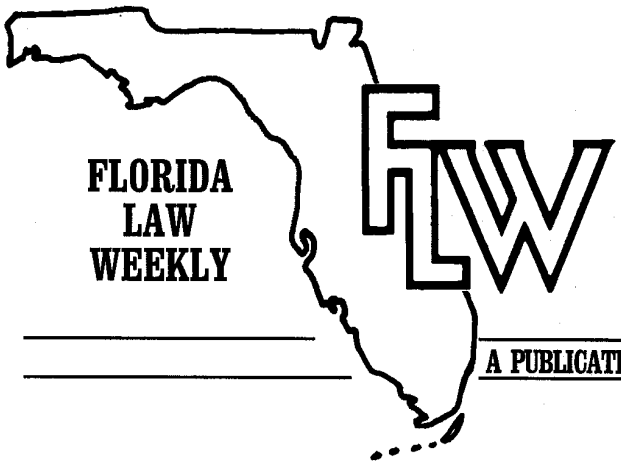
Volume 28, Number 2, June 30, 2020



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 95-175

Reports of Decisions of:

THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—PERSONAL INJURY PROTECTION—COVERAGE—MEDICAL EXPENSES—STATUTORY FEE SCHEDULES. A county court judge certified the following question as one of great public importance: "When a PIP insurer has elected the Medicare fee schedule limitation permitted by Florida Statute §627.736(5)(a)1, which provides that the insurer may limit reimbursement to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B," and the "allowable amount" under the fee schedule is not specified in a general amount but instead must be determined on an individualized basis, is the PIP insurer entitled to limit the reimbursement to 80 percent of the workers' compensation fee schedule?"** *GOOD HEALTH MEDICAL REHAB, INC. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed May 6, 2020. Full Text at County Courts Section, page 165a.*

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Bold denotes decision by circuit court in its appellate capacity.

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LIMITED PARTNERSHIPS

RECEIVERSHIP

TORTS

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* * *

TABLE OF CASES REPORTED

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* * *

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* * *

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TABLE OF CASES TREATED (continued)

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to urine test—Officer had probable cause to request that licensee submit to urine test where breath test results showing blood alcohol level of less than half the legal limit were inconsistent with the level of impairment observed by officer—Competent substantial evidence supports finding that licensee refused urine test where licensee requested lawyer before taking test and again after being read implied consent warning—Hearing officer—Departure from neutrality—No merit to argument that licensee was not afforded right to hearing with appearance of impartiality because departmental training allegedly evidences bias in favor of law enforcement and department and against drivers

VICTOR ENGLAND, JR., Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2018-AP-106, Division AP-A. February 18, 2020. Petition for Writ of Certiorari from the decision of the State Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins, Susan Z. Cohen and John N. Kessenich, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) This cause is before this Court on Petitioner, Victor England Jr.'s Petition for Writ of Certiorari filed on October 8, 2018. The Petition raises three arguments for review: (1) Whether or not the Department's order failed to comply with the essential requirements of the law and failed to afford due process when the hearing officer determined there was competent, substantial evidence to demonstrate Trooper Healy had reasonable cause to request a urine test from Petitioner; (2) Whether or not the Department failed to comply with the essential requirements of the law and failed to afford Petitioner due process when the hearing officer held there was competent, substantial evidence of a refusal to take a urine test; and (3) Whether or not the Department failed to comply with the essential requirements of the law and failed to afford Petitioner his due process right to a hearing with the appearance of impartiality.

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

(1)

In his first argument, regarding Trooper Healy's request for a urine test, Petitioner contends that while there were indicators of possible impairment associated with alcohol, there was no evidence to show Petitioner was impaired by a chemical or controlled substance, and therefore, Trooper Healy did not have reasonable cause to request a urine test.

In a formal review hearing of a license suspension for refusal to submit to a breath, blood, or urine test, a hearing officer's scope of review is limited to:

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

§ 322.2615(7)(b), Fla. Stat. (2018).

The record shows Trooper Healy observed Petitioner's vehicle weave across the lane markers, drive through a safety zone, cross the center lane marker and drive in both east-bound lanes, turn abruptly or illegally, and turn with a wide radius. Upon approaching Petitioner, who was the driver of the vehicle, Trooper Healy observed he had an odor of alcoholic beverage coming from his breath, a flushed face, and bloodshot watery eyes. The report indicates Petitioner was "Slow to Respond to Officer/Officer Must Repeat." Petitioner admitted he had been drinking. When exiting the vehicle, Petitioner was unsteady on his feet and swayed. Petitioner also showed positive for impairment on all of the field sobriety checks. Petitioner agreed to take a breath test and blew .039 on both tests.

Petitioner's breath test results were less than half the legal limit, which was inconsistent with the level of impairment observed by Trooper Healy. As argued by the Department, this is not a case in which the behavior observed could be explained away as the behavior of a person who had been drinking but not in excess of the legal limit. *See, e.g., Kennedy v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 1110a (Fla. 4th Cir. Aug. 2, 2012); *Bolduc v. Dep't of Highway Safety and Motor Vehicles,* 6 Fla. L. Weekly Supp. 62a (Fla. 9th Cir. Oct. 2, 1998); *Costello v. Dep't of Highway Safety and Motor Vehicles,* 5 Fla. L. Weekly Supp. 349b (Fla. 7th Cir. Dec. 10, 1997). As such, the hearing officer's finding that Trooper Healy had probable cause to request Petitioner to submit to a urine test was supported by competent, substantial evidence. Petitioner's claim is denied.

(2)

In his second argument, pertaining to Petitioner's refusal to take a urine test, Petitioner contends the only evidence present in the case shows that when Petitioner was asked to take a urine test, he requested a lawyer, and Trooper Healy improperly counted the request for a lawyer as a refusal.

The record before the hearing officer showed Trooper Healy asked Petitioner if he would take a urine test at the jail and he agreed, at the jail Petitioner advised he wanted to talk to his lawyer before the urine test, and Petitioner was read the implied consent warning and stated he still wanted to talk to his lawyer.

In *Lavin v. Dep't of Highway Safety and Motor Vehicles,* the petitioner had ignored the deputy's request for a breath test and made a request for his attorney. 16 Fla. L. Weekly Supp. 605a (Fla. 6th Cir. May 15, 2009). The court recognized, "[t]o hold that such conduct does not amount to a refusal would be to destroy the effectiveness of the statute in question" and "[a]nyone faced with a request for a breath test could simply avoid a direct answer to the request and thereby

escape the consequences of his or her failure to take the breath test." *Id*.

