendant's corporate representative is not required to answer the question. However, Plaintiff may attempt to rephrase the question to avoid soliciting legitimately privileged information. Defendant and/or its counsel shall be subject to sanctions, including, but not limited to, the striking of all defenses and affirmative defenses and entry of a Default, if the Court finds that any attorney-client privilege objection is made in bad faith.

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[1]The following attorneys from Butler, Weihmuller, Katz, Craig, LLP have previously appeared for hearings in this matter: Muhammed Mubarak, Esq. on March 29, 2018, Bryan Hohman, Esq. on November 5, 2018, Todd Sauer, Esq. on November 19, 2018, Anita Bittner, Esq. on May 14, 2019, Stephen Udagawa, Esq. on July 31, 2019, Erin Isdell, Esq. on December 12, 2019, and Nicholas Pazos, Esq. on January 6, 2020. The Court does not have notes as to who appeared for an October 2, 2019 hearing, the only other hearing date that has taken place for this matter.

[2]Therefore, while the Court has and will refer generally to "Defendant's counsel", the Court does not attribute Defendant's counsel's prior conduct to Mr. Ballard personally.

[3]At the conclusion of the hearing, upon inquiry by the court reporter, Mr. Ballard affirmatively requested a transcript of the proceeding.

[4]At the hearing on January 14, 2020, Mr. Manon raised additional issues with the exhibits sent to him by Defendant's counsel. Since the Court has not reviewed Defendant's exhibits or compared Defendant's exhibit lists with the actual exhibits disclosed, the Court reserves ruling as to whether there are additional non-compliances with this Court's December 12, 2019 oral pronouncement, subsequent written order, and January 6, 2020 Order.

[5]See *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002) [27 Fla. L. Weekly S357b].

* * *

Attorney's fees—Insurance—Expert witness—Insurer's motion to dispense with fee expert or preclude taxation of expert witness fee is denied—Medical provider is entitled to fees incurred responding to motion

ALLIANCE SPINE AND JOINT I, INC., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20007745, Division 61. January 28, 2021. Corey Cawthon, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. David Jacqueline Whittingham, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISPENSE WITH AND/OR WAIVE ATTORNEY FEE EXPERT OR IN THE ALTERNATIVE, MOTION TO PRECLUDE TAXATION OF ATTORNEY FEE EXPERT WITNESS FEE AND PLAINTIFF'S MOTION FOR ENTITLEMENT TO ADDITIONAL ATTORNEY'S FEES AND RELATED TO ADDRESSING DEFENDANT'S MOTION

This cause having come before the Court on Defendant's Motion to Dispense with and / or Waive Attorney Fee Expert or in the Alternative, Motion to Preclude Taxation of Attorney Fee Expert Witness Fee and *Plaintiff's Motion for Entitlement to Additional Attorney's Fees Related to Addressing Defendant's Motion,* the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED, as follows:

1. That Defendant's Motion to Dispense with and / or Waive Attorney Fee Expert or in the Alternative, Motion to Preclude Taxation of Attorney Fee Expert Witness Fee is hereby DENIED.

2. That Plaintiff's Motion for Entitlement to Additional Attorney's Fees Related to Addressing Defendant's Motion is GRANTED. The Court finds that the Defendant's motion contests Plaintiff's entitlement to costs that are allowed under Florida Law and this has needlessly forced the Plaintiff to expend time that they would otherwise not have been required to expend given the confession of judgment. As such the Plaintiff is entitled to the recovery of any reasonable time expended addressing Defendant's motion, preparing their motion, attending the hearing and preparing the instant order.

* * *

Insurance—Continuance—Parental leave—Insurer's in-house counsel's request for parental-leave continuance was timely under rule 2.570(a)(2) where motion was filed less than two weeks after it was made clear that trial court did not believe that appellate stay entered by circuit court remained in effect after appeal was transferred to district court—Counsel failed to establish good cause to grant a stay longer than the presumptive maximum length of three months where the only good cause argued was that insurer had awarded counsel five months' leave; it is very unlikely trial will be set before counsel is scheduled to return from leave; and three different law firms have filed appearances on behalf of insurer—Court rejects argument that counsel cannot be said to be "lead" counsel as required by rule 2.570(b)(1) because she has had no substantial participation in material matters of the case—As an officer of the court, counsel's statement that she is lead counsel is presumed true—Moreover, review of docket reveals counsel has been involved in almost every aspect of the case—Court finds no substantial prejudice to plaintiff in approving three-month stay

AUTO GLASS AMERICA, LLC, (a/a/o Terry Tennant), Plaintiff, v. ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-17635 COCE 53. February 28, 2021. Robert W. Lee, Judge. Counsel: Emilio Stillo, Tampa, for Plaintiff. Janine Menendez-Aponte, Miami; Geneva Fountain, Jacksonville; and Sally R. Culley, Orlando, for Defendant.