Petitioner requested a lawyer before taking the urine test, and then again after being read the implied consent warning. This is not a case where a single request for a lawyer was deemed a refusal. There was competent, substantial evidence to support the hearing officer's finding that Petitioner refused to take a urine test, and therefore, Petitioner's claim for relief is denied.

(3)

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

(4)

On June 10, 2019, Petitioner filed a "Motion for Oral Argument," requesting oral argument on the instant Petition. Since this Court finds Petitioner is not entitled to certiorari relief, Petitioner's request for oral argument is moot.

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

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of arrest—Actual physical control of vehicle—Crash report as a whole, including statements made for purposes of completing report, are admissible in administrative license suspension review hearing—Even if statements made for purposes of completing crash report were not exempted from accident report privilege, where officer observed licensee standing next to driver s' side door of crashed vehicle on street where licensee does not live and using side of vehicle to keep himself from falling over, there was competent substantial evidence to support hearing officer's conclusion that arresting officer had probable cause to believe that licensee was driving or in actual physical control of vehicle while under influence—Breath test—No merit to argument that breath test operator was not properly certified—Hearing officer—Departure from neutrality—No merit to argument that licensee was not afforded right to hearing with appearance of impartiality because departmental training allegedly evidences bias in favor of law enforcement and department and against drivers

HAGIOS DE WET, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2018-AP-102, Division AP-A. February 18, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins, and Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) This cause is before this Court on Petitioner Hagios DeWet's Petition for Writ of Certiorari, filed on September 19, 2018. The Petition raises three arguments for review: (1) Whether or not the Department's order departed from the essential requirements of the law when it found there was competent, substantial evidence Petitioner was driving or in actual physical control of a motor vehicle while impaired; (2) Whether or not the Department's order was supported by competent, substantial evidence and complied with the essential requirements of the law when the hearing officer found Sergeant Potter properly certified; and (3) Whether or not the Department failed to comply with the essential requirements of the law and failed to afford Petitioner his due process right to a hearing with the appearance of impartiality.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. Based upon this standard, this Court finds that Petitioner is not entitled to relief.

(1)

Petitioner's first argument pertains to application of section 316.066, Florida Statutes, commonly referred to as the "accident report privilege."

Section 316.066, provides in part:

> Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal.

§ 316.066(4), Fla. Stat. (2014).

Section 322.2615, which governs the suspension of an individual's driver's license and the right to review of such suspension, creates an exception to the accident report privilege. It provides, "[n]otwithstanding s. 316.066(4), the crash report shall be considered by the hearing officer." § 322.2615(2)(b), Fla. Stat. (2014).

In a formal review hearing of a license suspension for driving with an unlawful blood- or breath-alcohol level, a hearing officer's scope of review is limited to:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7), Fla. Stat. (2014).

"[P]robable cause sufficient to justify an arrest exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.' " *Dep't of Highway Safety and Motor Vehicles v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a] (citations omitted). The Second District Court of Appeal recognized that "probable cause is a conclusion often drawn from 'reasonable

inferences.' " *Dep't of Highway Safety and Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a](quoting *Favino*, 667 So. 2d at 309). The circuit court in *Silva* found there was no competent, substantial evidence to support the hearing officer's finding that Mr. Silva was driving or in actual physical control of a motor vehicle in violation of section 316.193, Florida Statutes, and reinstated Mr. Silva's driving privilege. *Id*. at 553. On second-tier review, the appellate court quashed the circuit court's order and found "the facts and circumstances surrounding the incident would lead a reasonable man to believe that Silva was driving the motorcycle found lying on the road shoulder next to him." *Id*.

In the instant case, Petitioner acknowledges the exception in section 322.2615, Florida Statutes, which permits a hearing officer to consider the crash report, but contends section 322.2615, by its plain language, does not create an exemption for the statements made for the purpose of completing the crash report. Prior decisions of this circuit, and other circuits, have found section 322.2615 creates an exemption for the crash report as a whole, including statements made for purposes of completing the crash report. See *Smith v. Dep't of Highway Safety and Motor Vehicles*, 23 Fla. L. Weekly Supp. 663a (Fla. 4th Cir. Jan. 15, 2016); *Tackett v. Dep't of Highway Safety and Motor Vehicles,* 22 Fla. L. Weekly Supp. 174a (Fla. 4th Cir. Sept. 10, 2014); *see also Horne v. Dep't of Highway Safety and Motor Vehicles,* 15 Fla. L. Weekly Supp. 442a (Fla. 13th Cir. March 20, 2008). While the Court finds those opinions persuasive, even assuming that section 322.2615 did not exempt statements made for purposes of completing the crash report and section 316.066(4) was applicable, other information in the record existed for the hearing officer to consider.

The record shows that Officer Carlson responded to a single vehicle crash at the intersection of 1st Street and Bowles Street in Neptune Beach. The vehicle crashed into a large tree in the front yard of 1414 1st Street. This is not the Petitioner's home address, or the street on which Petitioner lives. When Officer Carlson arrived on the scene of the crash, Petitioner was standing next to the driver side door and was using the side of the vehicle to keep himself from falling over.

Even excluding the statements made by Petitioner for purposes of completing the crash report, the record contains competent, substantial evidence to support the hearing officer's conclusion that Officer Carlson had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances. As in *Silva*, the circumstances surrounding the accident and Officer Carlson's observations, detailed above, provided sufficient probable cause for the officer to believe Petitioner was driving the vehicle involved in the crash. Accordingly, Petitioner's claim for relief is denied.

(2)

Petitioner's second argument, regarding improper delegation, has been rejected by the Fourth Circuit. *See Koenig v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 67a (Fla. 4th Cir. March 6, 2018); *Gantt v. State*, 27 Fla. L. Weekly Supp. 495a (Fla. 4th Cir. Feb. 9, 2018); *Hurst v. State,* 45-2016-AP-000006-APAY (Fla. 4th Cir. Feb. 9, 2018).[1] This Court finds the reasoning of those opinions persuasive, and again rejects Petitioner's argument.

(3)

Petitioner's third argument regarding the right to a hearing with the appearance of impartiality has also been rejected by the Fourth Circuit. *See e.g., Meadows v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 699a (Fla. 4th. Cir. Sept. 27, 2018); *Edward Baker Eman v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-AP-000056-XXXX, (Fla. 4th Cir. May 22, 2017); *Spear v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-CA000579-XXXX (Fla. 4th Cir. June 15, 2017); *Bruschi v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-AP-000065-XXXX (Fla. 4th Cir. Oct. 5, 2017). This Court finds persuasive the reasoning in those opinions and denies Petitioner's claim for relief in Ground Three.

(4)

On November 30, 2018, 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.)

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[1]Petitioner acknowledges these opinions, which were pending review in the First District Court of Appeal at the time his Petition was filed. The First DCA has since denied certiorari in both cases.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Welfare check—Officer who received anonymous 911 call regarding female being attacked by four males in vehicle conducted lawful welfare check when he approached vehicle matching description after observing the vehicle make a U-turn, pull into parking lot of closed building in middle of the night, and stop

ANISSA BASULTO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000032-AP-88B. UCN Case No. 522019AP000032XXXXCI. March 16, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

(LINDA R. ALLAN, J.) Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles ("DHSMV") sustaining the suspension of her driving privilege pursuant to § 322.2615, Florida Statutes. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

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

> On February 24, 2019, Officer Santana was dispatched in reference to an anonymous 911 call regarding a female being attacked by four males. A description of the vehicle was given. Officer Santana observed the described vehicle make a U-turn, pull into the parking lot of Pinch A Penny and park. Officer Santana pulled into the parking lot and stopped the vehicle. Officer Santana made contact with the Petitioner to check on her welfare, observed signs of impairment and requested further investigation.
>
> Officer Hastings arrived at the stop and made contact with the Petitioner. Officer Hastings observed the Petitioner's eyes to be bloodshot and watery, her speech was slurred and she had the odor of an alcoholic beverage coming from her breath. The Petitioner was leaning on her vehicle for support, staggered heavily as she walked and swayed while speaking with Officer Hastings.
>
> The Petitioner performed Field Sobriety Tests poorly. Based on the totality of the circumstances, the Petitioner was arrested for DUI. The Petitioner submitted to a breath test. The results were .169g/210L and .165g/210L.

Based on Petitioner's breath samples, her license was suspended. After a hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

"[U]pon first-tier certiorari review of an administrative decision,

the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dept of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a].

Discussion

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] (internal citations omitted). "The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Dept. of Highway Safety & Motor Vehicles,* 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a]. An officer may conduct an initial stop based on reasonable suspicion if the officer has "a legitimate concern for the safety of the motoring public." *Dept. of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). Such concern "can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Id.* Florida law supports an officer's ability to conduct a welfare check on the occupants of a stopped or parked vehicle at an unusual time or place. *See, e.g., Dermio v. State,* 112 So. 3d 551, 555-56 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a] (finding the initial encounter to be a lawful welfare check where the car was parked in the parking lot of a local bar around 3:30 in the morning with the motor running and the lights on).

Here, Petitioner does not challenge whether there existed competent, substantial evidence to support the Hearing Officer's factual findings, but instead argues that the facts do not establish a lawful basis for the initial encounter with the Petitioner. Specifically, Petitioner asserts that the Hearing Officer departed from the essential requirements of law by "determin[ing] the traffic stop was lawful on the basis of an anonymous tip." However, the Hearing Officer actually determined that the stop was a lawful welfare check. The facts establish that Officer Santana approached Petitioner to check on her welfare because of an anonymous call regarding a female being attacked by four males. In addition, Officer Santana did not pull over Petitioner; instead, Officer Santana approached the car after it pulled into a Pinch A Penny at 1:00am and parked. Accordingly, Officer Santana properly conducted a welfare check based on the details provided in the anonymous tip and Petitioner's action of parking at a closed business in the middle of the night.

Conclusion

Because the Hearing Officer did not depart from the essential requirements of law, it is **ORDERED AND ADJUDGED** that Petition for Writ of Certiorari is **DENIED**. (PAMELA A.M. CAMPBELL, LINDA R. ALLAN, and AMY M. WILLIAMS, JJ.)

* * *

Insurance—Personal injury protection—Attorney's fees—Trial court's application of contingency fee multiplier of 2.0 was supported by competent substantial evidence—Appellate fees awarded pursuant to section 57.105

OCEAN HARBOR CASUALTY INSURANCE CO., Appellant, v. MEDICAL SPECIALISTS OF TAMPA BAY, L.L.C., d/b/a GULF COAST INJURY CENTER, a/a/o Alonzo Guzman-Giron and Antonia Gomez, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2014-AP-0005-WS. L.T. Case No. 2010-CC-1145-WS. UCN Case No. 512014AP00005APAXWS. November 9, 2015. On appeal from County Court, Paul Firmani, Judge. Counsel: Douglas H. Stein and Stephanie Martinez, for Appellant. Lawrence H. Liebling and Arthur Liebling, for Appellee.

[Lower court order published at FLWSUPP 2801GUZM.]

ORDER AND OPINION

The Court finds no error with the trial court's application of a 2.0 contingency fee multiplier to the Appellee's award of attorney's fees. The order of the trial court is affirmed and Appellee's Motion for Appellate Attorney's Fees is granted.

STATEMENT OF THE CASE AND FACTS

Appellant was the defendant below in an action by Appellee for failure to pay personal injury protection benefits for treatment rendered as the result of an automobile accident. The trial court granted summary judgment in favor of Appellee. Appellant appealed the final order to this Court, which previously reversed in part, affirmed in part and remanded the cause to the trial court. On remand, Appellant confessed judgment by paying the claim, and did not contest Appellee's entitlement to attorney's fees. The trial court found Appellee entitled to compensation for 100.6 hours expended at the trial and appellate level as reasonable and necessary, and found a rate of $350.00 per hour was reasonable, resulting in a lodestar of $35,210.00. The trial court applied a 2.0 multiplier and awarded a total fee amount of $70,420.00, finding the relevant market required a contingency fee multiplier in order for the plaintiff to obtain representation in this case, and that it was unlikely plaintiff's attorneys or any other attorney would have accepted the case without the potential for a multiplier. Appellant challenges the trial court's application of a multiplier, alleging Appellee failed to demonstrate the relevant market required a multiplier.

STANDARD OF REVIEW

This Court's "standard of review with respect to the application of a multiplier is one of abuse of discretion." *USAA Cas. Ins.* Co. *v. Prime Care Chiropractic Enters., P.A.*, 93 So. 3d 345, 347 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1107a]; *Discovery Experimental & Dev., Inc. v. Dep't of Health,* 824 So. 2d 195, 196 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1395a]. "The application of a contingency risk multiplier must be reversed if it is not supported by competent, substantial evidence." *USAA Cas. Ins. Co.*, 93 So. 3d at 347.