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR PARENTAL LEAVE CONTINUANCE

This cause came before the Court on February 26, 2021 for hearing of the Defendant's Motion for Parental-Leave Continuance, and the Court's having heard argument and reviewed the Motion, matters of record, and relevant legal authorities, the Court finds as follows:

Background. This case was filed on July 11, 2019. The Plaintiff did not seek a jury trial. On July 16, 2019, the Defendant Allstate was served, and on August 2, 2019, Allstate filed its Motion for Extension of Time to Respond to Complaint. The Motion was signed by in-house defense counsel Janine Menendez-Aponte. The Motion was granted by Agreed Order dated August 13, 2019 and was served on Ms. Menendez-Aponte the same date. At that date, Allstate had no other counsel of record.

On September 6, 2019, Allstate filed its Motion to Dismiss Complaint, Demand for Appraisal, and Motion for Protective Order Regarding Discovery, again signed by Ms. Menendez-Aponte. Thereafter, the case had little record activity until January 29, 2020, when the Court served an Order Setting Case Management Conference for February 14, 2020. At that point, Ms. Menendez-Aponte was still Allstate's sole counsel of record. The Court's Case Management Conference worked magic, triggering increased record activity.

On February 17, 2020, the Plaintiff set Allstate's Motion to Dismiss for hearing for March 6, 2020. Two day later, Allstate filed its Motion for Protective Order pertaining to discovery issues and a Notice of Objection to Subpoena seeking non-party production. Attorney Menendez-Aponte signed both filings.

On February 28, 2020, Allstate filed its extensive Amended Motion to Dismiss Complaint, Demand for Appraisal, etc., along with Notices of Filing Supplemental Authority and Exhibits (almost 200 pages total). Again, all were signed by Ms. Menendez-Aponte.

On March 2, 2020, for the first time, Allstate had a second law firm file a Notice of Appearance, but this time designated as "appellate counsel." Nevertheless, the firm of Boyd & Jenrette began to file through its own signature some documents pertaining to the trial level proceeding.

On March 6, 2020, the hearing on the Amended Motion to Dismiss went forward before the Honorable Dan Kanner because Judge Lee was unavailable for the hearing. Counsel from both of Allstate's firms of record appeared. However, Ms. Menendez-Aponte took the lead at the hearing. On April 24, 2020, Judge Kanner entered an Order denying the Defendant's Amended Motion to Dismiss, but granting a stay pending appraisal and allowing limited discovery on whether Allstate's appraiser was a disinterested appraiser.

On May 11, 2020, the Court set another Case Management Conference. In response, Allstate filed a Motion to Stay Pending Appeal, while the Plaintiff filed a Motion to Enforce Judge Kanner's order concerning discovery. The stay pending appeal was signed by Boyd & Jenrette, P.A. The Court heard the matters on June 4, 2020, with Boyd & Jenrette arguing on behalf of Allstate. The Court denied the Motion to Stay.

On June 12, 2020, the appellate court entered a stay. Nevertheless, on December 18, 2020, the appellate court denied Allstate's petition for writ of certiorari.

On December 30, 2020, the Court set a third Case Management Conference, as well as entering an Order Setting Pretrial Deadlines and an Order Referring Case the Mediation. The next day, Allstate filed a Motion for Rehearing in the appellate proceeding. As a result, the appellate case was transferred to the Fourth District Court of Appeal because of the change in the Circuit Court's appellate jurisdiction. (As of the date of this Order, the Motion for Rehearing remains unresolved, and Allstate still has not provided the discovery ordered by Judge Kanner.)

By filings made by the firm of Boyd & Jenrette, P.A., Allstate takes the position that the Circuit Court's stay remains in effect. This Court addressed this issue at the Case Management Conference, requesting that the parties get clarification from the Fourth DCA due to questions involving the midstream transfer of this case to the DCA. Allstate filed that Motion in the appellate court on February 1, 2021. (As of the date of this Order, almost four weeks later, no ruling has been issued on that Motion.)

Meanwhile, on February 6, 2021, the Plaintiff filed another Motion to Enforce Judge Kanner's order, as well as a Notice of Specifications for an Allstate corporate representative deposition. Three days later, Ms. Menendez-Aponte filed a Motion for Parental-Leave Continuance, stating that she will be out on parental leave from the beginning of February until July 2021. She states that she is lead trial counsel, and that Allstate will be substantially prejudiced if the matters involved in preparing for trial are not stayed. The matter was set for hearing for February 26, 2021.

At the hearing, another attorney appeared on behalf of Ms. Menendez- Aponte, along with Boyd & Jenrette counsel Geneva Fountain. Attorneys Emilio Stillo and Mac Phillips appeared on behalf of the Plaintiff. Mr. Phillips advised the Court that it objected to the stay for four reasons: (1) the motion for parental-leave stay was not "timely" as required by Rule 2.570(a) & (b)(2); (2) the motion seeks a five-month stay, beyond the "presumptive maximum length" of a parental-leave stay as specified in Rule 2.570(c); (3) there has been no substantial participation by Ms. Menendez-Aponte on the main issue in this case and therefore she cannot be "lead" counsel under Rule 2.570(b)(1); and (4) the Plaintiff would be substantially prejudiced by the stay. Ms. Dolan advised the Court that a five-month stay was being sought because that is the length of stay provided by Allstate, Ms. Menendez-Aponte's employer.

Conclusions of Law. In this case, the appellate court ruling against Allstate's position was issued on December 18, 2020. Clearly, Ms. Menendez-Aponte was aware of her upcoming leave, but she did not seek a parental-leave stay until February 9, 2021, almost eight weeks later. Allstate's position is that it believed the case was still stayed pending resolution of the motion for rehearing in the appellate case, and it was moving forward with that understanding, so there was no need for Ms. Menendez-Aponte to seek a parental-leave stay if the trial-level case was stayed for another reason. Indeed, it wasn't until the case management conference of January 28, 2021 that this Court made it clear that it did not believe the appellate stay was still in effect. Upon that announcement, Ms. Menendez-Aponte filed her Motion less than two weeks later. The Court therefore concludes that Ms. Menendez-Aponte's request was timely under Rule 2.570(a)(2) that requires the attorney to move "within a reasonable time after the [. . .] setting of the specific proceeding(s) or the scheduling of the matter(s) for which the continuance is sought."

Next, the Court considers the length of stay sought. Under Rule 2.570(b), "[t]hree months is the presumptive maximum length of a parental-leave continuance absent a showing of good cause that a longer time is appropriate." Here, the only "good cause" argued at the hearing is that Allstate awarded Ms. Menendez-Aponte five months leave. Without more, this Court concludes that this is insufficient to meet the "good cause" requirement. Additionally, the Court notes that it is very unlikely that the trial setting will be before July 2021, when Ms. Menendez-Aponte is scheduled to return to Allstate. Moreover, three different law firms have now filed Notices of Appearance on behalf of Allstate in this case.[1]

The Plaintiff next argues that Ms. Menendez-Aponte has had no substantial participation in the material matters in the case, and as a result, she cannot be said to be "lead" counsel as required by Rule 2.570(b)(1). However, Ms. Menendez-Aponte stated that she is lead trial counsel on this case, and as an officer of the court, her statement, in the Court's view, raises a presumption that this is true. Moreover, a review of the docket indicates that Ms. Menendez-Aponte has been involved in every aspect of this case, except that the firm of Boyd & Jenrette, P.A. took lead on the issues involving the appeal. It makes sense that she would want to be involved in the preparation and supervision of matters involving the upcoming trial, even if she does not directly handle them herself.[2]

Finally, the Court looks at the issue of substantial prejudice to the Plaintiff pursuant to Rule 2.570(e)(1). True, the appraisal process itself has come to a standstill doe to Allstate's actions. The Plaintiff asserts that it propounded discovery over a year ago, without any production from Allstate to date. And now that the case is on a trial track, Plaintiff risks being unable to adequately prepare for trial if the case is stayed further. While this may be true if Allstate were objecting to any delay in the trial, Allstate has made no such objection. Moreover, in light of the fact that the Court is approving only a three-month stay, the Court finds no substantial prejudice to the Plaintiff. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Parental-Leave Continuance is GRANTED IN PART as follows. The Defendant has not made a good cause showing for a stay longer than

the presumptive maximum length of three months. This case is accordingly stayed through April 30, 2021. All deadlines in the Uniform Pretrial Order, except for mediation, shall begin to run on May 1, 2021. The mediator in this case is hereby directed to reschedule the mediation for a date during the month of May 2021.

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[1]The third firm, Rumberger, Kirk & Caldwell, P.A., entered its appearance on February 22, 2021.

[2]Although the Rule does not define "lead counsel," that phrase has been defined in other contexts to include a team leader. *See Amendments to Rules Regulating Fla. Bar*, 11 So.3d 343, 345 (Fla. 2009) [34 Fla. L. Weekly S369a].

* * *

Insurance—Homeowners—Coverage—Exclusions—Policy exclusion for loss caused by constant and repeated seepage or leakage of water does not exclude from coverage homeowners' mold damage where damage falls within exception to exclusion applicable when homeowner is unaware of seepage or leakage and resulting damage is hidden—No merit to argument that damage was not hidden because laboratory tests detected invisible mold spores outside of walls

DRY SOLUTION EXPRESS, CORP., a/a/o Eric Brown, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE-19-008656. January 26, 2021. Phoebee R. Francois, Judge. Counsel: Maria F. Diaz, Diaz Legal Consulting, Sunrise, for Plaintiff. Justin Schwerling, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S SECOND AND FIFTH AFFIRMATIVE DEFENSES

THIS CAUSE having come to be heard before the Court on the above motion on November 3, 2020 before Honorable Phoebee Francois, and this Court having considered the record, the arguments of counsel and being otherwise advised in the Premises is hereby:

ORDERED AND ADJUDGED

Plaintiff's Motion is hereby GRANTED.