LAW AND ANALYSIS

Appellant claims it was error to apply a contingency fee multiplier in this case because Appellee failed to present competent, substantial evidence that Appellee had any difficulty obtaining representation in the matter before the trial court, and therefore there was no basis for a finding that the relevant market required a multiplier in order for Appellee to obtain competent counsel.

At trial, Appellee's general manager testified that part of his duties include retaining attorneys on Appellee's behalf to prosecute PIP claims, and testified that Lawrence and Arthur Liebling, Appellee's attorney's in this matter, had been hired by Appellee in the past to prosecute PIP cases. The general manager testified that he did not contact any other attorneys prior to contacting Liebling & Liebling to request representation in this matter due to the difficulty of the case. The general manager testified Arthur Liebling was the first attorney he contacted regarding this matter, and that he accepted the case. The general manager testified that Appellee had a preexisting agreement with the attorney's handling Appellee's PIP cases, including Mr. Liebling, and that the understanding was that the attorneys accepted the cases only on a contingent fee basis with the possibility of a multiplier. The general manager testified that this was the agreement in place when Arthur Liebling agreed to accept this case, and that Appellee could not afford to hire an attorney in this matter without this agreement.

Arthur Liebling testified that he agreed to accept the case because Appellee had been one of his largest clients. Mr. Liebling testified he would not have accepted the benefits exhausted case on a contingent fee basis without the possibility of a multiplier, although this was not

discussed when he accepted the case. Lawrence Liebling also testified that he would not have accepted the case without the possibility of a multiplier. Appellee's expert testified that a 2.0 to 2.5 multiplier was applicable in this case, because a competent lawyer would not take a benefits exhausted case on a contingent fee basis without the possibility of a multiplier.

A trial court should only apply a contingency risk multiplier after consideration of the following factors:

> (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 *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla.1985), are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.

USAA Cas. Ins. Co., 93 So. 3d at 347 (citing *Standard Guar. Ins. Co. v. Quanstrom,* 555 So. 2d 828, 834 (Fla. 1990)). Before a court may adjust for any risk assumption, the evidence must support the court's finding "that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Sun Bank of Ocala,* 564 So. 2d at 1079. When "there is no evidence that the relevant market required a contingency fee multiplier to obtain competent counsel, then a multiplier should not be awarded." *USAA Cas. Ins. Co.*, 93 So. 3d at 347. *See Progressive Exp. Ins. Co. v. Schultz,* 948 So. 2d 1027, 1030 (Fla. 5th DCA 2007) [31 Fla. L. Weekly D2610a].

Appellant's expert witness testified that Appellee had no difficulty in obtaining representation in this case, based on the testimony that Arthur Liebling, the first attorney Appellee contacted regarding the matter, accepted the case. Appellant contends this is dispositive of the issue of whether the relevant market required a multiplier. The testimony was that Appellee's counsel was the first attorney contacted about the case, who accepted the case based on the long-standing attorney-client relationship. Appellant maintains the absence of difficulty in obtaining representation meant a multiplier could not be applied.

Appellee has four clinics and around 3,000 patients, out of which around 700 per year are PIP patients. Around 2010, when Appellant denied Appellee's claim, Appellee was receiving hundreds of PIP denials or reductions each month. Due to the number of cases, Appellee had an arrangement with certain PIP attorneys who were employed on a contingent fee basis with the possibility of a multiplier if awarded by the court. Appellee's manager testified this arrangement was necessary due to the difficulty in pursuing these numerous claims, and that Appellee could not afford to pay attorneys hourly rates for the large number of claims seeking small amounts of damages, and without this arrangement Appellee could not afford to prosecute the claims.

Appellant's argument is that Appellee's failure to testify as to any difficulty in obtaining counsel to pursue this case demonstrates the market did not require a multiplier and that there is not competent substantial evidence to support the trial court's finding to the contrary. Appellant contends that testimony by Appellee's expert witness and the testimony of Appellee's attorneys are not sufficient to prove the market required a multiplier in this case, because expert testimony as to opinion cannot constitute proof of the facts necessary to support the expert's conclusion. *See Miller v. First American Bank and Trust,* 607 So. 2d 483, 485 (Fla. 4th DCA 1992).

Appellee responds that the record contains competent, substantial evidence to support the application of the multiplier in this case. "The competent substantial evidence standard defers to the trial court's judgment because the trial court is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses." *Savage v. State,* 120 So. 3d 619, 622 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1858a]. The question as to what the relevant market requires is one of fact. The trial court in this case issued a detailed opinion addressing each of the factors necessary to demonstrate a multiplier is appropriate. *See Quanstrom,* 555 So. 2d at 834.

Appellee cites the trial court's findings in this case that Appellee, "as a matter of sound business practice and economic necessity, was unable to pay competent attorneys on an hourly basis to pursue collection of hundreds of relatively small dollar amount PIP claims," and it would have been "extremely difficult, if not impossible," for Appellee to obtain competent representation in this matter on a contingency fee basis without the possibility of a multiplier. The record contains competent substantial evidence in the form of testimony from Appellee's general manager and Appellee's expert witness that the relevant market required a multiplier in this case in order for Appellee to obtain counsel to prosecute the underlying claim. The *Schultz* case relied on by Appellant is distinguishable in that neither the plaintiff nor plaintiff's agent testified on plaintiff's behalf in that case, and there was no evidence to support a finding that the relevant market required a multiplier. *See* 948 So. 2d at 1029. The evidence in this case supports the trial court's findings.

ATTORNEY'S FEES

Appellee filed a Motion for Sanctions and Attorney's Fees pursuant to § 57.105, Fla. Stat. and Fla. R. App. P. 9.410. Appellee contends the appeal is frivolous and seeks fees and costs as a sanction against Appellant because the appeal is without merit. *See JPMorgan Chase Bank, N.A. v. Hernandez,* 99 So. 3d 508, 513 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1328d]. Appellee cites to Appellant's attempts to characterize the standard of review in this case as de novo, which is not the standard by which this Court reviews an award of attorney's fees that employs a multiplier. *See Bd. of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa v. Parker,* 113 So. 3d 64, 69-70 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D757a]. Appellee maintains Appellant improperly seeks to retry the factual determination of the relevant market requirement factor in this Court, by asking the Court to reweigh the evidence and substitute its judgment for that of the trial court. *See Swanigan v. Dobbs House,* 442 So. 2d 1026, 1027 (Fla. 1st DCA 1983).