Per Defendant's Second and Fifth Affirmative Defenses the insured's mold damage was excluded from coverage under its policy. Defendant sustains that the loss was caused by regular exposure to water, and not from a one-time event, falling within its "Constant or Repeated Seepage or Leakage of Water" exclusions. However, an exception to these exclusions is carved out when:

> a. The insureds are unaware of both the source of the constant or repeated seepage or leakage, and the resulting damage; and
>
> b. The resulting damage is hidden within the walls of the property.

Plaintiff conclusively proved that the insured was unaware of any leaks (other than the one that gave rise to this claim), that the mold damage in the insured's home was not visible, and that the insured was unaware of such damage before the claim investigation. As such, it is undisputed that the Plaintiff satisfied the first prong of the exception.

Nonetheless, Defendant disputes Plaintiff's satisfaction of the second prong, namely, whether the damage was "hidden". Defendant's argument is that since the mold test samples used by the laboratory to confirm the presence of mold could be taken without accessing the inside of the walls, the mold damage was not completely "hidden". In other words, since ***invisible*** mold spores were found outside the walls, Defendant argues that at least a small part of the damage was not hidden within the living room walls.

After a review of the definitions of the word "hidden", this Court finds no ambiguity in the aforementioned policy provisions and holds that pursuant to the plain language of such provisions, mold damage on the insured's home was in fact hidden.

According to Florida law, "the construction of an insurance policy is a question of law for the court. . . ." *Liebel v. Nationwide Ins. Co.,* 22 So. 3d 111, 114-15 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2032a]; *see also Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a]. Such construction must "begin with the guiding principle that insurance contracts are construed in accordance with 'the plain language of the policy as bargained for by the parties.' " *Fayad v. Clarendon Nat. Ins. Co.,* 899 So. 2d 1082, 1086 (Fla. 2005) [30 Fla. L. Weekly S203a]. And "if a policy provision is clear and unambiguous, it should be enforced according to its terms. . . ." *Garcia v. Federal Ins. Co.,* 969 So. 2d 288, 291 (Fla. 2008) [32 Fla. L. Weekly S657a]. To the contrary, "if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous." *Fayad,* 899 So. 2d at 1086. However, " '[a] true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner.' " *BKD Twenty-One Mgmt. Co. v. Delsordo,* 127 So. 3d 527, 530 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2541c] (citations omitted). "[C]ontractual language is ambiguous only if it is susceptible to more than one reasonable interpretation." *Id.* And "where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *Id.* Also, while "[a]mbiguous coverage provisions are construed strictly against the insurer . . . and liberally in favor of the insured . . ambiguous exclusionary clauses are construed even more strictly against the insurer than coverage clauses." *Id.; Union American Ins. Co. v. Maynard,* 752 So. 2d 1266, 1268 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D648a].

"When determining the meaning and scope of an exclusion clause or other provisions of an insurance policy, legal niceties, technical terms, and phraseology extracted from the vernacular of the insurance industry should never transcend the common understanding of the ordinary person. Therefore, the proper inquiry is not whether a legal scholar can, with learned deliberation, comprehend the meaning of an insurance policy provision, but instead, whether it is understandable to a layperson." *Hrynkiw v. Allstate Floridian Ins. Co.,* 844 So. 2d 739, 741-42 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1146e]. Lastly, when interpreting policy provisions, the "[w]ords and phrases in an insurance policy, when not specifically defined therein, 'must be given their everyday meaning and read in light of the skill and experience of ordinary people.' " *Siegle v. Progressive Consumers Ins. Co.,* 788 So. 2d 355, 359-60 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1506a] (citations omitted). And "[i]n construing words in insurance policies, it is appropriate for courts to turn to legal and non-legal dictionaries for common meanings."

The word "hidden" is defined as:

> a. "*Being out of sight or not readily apparent; concealed*." Merrian Webster Dictionary, *available at,* https://www.merriam-webster.com.
>
> b. "*[N]ot easy to find*."
>
> Cambridge Dictionary, *available at,* https://dictionary.cambridge.org/us.

Since mold damage in the insured's property was out of sigh, not readily apparent, concealed within the walls, and not easy to find (as a lab analysis was needed to confirm its presence), we find that such mold damage falls within the pure definition of the term "hidden" as intended under the policy.

In addition, it is worth noting that even if this Court would have found Defendant's creative interpretation of the term "hidden" —to exclude out of sight damage from which invisible evidence can be found in the open— to be reasonable, this term would have been considered ambiguous, at best. In that case, Summary Judgment for the Plaintiff would still have been proper, as any ambiguity on the policy must be construed strictly against the insurer that drafted the policy and liberally in favor of the insured. *Fayad,* 899 So. 2d at 1086. This would be especially true when it comes to exclusionary clauses,

which must be construed even more strictly than coverage clauses. *Id.*

As such, Plaintiff tendered sufficient evidence to support its Motion for Summary Judgment as to Defendant's Second and Fifth Affirmative Defenses.

Therefore, even if the mold damage would have been caused by a regular exposure to water, the exclusions invoked by Defendant in its Second and Fifth Affirmative Defenses would not exclude the subject loss from coverage, as the circumstances of this loss fall within the exception to such exclusionary clauses.

* * *

Insurance—Personal injury protection—Standing—Assignment—Where insured executed assignment in favor of physician who shared registered agent with and operated out of same location as plaintiff medical provider, but insured did not execute assignment in favor of provider, provider has no standing to bring suit against insurer—Section 57.105 attorney's fees are awarded to insurer

ATLAS MEDICAL AND ORTHOPEDICS, LLC, a/a/o Sheraine Cousleys, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE-17-011917 (83), Civil Division. September 25, 2019. Ellen Feld, Judge. Counsel: Narcy Fajardo-Sanchez, Progressive PIP House Counsel, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR ENTITLEMENT FOR ATTORNEY'S FEES PURSUANT TO FLA. STAT. 57.105 AND MOTION TO TAX COSTS

THIS CAUSE having come before the Court upon Defendant's Motion for Attorney's Fees Pursuant to Fla. Stat. 57.105 and to Tax Costs and argument having been heard by this Court on September 19, 2019, having been fully advised in the premises, the Court finds as follows:

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff filed its Complaint on May 24, 2017 alleging a dispute over Personal Injury Protection ("PIP") benefits. Plaintiff filed suit based on a cause of action pursuant to Florida's Motor Vehicle No-Fault Law for medical services provided because of a motor vehicle accident. The Complaint alleges that the insured "equitably assigned to Plaintiff and/or also executed a written assignment of benefits, assigning to Plaintiff certain benefits payable pursuant to the policy of insurance issue by Defendant." *See* Plaintiffs Complaint, ¶12.

A copy of an assignment of benefits was not attached to the Plaintiff's pre-suit demand letter, their Complaint and the Defendant has at no time received an assignment of benefits between the assignor, Sheraine Cousleys, (hereinafter referred to as Cousleys), and the Plaintiff, Atlas Medical and Orthopedics LLC, (hereinafter referred to as Atlas).

Defendant served a 57.105 Motion for Sanctions on July 18, 2017, asking for the suit to be dismissed as Plaintiff lacked standing. The 57.105 Motion, along with a Motion to Dismiss for Lack of Standing were filed with the Court on August 16, 2017. On July 19, 2018, the Court executed an Order requiring Plaintiff to file the Assignment of Benefits giving it standing. On August 8, 2018, Plaintiff filed a Notice of Filing Assignment of Benefits between the insured and Dr. Rahat Faderani, DO, MPH, PA., (hereinafter referred to as Faderani). On August 10, 2018, Defendant filed a Renewed Motion to Dismiss and served a second 57.105 Motion for Sanctions. The second motion to dismiss was set for hearing March 28, 2018. On March 28, 2018, this Court granted Defendant's motion dismissing Plaintiff's suit for lack of standing. Plaintiff argued that Faderani and Atlas shared a registered agent and operated out of the same location. The assignment between Faderani and Cousleys does not cure the fact that there was no assignment between the Plaintiff and Cousleys.

CONCLUSIONS OF LAW

Standing as a matter of law is required in order for Plaintiff to bring and maintain suit. *See* Fla. R. Civ. P. 1.210 (a). "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v. Morton,* 405 U.S. 727, 731-32 (1972). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the United States Constitution]." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citing decision omitted). Proving standing is "an indispensable part of the plaintiffs case," and the burden of proving standing rests with the plaintiff. *Id.* Standing must exist at the time the lawsuit was filed. *Macaline Dadaille v. Allstate Indemnity Co.,* 7 Fla. L. Weekly Supp. 343a (2000), *citing Marion Correctional Inst. v. Kriegel,* 522 So. 2d 1354 (Fla. 1988).

Plaintiff lacks standing to file or maintain this lawsuit because no assignment of benefits between the assignor, Sheraine Cousleys and the Plaintiff, Atlas exists. Plaintiff's failure to provide an assignment between the insured and the Plaintiff is fatal to its claim. "To demonstrate standing to file a PIP suit on behalf of an insured, a medical provider must provide a written assignment of benefits that is executed after the relevant date of loss. . ." *Central Palm Beach Physicians & Urgent Care, Inc. D/B/A ala/o Allan Campo v. Progressive Select Insurance Company,* 24 Fla, L. Weekly Supp. 726a (2016). In the case at bar the Plaintiff never provided a written assignment between Cousleys and Atlas, not with their demand letter and not attached to the complaint.

In *Progressive Express Insurance Company v. McGrath Community Chiropractic, f/k/a Naples Community Chiropractic*, 913 So. 2d 1281 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D2622b], the Court held that the assignment of benefits is the basis of the claimant's standing to invoke the process of the court. Standing must exist pre-suit and Plaintiff's attempt to acquire standing by filing an assignment of benefits between Faderani and Cousleys does not cure the fact that Atlas and Cousleys did not have an executed assignment.