We find the arguments advanced on appeal to be without merit and Appellee's Motion for Attorney's Fees well-taken. Appellant's assertion that the evidence does not support the finding as to the relevant market requirement is contradicted by the record. The Motion for Appellate Attorney's Fees is granted, with the matter remanded to the trial court for a determination of reasonable appellate attorney's fees to be assessed equally against Appellant and appellate counsel pursuant to § 57.105, Fla. Stat.

CONCLUSION

The trial court's application of a 2.0 multiplier to the award of attorney's fees in this matter is supported by competent, substantial evidence. The order of the trial court is hereby AFFIRMED. Appellee's Motion for Appellate Attorney's Fees is hereby GRANTED and the cause is remanded to the trial court for a determination of reasonable appellate attorney's fees.

It is FURTHER ORDERED AND ADJUDGED that the order of the trial court is hereby AFFIRMED.

It is FURTHER ORDERED that Appellee's Motion for Attorney's Fees is GRANTED. The cause is remanded to the trial court for a determination of reasonable appellate attorney's fees.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop and arrest—Officer who observed that licensee's vehicle windows appeared to be tinted darker than permitted by law and that licensee failed to dim his high beam headlights when within 500 feet of oncoming traffic had probable cause for traffic stop—Where licensee had odor of alcohol and difficulty producing license and performed poorly on field sobriety exercises, there was probable cause for his arrest

RAY ADAM NELOMS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2018 31788 CICI, Division 32. January 29, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ORFINGER, Judge.) THIS CAUSE came before the Court on Petitioner, RAY ADAM NELOMS', Petition for Writ of Certiorari. The Court, having reviewed the Petition and Exhibits attached thereto, the Response, and being fully advised in the premises, finds as follows:

Statement of the Facts

On September 1, 2018, Petitioner RAY ADAM NELOMS was arrested for driving under the influence (DUI). His driver's license was administratively suspended for six months by Respondent STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("DHSMV"). Thereafter, Petitioner requested a formal review hearing of his license suspension pursuant to Fla. Stat. § 322.2615. The hearing was held on September 25, 2018, before DHSMV Field Hearing Officer Ann Marie Totten.

The following documents were presented and reviewed at the hearing: (1) DDL-1: DUI Uniform Traffic Citation AOZB5XP (Notice of Suspension); (2) DDL-2: Photocopy of Petitioner's Florida Driver's License; (3) DDL-3: Probable Cause Charging Affidavit-Volusia County; (4) DDL-4: Narrative/Supplement Report submitted by Officer Richard Rubin; (5) Narrative/Supplement Report submitted by Officer Ryan Smith; (6) DDL-6 Breath Alcohol Affidavit; (7) DDL-7: Agency Inspection Report-Intoxilyzer 80001156; (8) DDL-8: Vehicle/Tow Report; (9) DDL-9: Property Report; and Driver's Exhibit 1: Charging Affidavit pertaining to Tony J. Walden (Petitioner's brother) Case #180800364-Arrest Date 08/19/2018. *See* Petition, Exhibit C at 2.

The only issues to be determined at Petitioner's hearing, as in all administrative hearings reviewing similar license suspensions, were (1) whether law enforcement officers had probable cause to believe that Petitioner was driving or in control of a motor vehicle while under the influence of alcohol or drugs, and (2) if so, whether Petitioner had a breath or blood alcohol level above the legal limit of 0.08 pursuant to Fla. Stat. § 316.193.

On October 3, 2018, the Hearing Officer entered a written order upholding the suspension of Petitioner's driver's license. The Hearing Officer found that:

> [T]he following facts are supported by a preponderance of the evidence: On September 1, 2018 at approximately 10:45 p.m. Officer Jonathan Raihala of the Ormond Beach Police Department was requested to assist Officer Smith on a traffic stop. When Officer Raihala arrived at 262 Military Boulevard, he was advised by Officer Smith the details of the stop. Officer Smith observed a white Cadillac (FL tag HBIN44), traveling northbound on South Nova Road in the 400 block. The driver failed to dim his high beams as he continued traveling as Officer Smith was traveling southbound. The officer also observed the vehicle had a dark tint to the windows. The defendant continued traveling on South Nova Road, turned onto Woodlands Boulevard and left onto Military Boulevard stopping in the driveway of 262 Military Boulevard. Officer Smith conducted a traffic stop, made contact with the driver who was identified as Ray Adam Neloms.
>
> Officer Raihala approached the vehicle and requested Mr. Neloms exit. He complied almost falling over as he was exiting the vehicle. Officer Raihala immediately smelled an odor of an alcoholic beverage coming from his breath and person, his eyes were bloodshot and watery and his speech was slurred. Officer Raihala requested Mr. Neloms participate in Field Sobriety Exercises. Mr. Neloms agreed and performed poorly. Mr. Neloms was placed under arrest for driving under the influence and transported to Ormond Beach Police Station. Officer Rubin requested Mr. Neloms submit to a breath test and conducted a twenty-minute observation. Mr. Neloms provided two valid breath samples with the results of .185g/210L and .186g/210L.
>
> Mr. Neloms received two warning citations for failing to dim his lights and illegal tint. Based on the foregoing, I find that Mr. Neloms was lawfully placed under arrest for driving under the influence. Mr. Neloms' driving privilege was suspended for six months for driving with an unlawful breath alcohol level.

Petition, Exhibit C at 2-3.

The Hearing Officer concluded that the law enforcement officer had probable cause to believe that Petitioner was driving or in control of a motor vehicle while under the influence, and that Petitioner had a breath-alcohol level higher than 0.08. *Id.* at 4. The Hearing Officer determined that all elements necessary to sustain suspension of Petitioner's driver's license were satisfied and supported by a preponderance of the evidence. The suspension of Petitioner's driver's license was therefore affirmed. *Id.*

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

Standard of Review

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

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

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

The third factor requires the Court to determine whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957) (defining "competent substantial evidence"). Of critical significance to this case, the Court in its review is not entitled to reweigh the evidence or substitute its judgment for the findings of the DHSMV Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm*

Beach Zoning Bd. of Appeals, 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [Petitioner's] driver's license should have been suspended").

Because Petitioner does not challenge the first two factors, *i.e.* whether he was afforded due process and whether the Hearing Officer applied the correct law, the only issue before this Court is whether the Hearing Officer's findings were supported by competent substantial evidence.