Thus, the assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place. *Livingston v. State Farm Mut. Auto. Ins. Co.,* 774 So.2d 716, 718(Fla. 2d DCA 2000) [25 Fla. L. Weekly D533c]. If the insured has assigned benefits to a medical provider, as they did in this case to Faderani, a different medical provider, Atlas has no standing to bring an action against the insurer.

57.105 SANCTIONS

In the case at bar the Plaintiff failed to prove that it had standing by providing an executed assignment of benefits at any time supporting the Defendant's position that the Plaintiff did not have standing. The Defendant did not know that the Plaintiff had standing at any time. If the Plaintiff knew it had standing and did not timely inform the Defendant of that fact, especially during the safe harbor period, the Defense is entitled to its fees and costs. The Court in *Insurance Corporation of New York v. M & J Health Center, Inc.,* 13 Fla. L. Weekly Supp. 682a (2006) stated, "The language of Fla. Stat. 57.105 is mandatory: "*shall* award fees."(emphasis added)." The Court further noted as in the case at bar, "M & J could have dismissed the case during the safe harbor and avoided fees. It failed to do so." Here, the Plaintiff had almost two years to show it had standing and it could have dismissed the case and avoided fees during the safe harbor period.

It is therefore **ORDERED AND ADJUDGED:**

Defendant's Motion for Entitlement to Reasonable Fees and Costs is **GRANTED** pursuant to Fla. Stat. 57.105. The Court reserves jurisdiction to determine the amount of reasonable fees and costs.

* * *

Attorney's fees—Amount—Hours expended—Hourly fee—Reasonableness—Costs—County court action seeking less than $3,000 arising from defendant's failure to pay balance on a residential door installation contract—Plaintiff seeking 117.4 hours at an hourly rate of $300—42.3 hours of trial preparation is too much time to prepare for a non-jury trial involving such a small amount in dispute—Plaintiff should have been able to litigate case in a lot less time with a lot less effort—Court declines to make reduction against counsels' time for duplicative charges where close view of billing record shows that both of plaintiff's counsel billed for discrete work and events—Although court has no doubt that high fee sought by plaintiff's counsel is, in part, the result of the overzealous response of defendant, plaintiff also filed case on several alternative grounds which it later abandoned—Plaintiff's time records are adequate overall to support fee award, particularly when supplemented by testimony at fee hearing—Court finds 91 hours at an hourly rate of $250 to be reasonable—Unknown charge is not awardable—Fedex charge not awardable as it was not required by the court—Background reports on defendant and his expert were unnecessary, and nothing was brought out at trial that indicated such reports were of any value to conduct of trial—Cost of color printing exhibits and interpreter fee for defendant's deposition were reasonably necessary and are therefore taxable—Cost for expedited transcript of the first day of trial was not reasonably necessary to prosecute case—Plaintiff's expert witness fee of almost $5,000 was not necessary—At best, an employee with experience installing doors for plaintiff could have been called to rebut defendant's unavailing claim of poor workmanship—Court finds $500 to be a reasonable expert's fee

FOUR BLR DOORS CORP., Plaintiff, v. HUMBERTO FORERO and AMANDA ALVAREZ FORERO, Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 20-003415 COCE 53. March 16, 2021. Robert W. Lee, Judge. Counsel: Nabila Torres and Hugo Garcia, Doral, for Plaintiff. Scott J. Kalish, Boca Raton, for Defendants.

FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

THIS CAUSE came before the Court on March 11, 2021 for hearing of the Plaintiff's Motion for Attorneys' Fees and Costs, and the Court's having reviewed the Motion and entire Court file; received evidence; heard argument; and been sufficiently advised in the premises, the Court finds as follows:

Background. This case involved the failure to pay a $2,700.00 balance on a residential door installation contract. It mushroomed into something far more than that—to paraphrase the saying, seldom has the Court seen so much work done for so little in dispute. On November 21, 2020, this Court entered its Final Judgment for Plaintiff, reserving on the issue of whether the Plaintiff is entitled to an award of fees. On December 8, 2020, the Plaintiff timely filed its Motion for Attorney's Fees and Costs. The next day, the Court entered its Order on Plaintiff's Motion, directing that the Plaintiff serve a breakdown of the fees sought by time, description and hourly rate. On December 23, 2020, the Plaintiff complied. Thereafter, on January 6, 2021, this Court entered its Order Preliminary to Hearing on Motion for Attorney's Fees and Costs, directing that the Defendant serve and file any specific written objections to Plaintiff's time entries. The Defendant served its response on February 6, 2021.

The Plaintiff is seeking 117.4 hours at an hourly rate of $300.00, and 0.2 hours at an hourly rate of $200.00. In her Notice of Filing, and later at the hearing, the Defendant's expert advised the Court that she believed a reasonable fee would be 25 hours at $150.00 per hour. At the hearing, defense counsel conceded an hourly rate of $200.00.

The Court set the matter for hearing for March 11, 2021. At the hearing both sides appeared with their expert witnesses, Addison Meyers, Esq. for the Plaintiff and Linda Knoerr, Esq. for the Defendant. Mr. Meyers gave the opinion that he believed the entire amount sought by Plaintiff's counsel was reasonable, focusing on an overall view of the case. Ms. Knoerr, on the other hand, gave a detailed explanation as to why she believed the case was, in essence, overlawyered. The Court has also considered the detailed written submissions of both parties, the arguments of the attorneys, and the controlling case law. In addition, the Court is quite familiar with and conducted its own thorough review of all matters of record in this case. This Court has presided over thousands of civil cases, and is quite familiar with the issues involving the pleadings, discovery, strategy, motion practice and resolution related to breach of contract cases litigated in South Florida.

Conclusions of Law. The Court has determined that the number of hours reasonably expended by Plaintiff's counsel in this case is a total of 91.0 hours: 73.7 hours for Ms. Torres; and 17.3 for Mr.Garcia.

The Court has also determined based upon Disciplinary Rule 4-1.5(b) of the Florida Bar Rules of Professional Responsibility that a reasonable hourly rate for the hours expended by Plaintiff's counsel is $250.00. The Court has considered all testimony presented on this issue, including Defendant and its expert.

In making its ruling, the Court specifically considered the following factors in determining the reasonable hourly fee and the reasonable number of hours spent litigating this case:

A. The time and labor required, the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly.

B. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

C. The fee customarily charged in the locality for similar legal services.

D. The amount involved and the results obtained.

E. The time limitations imposed by the client or by the circumstances.

F. The nature and length of the professional relationship with the client.

G. The experience, reputation, and ability of the lawyers performing the services.

H. Whether the fee is fixed or contingent.

Additionally, based on controlling case law dealing with the issue of awarding of attorney's fees, the Court notes several guidelines to assist in determining whether a fee is reasonable:

• The Court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue. *Trumbull Ins. Co. v. Wolentarski*, 2 So.3d 1050, 1056-57 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D274a]; *Baratta v. Valley Oak Homeowners' Ass'n*, 928 So.2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c]. In the instant case, the evidence revealed that Plaintiff's counsel was "over-thorough" in research and preparation, taking what should have been a basic breach of contract case and aggressively litigating the dispute. For instance, Ms. Torres billed 25.4 hours for trial preparation, while Mr. Garcia billed 16.9 hours, for a total of 42.3 hours. Simply put, this is too much time to prepare for a non-jury trial involving such a small amount in dispute. The Court acknowledges that this case was aggressively defended on the defense of poor worksmanship, so more than a few hours of trial preparation is warranted, but Plaintiff's counsel took it far beyond what was reasonable. Accordingly, the Court is deducting 8.4 hours for Ms. Torres's time and 6.9 hours from Mr. Garcia's time.

• As a general rule, duplicative time charged by multiple attorneys working on the case is usually not compensable. *Baratta*, 928 So.2d at 499. While it may appear that some of Plaintiff's counsel's time is duplicative, a close view of the billing records indicate that both of Plaintiff's counsel billed for discrete work and events. As a result, the Court declines to make a reduction against Plaintiff's counsel's time for this reason.

• The Court should also consider the amount of fees sought in relation to the amount in dispute. *See Progressive Express Ins. Co. v. Schultz*, 948 So.2d 1027, 1032-33 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b]. In determining whether the fee sought in this case is reasonable, the Court has therefore considered that this is a County Court case seeking less than $3,000 in damages. Related to other factors present in this case, the Court notes that Plaintiff should have been able to litigate this case in a lot less time and with a lot less effort. The Court has accordingly made an appropriate reduction against the time sought.

• The Court should consider the nature of the defense, particularly whether the non-moving party went "to the mat" in the case. *See Progressive*, 948 So.2d at 1032. If the non-moving party took positions and actions to be litigious, it cannot now be heard to complain that it "invited the moving party to dance." *See Roco Tobacco Co. v. Div. of Alcoholic Beverages*, 934 So.2d 479, 482 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1826b]. Although this case involved a seemingly small amount of damages in relation to the fee sought, the Court notes that the Defendant raised the defense of failure to install the doors in a workmanlike manner. This defense also served as the basis of the Defendant's counterclaim. Both the defense and counterclaim failed. Additionally, Defendants were aggressive in the manner in which they responded to this case, and the Court has no doubt concluding the high fee sought by Plaintiff's counsel is in part as a result of the overzealous response of Defendant. However, the Plaintiff's filed the case on several alternative grounds, which it later abandoned. As a result, the Court is reducing Ms. Torres's time by 9.1 hours and Mr. Garcia's time by 2.0 hours.

• The Court should further consider whether it has received adequate documentation to support the number of hours claimed. As stated by the Florida Supreme Court, "inadequate documentation may result in a reduction in the number of hours claimed." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985). This is true because "Florida courts have emphasized the importance of keeping accurate and current time records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id.* The Court finds Plaintiff's although the time records appear to be barebones in some instances, they are overall adequate to support the Court's fee award, particularly when supplemented by testimony at the fee hearing.