Legal Analysis

The only argument Petitioner advances in this Court is that "[t]he facts in this case is [sic] simply not true." Petition at 2. According to Petitioner, this Court's task is to determine: "(a) [w]ho made the traffic stop; (b) [d]id Officer SMITH make a true report; and (c) [d]id officers profile [the] car." *Id.*[1] Petitioner misapprehends the Court's role in these proceedings. Contrary to Petitioner's apparent belief, the Court is explicitly prohibited from considering the truth or falsity of the Hearing Officer's factual findings. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs,* 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a].

The Court's review on a petition for certiorari is strictly limited to determination of whether the Hearing Officer's decision is lawful, not whether it is right or wrong. *Id.* To that end, and to satisfy the third factor in its review of the Hearing Officer's decision, the Court need only determine whether the factual findings and judgment are supported by substantial competent evidence. Once this Court finds evidence in the record that supports the Hearing Officer's conclusion, the inquiry is concluded. *Id.* Any contradicting evidence is outside this Court's scope of inquiry and may not be considered on certiorari review. *Id.* Stated differently, the Hearing Officer is responsible for resolving conflicts in the evidence and determining what evidence is more credible. Even in the face of conflicting evidence, the Hearing Officer's decision will be upheld so long as there is competent substantial evidence to support that decision.

As stated above, the only matters to be determined at the administrative hearing were (1) whether the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic or chemical substances; and (2) whether Petitioner had an unlawful breath or blood alcohol level. Fla. Stat. § 322.2615(7)(a). Notably, Petitioner does not raise any argument as to the Hearing Officer's factual findings or conclusions of law on either of those issues.

Petitioner's DUI arrest was lawful. Officer Smith's report evidences that he had probable cause to stop Petitioner. "Probable cause" is established if " 'the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.' " *Dept. of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (quoting *Dept. of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. lst DCA 1997) [22 Fla. L. Weekly D161a]).

Officer Smith's report states that he was in his patrol car and was stopped at a red traffic light waiting to make a left turn when he noticed Petitioner's vehicle. He noted that the car's windows appeared to be a tint darker than permitted by Fla. Stat. § 316.2953, and that Petitioner failed to dim his high beam lights while within 500 feet of oncoming traffic, in violation of Fla. Stat. § 316.238(1)(a). *See* Petition, Exhibit A. Officer Smith's suspicion of the existence of either of these violations provided sufficient support for the traffic stop.

After Officer Smith made several attempts to stop Petitioner's vehicle, Petitioner finally stopped his car. Officer Smith states that when he was able to make contact with Petitioner, Officer Smith "could smell the odor of consumed alcohol radiating from the vehicle." *Id.* Officer Smith also observed that Petitioner had considerable difficulty producing his driver's license, fumbling through and dropping multiple cards before providing the requested license. Officer Raihala responded to the scene and conducted Field Sobriety Exercises. Based on Petitioner's performance on the tests, Petitioner was placed under arrest for DUI. *Id.*

This Court finds that the documentary evidence presented at the administrative hearing constitutes competent substantial evidence and supports the Hearing Officer's factual findings and judgment affirming Petitioner's driver's license suspension.

Accordingly, it is hereby

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

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[1]DHSMV's Response goes well beyond the scope of the minimal argument raised by the Petitioner.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Hearing officer did not depart from essential requirements of law by relying on offense report to determine that there was probable cause for licensee's arrest—Technical defects in report did not render it a nullity where report substantially complied with requirements of statute—No merit to argument that officer's lack of reference to having observed any odor of alcohol prior to licensee's arrest precludes finding of probable cause for arrest where officer did observe multiple other indicia of impairment

FREDERICK JOSEPH BRIAN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-005935-O. March 27, 2020. Petition for Writ of Certiorari from the Florida Department of Highway Safety and Motor Vehicles. Counsel: Matthew P. Ferry, Lindsey & Ferry, P.A., for Petitioner. Mark L. Mason, Assistant General Counsel, Florida DHSMV, for Respondent.

(Before ALVARO, WILSON, MUNYON, JJ.)

(**PER CURIAM**.) Frederick Brian ("Petitioner") seeks certiorari review of a Final Order entered by the Department of Highway Safety and Motor Vehicles ("Department") sustaining his driver license suspension for driving with an unlawful blood-alcohol level. We have jurisdiction and dispense with oral argument. *See* § 26.012(1), Fla. Stat. (2019); Fla. R. App. P. 9.030(c)(3). For the reasons discussed herein, we deny the instant Petition.

BACKGROUND

Following the Petitioner's arrest for driving under the influence, he requested a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes (2019). An evidentiary hearing was held for that purpose on April 4, 2019.[1] The Petitioner's counsel moved to strike the offense report from the record on the basis that the report was not in affidavit form as required by statute and, thus, should not be considered. Counsel argued that since the offense report was not signed or notarized properly, it should be stricken from the record. Additionally, counsel noted that the jurat did not contain the Petitioner's name, the arresting officer did not swear and affirm the offense report was true and correct, and there was a lack of information regarding the person who administered the oath and

performed the attestation, including the fact that there was no officer identification number or notary seal included on the jurat. Thus, counsel argued that in the absence of the offense report, there was not competent and admissible evidence to establish that the arresting officer had probable cause to believe that the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical controlled substances.

On April 15, 2019, the Department Hearing Officer issued a Final Order and made the following findings of fact:

> I find that the following facts are supported by a preponderance of the evidence: On February 25, 2019 at approximately 1:56 a.m., Officer E. Barnhorst of the Apopka Police Department responded to a traffic crash which occurred in a parking lot involving a possible drunk driver. Upon arrival, Officer Barnhorst met with both drivers and the Fire Department. A traffic crash investigation was not conducted due to the crash occurring in a parking lot. The at fault driver, later identified as Frederick Joseph Brian, was still in the driver's seat of his vehicle and had the keys nearby. The Fire Department personnel advised the officer that Mr. Brian was not being cooperative. Officer Barnhorst spoke to Mr. Brian to make certain that he was not suffering a medical episode. The officer observed that Mr. Brian made slow and deliberate movements, his speech was slurred, mumbled, and thick tongued, his eyes were bloodshot and glossy, his clothing was disheveled, and he had difficulty answering simple questions.
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> Officer Barnhorst asked Mr. Brian some medical related questions to which Mr. Brian stated that he does not take any medications and was not in need of medical attention. Mr. Brian advised that he was not diabetic and that he knew what day and date it was. Mr. Brian stated that he didn't know why the police and fire been driving and did not hit another vehicle. After some discussion, the officer convinced Mr. Brian to allow the Fire Department to perform a medical checkup. Mr. Brian stood up and leaned against the vehicles for balance. Another officer stood with Mr. Brian while Officer Barnhorst spoke with the other driver.
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> Officer Barnhorst made contact with Ms. Wailani Colon Betancourt who was the driver of the not at fault vehicle. Ms. Betancourt provided a verbal statement as well as a sworn statement, which was written by another person. Ms. Betancourt advised Officer Barnhorst that she was sitting in her vehicle, which was parked in front of her apartment building. Ms. Betancourt stated that she observed Mr. Brian attempting to park in a space next to hers. While pulling in, Mr. Brian scraped the driver side of his vehicle along the passenger side of Ms. Betancourt's vehicle, causing damage to the passenger side mirror and bumper. Ms. Betancourt stated that she exited her vehicle to speak to Mr. Brian, but he ignored her and appeared drunk. Ms. Betancourt called the police.
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> Officer Barnhorst returned to speak to Mr. Brian and learned that he was again refusing to cooperate with the Fire Department. Mr. Brian stated that he did not want the Fire Department to do anything and signed a refusal form. Mr. Brian stated that he was going into his house and Officer Barnhorst told him that he could not leave until he had dispelled the officer's fears that he was operating a motor vehicle under the influence. Mr. Brian stated that he was in a parking lot to which Officer Barnhorst advised that it didn't matter.
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> Officer Barnhorst requested that Mr. Brian perform the Field Sobriety Exercises. Mr. Brian argued that he had not been driving. The officer told Mr. Brian that the investigation was past that point and requested again that Mr. Brian perform the exercises. Mr. Brian advised that he would not be doing the Field Sobriety Exercises. Officer Barnhorst informed Mr. Brian that based on the observations to that point, he would be subject to arrest if he did not perform the Field Sobriety Exercises. The officer advised Mr. Brian that the Field Sobriety Exercises were his opportunity to dispel the officer's concerns. Officer Barnhorst asked Mr. Brian if he felt he was okay to drive and Mr. Brian said that he did not.
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> After further discussion, Mr. Brian agreed to perform the Field Sobriety Exercises. Officer Barnhorst asked Mr. Brian if he wore glasses and Mr. Brian stated that he did not. The officer asked Mr. Brian to read his name tag and Mr. Brian could not, then stated that he needed his glasses. The officer asked if he could get Mr. Brian's glasses for him, but Mr. Brian didn't understand the question. Officer Barnhorst asked the question several times. Mr. Brian then stated that he would not be performing the Field Sobriety Exercises. Mr. Brian placed his hands behind his back at which time he was placed under arrest for DUI. Due to Mr. Brian's unsteady balance, he had difficulty getting into the back seat of the patrol vehicle. Mr. Brian eventually just laid down and said to close the door. Officer Barnhorst had to physically assist Mr. Brian into a seated position in the patrol vehicle.
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> Officer Barnhorst stated that he was suffering from allergies and could not smell the odor of an alcoholic beverage in the patrol vehicle. Officer Sullivan advised Officer Barnhorst that the odor of an alcoholic beverage was apparent in the patrol vehicle and that the back of the patrol vehicle smelled like a brewery while they were assisting Mr. Brian into his seat. The Intoxilyzer instrument was inoperable at the Apopka Police Department, so the officer transported Mr. Brian to the Orange County DUI Testing Center. Mr. Brian was observed for twenty minutes, then escorted to a breath testing room. Officer Barnhorst read the Implied Consent Warning to Mr. Brian and requested that he provide samples of his breath for testing. Mr. Brian advised that he would not be providing a breath sample. Officer Barnhorst informed Mr. Brian of the consequences of refusing and Mr. Brian stated that he understood and would still not be providing a breath sample. Mr. Brian's privilege to operate a motor vehicle was suspended for refusing to submit to the breath test.
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> Based on the foregoing, the Hearing Officer finds that Frederick Joseph Brian was placed under lawful arrest for DUI.

The hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain the Petitioner's suspension. The Department informed the Petitioner in an order the suspension of his driving privilege had been sustained. The Petitioner seeks timely review of the Final Order.

STANDARD OF REVIEW

On first-tier certiorari review of agency action, a circuit court must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Broward Cnty. v. G.B.V. Intl, Ltd.,* 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S389a]. This Court may not reweigh the evidence or substitute its judgment for that of the agency, for it is the Department hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Dep't of Highway Safety and Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989) (citation omitted). Instead, this Court's function is to review the record to determine whether the decision is supported by competent substantial evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'r,* 794 So. 2d 1270, 1273-75 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1093-94 (Fla. 2000) [25 Fla. L. Weekly S461a]. Competent substantial evidence is defined as such relevant evidence as a reasonable person would accept as adequate to support the findings and decision made. *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957).

The Florida Supreme Court has recently emphasized the "close review" a circuit court must conduct in reviewing the Department's decision to sustain a license suspension for DUI, as compared to first-tier review of other administrative hearings: "[a] court conducting section 322.2615 first-tier certiorari review faces constitutional

questions that do not normally arise in other administrative review settings," in that the court must conduct "a Fourth Amendment analysis of whether there was reasonable suspicion to stop the vehicle or probable cause to believe that the driver was in physical control of the vehicle while under the influence of alcohol." *Wiggins v. Dep't of Highway Safety and Motor Vehicles,* 209 So. 3d 1165, 1172 (Fla. 2017) [42 Fla. L. Weekly S85a]. As such, probable cause sufficient to justify an arrest exists "where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Dep't of Highway Safety and Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a] (quoting *City of Jacksonville v. Alexander,* 487 So. 2d 1144, 1146 (Fla. 1st DCA 1986). Furthermore, "the facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which conviction must be based." *Id.* (quoting *State v. Riehl,* 504 So. 2d 798, 800 (Fla. 2d DCA 1987). Instead, probable cause is a conclusion drawn from reasonable inferences drawn from an arrestee's actions that support the officer's conclusion. *State v. Cote,* 547 So. 2d 993, 995 (Fla. 4th DCA 1989).