The ultimate goal of all the guidelines set forth above is to determine whether a fee is "reasonable." The Court therefore finds that 91.0 hours for is reasonable, at an hourly rate of $250.00 is reasonable.

In sum, the Court finds that the time awarded in this case was reasonable based on the conduct of the Defendant in denying the claim for damages; the aggressive manner in which this particular case was defended; the amount of time the attorney needed to bring this case to a conclusion; the amount recovered; and the specific factors discussed in *Rowe*, *Bell*, and Rule of Professional Responsibility 4.1-5.

Unlike an award of attorney's fees, the amount of costs awarded is usually not subject to much dispute. Not so in this case. The Plaintiff is seeking an award of costs that far exceeds the amount of dispute. The total amount sought is $9,324.09. Some of this is certainly taxable—filing fee, summonses, service of process, mediation, and court reporter's attendance at hearings and trial. Of the total amount sought, however, the amount of $7,272.66, is questionable.

The Statewide Uniform Guidelines for Taxation of Costs in Civil Cases are prefaced with the following purpose and application: "The taxation of costs is within the broad discretion of the trial court. The trial court should exercise that discretion in a manner that is consistent with the policy of reducing the overall costs of litigation and of keeping such costs as low as justice will permit." Further, costs are to be taxed if the moving party shows that the costs was "reasonably necessary [. . .] to prosecute the case at the time the action [. . .] was taken." Keeping this in mind, the Court considers the Plaintiff's request for the costs of background reports on both the Defendant and the defense expert; an interpreter's fee for the Defendant's deposition; color printing of exhibits used at trial; overnight delivery charges; a transcript of the first day of trial; and Plaintiff's expert's fee. There is also a charge for $35.89 the purpose of which has been redacted.

The Court further considers the amount in dispute—an amount that normally falls within the small claims rules, but because of a cause of action that was alleged and ultimately abandoned fell within the rules of civil procedure. There was simply no need for the extensive costs incurred in this case. First, the unknown charge of $35.89 is not awardable. The Court declines to award the $21.51 Fedex charge, as it simply was not required by the Court, but rather done as a convenience for the Plaintiff. Further, for this type of dispute, there was simply no need to obtain background reports on the Defendant and his expert ($150.00), and certainly nothing was brought out at trial that indicated that these reports were of any value to the conduct of the trial. *See* Uniform Guideline III(C). The Court, however, believes the costs for color printing of the exhibits ($146.63) and the interpreter fee for the Defendant's deposition ($280.00) were reasonably necessary and are therefore taxable.

The takes us to the two largest costs: $1,688.63 for an expedited transcript and $4,950.00 for the Plaintiff's expert fee. The Court concludes that obtaining a transcript of the first day of trial—particularly one involving such a small amount in dispute—was simply not reasonably necessary to prosecute the case. Therefore, the Court declines to tax this cost. Moving on to the expert fee, the Court notes that this "expert" was in fact the qualifying contractor for the Plaintiff and had so been for the past 18 years. He actually reviewed the plans for the installation of the door at dispute in this case. He was more in the nature of a fact witness than an expert witness. Moreover, based on the testimony elicited from the expert, it is clear he is paid routinely for his work with the Plaintiff, so much so that the Court concluded he was the Plaintiff's employee.

While it is true that a "reasonable fee for [an expert's] trial testimony" should be taxed, this is assuming that the moving party established that the cost was "reasonably necessary." *See also Winter Park Imports, Inc. v. JM Family Enterprises, Inc.*, 77 So.3d 227, 232 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D24a]; *South Pointe Family & Children Centers, Inc. v. First Nat'l Bank of Chicago*, 783 So.2d 327, 329 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1025b]; *Starita v. West Putnam Post Number 10164*, 666 So.2d 278, 278-79 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1943a]. The Court concludes that "expert" work amounting to almost $5,000.00 was simply not necessary for this case. At best, any employee with experience installing these doors for the Plaintiff could have been called to rebut the Defendant's unavailing claim of poor workmanship—particularly in what was in essence a small claims action. Therefore, based on the testimony elicited from the expert, the nature of the case, and the Court's experience with literally hundreds of cases involving expert testimony, the Court finds $500.00 to be a reasonable expert's fee. Therefore, the Court taxes costs in the total amount of $2,978.06. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff shall recover the sum of **$22,750.00** (the reasonable attorney fee for the law firm that represented the Plaintiff, FOUR BLR DOORS CORP.) from the

Defendant, HUMBERTO FORERO and AMANDA ALVAREZ FORERO, plus interest thereon at 5.37% per annum from November 21, 2020 to the date of this Judgment (*Clay v. Prudential*, 617 So.2d 443 (Fla. 4th DCA, 1993)), in the amount of **$391.60, for a total of $23,141.60**, that shall bear interest at the rate of 4.81% per annum until paid, for which sums let execution issue. It is also

ORDERED AND ADJUDGED that Plaintiff shall recover its costs in the amount of **$2,978.06**, which shall bear interest at the rate of 4.81% per annum until paid, for which sum let execution issue.

* * *