STAUTORY BACKGROUND

Section 322.2615 provides for the suspension of one's driving privilege for DUI. Specifically, the statute authorizes a law enforcement officer to suspend one's driving privilege when that person is driving or in physical control of a vehicle and has a blood or breath alcohol level of .08 or higher. Alternatively, a law enforcement officer may also suspend the driving privilege of one who refuses to submit to a urine, breath, or blood-alcohol test. § 322.2615(1)(a), Fla. Stat. (2019). If the driver refuses to perform a lawfully requested urine, breath, or blood test, the officer must notify the driver that his or her license will be suspended for a year, or eighteen months if the driver has previously had his or her license suspended for failure to submit to such tests. § 322.2615(1)(b)1.a. Section 322.2615 is to be read *in pari materia* with section 316.1932, *Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1076 (Fla. 2011) [36 Fla. L. Weekly S654a], as revised on denial of rehearing (Nov. 10, 2011), a statute which provides that the requested sobriety tests "must be incidental to a lawful arrest" and that the officer must have "reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages." § 316.1932(1)(a)1.a., Fla. Stat. (2019). Once the license is suspended, the driver may request review by the Department through an administrative hearing before the Department within ten days after issuance of the notice of suspension. § 322.2615(1)(b) 3. The statute further provides that the review hearing will essentially function as a trial before the Department:

> Such formal review hearing shall be held before a hearing officer designated by the department, and the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents [submitted for review], regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension.

§ 322.2615(6)(b).

During a formal review hearing for license suspension for driving with an unlawful blood-alcohol level or breath-alcohol level of .08 or higher, the hearing officer is limited to the following issues, which must be established by a preponderance of the evidence[2]:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; and
>
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a). The hearing officer's authorization to determine the "lawfulness of the stop" is built into the provision of the essential element of whether probable cause existed. *Wiggins,* 209 So. 3d at 1167 (citation omitted). Finally, the hearing officer's decision may be reviewed by an Article V judge or judges in a circuit court by a writ of certiorari. § 322.2615(13).

DISCUSSION

The Petitioner argues that the offense report authored by Officer Barnhorst does not qualify as an "affidavit" under section 322.2615(2)(a) because the jurat is defective, therefore, it is not a document that can be considered self-authenticating. Further, the Petitioner argues that the lack of any reference to an odor of alcohol prior to his arrest precludes a finding of probable cause. For the reasons explained below, we find that there was competent substantial evidence to support the hearing officer's decision to sustain the suspension of the Petitioner's driving privilege; thus, the hearing officer's decision was in accordance with the essential requirements of law.

I. The offense report was an affidavit properly relied on by the hearing officer because technical defects in an affidavit do not render it a nullity.

A DUI is a misdemeanor offense under Florida law. *See* Sections 316.193(2)(a), 775.08(2), 901.15(1), Fla. Stat. (2019). Generally, a law enforcement officer may only make a warrantless misdemeanor arrest when the officer has actually witnessed commission of the offense. *See* Section 901.15, Florida Statutes (2019). Pursuant to section 316.645, Florida Statutes (2019), however, a "police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash." Thus, a warrantless arrest at the scene of a traffic accident for misdemeanor DUI is the exception to the general statutory requirement that an officer can only make a warrantless misdemeanor arrest if the offense is committed in his presence. *See State v. Hemmerly,* 723 So. 2d 324, 325 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2666b] (a police officer is authorized to arrest when based on his or her personal investigation at the scene of a traffic crash, the officer has reasonable and probable grounds to believe that a driver has committed the misdemeanor crime of DUI).

Section 322.2615(2) provides that a "law enforcement officer shall forward to the department . . . a report of the arrest, including an affidavit stating the officer's grounds for belief that the person arrested was in violation of s. 316.193 . . . " Section 322.2615(11) provides that a "formal review hearing may be conducted upon a review of the reports of a law enforcement officer." Rule 15A-6.013 provides that in a formal administrative review proceeding, the hearing officer shall consider "any report or photocopies of such report submitted by a law enforcement officer . . . relating to the arrest of the driver . . . " Moreover, Rule 15A-6.013(2) does not require extrinsic evidence of authenticity as a condition precedent to admissibility. Accordingly, when read in conjunction, these principles allow a hearing officer to consider any report, even unsworn, submitted by a law enforcement officer.[3] *See Tolentino v. Dep't of Highway Safety and Motor Vehicles,* 7 Fla. L. Weekly Supp. 304a (Fla. 9th Cir. Ct.

2000).

Section 117.10, Florida Statues (2019), permits law enforcement officers to administer oaths when engaged in official duties and, specifically, section (2) exempts law enforcement officers from the technical requirements of a notarial certificate. While the Petitioner argues that nothing in the record establishes that the attestor, "J. Miller," is a law enforcement officer, this exact argument has previously been rejected by courts. *See Dep't of Highway Safety and Motor Vehicles v. Padilla,* 629 So. 2d 180, 181 (Fla. 3d DCA 1993) (holding that there was no evidence to dispute that the affiant was fully and properly sworn before an authorized attesting officer); *Dep't of Highway Safety and Motor Vehicles v. McGill,* 616 So. 2d 1212, 1213-14 (Fla. 5th DCA 1993) (concluding that the documents filed by the officer were "affidavits," even though technically defective under the amended Chapter 117). Moreover, one police officer may attest to the signature of another police officer regarding implied-consent-law refusal affidavits. *See Dep't of Highway Safety and Motor Vehicles v. Brown,* 179 So. 3d 547, 549-550 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2651a].

We find that the technical defects contained in the offense report or "affidavit" here do not render it a nullity because it substantially complied with the requirements of the statute. *See Gupton,* 987 So. 2d at 738 (holding that the attestor's failure to designate on probable cause affidavit whether attestor was a notary public or a police officer did not result in the document not being an "affidavit"); *Crain v. State,* 914 So. 2d 1015, 1018-24 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2607a] (holding that an improperly sworn affidavit was not a fatal defect); *Dep't of Highway Safety and Motor Vehicles v. Cochran,* 798 So. 2d 761, 763 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1953a] (holding that the possible defect in the affidavit alone was not a sound basis to overturn the hearing officer's findings which supported the license suspension when viewed with additional documentation that clarified the evidence); *McGill,* 616 So. 2d at 1213 (Fla. 5th DCA 1993) (holding that document was an affidavit despite technical defects in notarization when notarization substantially complied with statute or met generally recognized criteria for affidavits and there was no genuine issue about its authenticity); *Kaminski v. Dep't of Highway Safety and Motor Vehicles,* 22 Fla. L. Weekly Supp. 513a (Fla. 9th Cir. Ct. 2014) (holding that the law enforcement reports signed by the officer, which included a notary's certificate that the document had been "sworn to and subscribed before me," was sufficient evidence for the hearing officer to rely as the form substantially complied with the statute even when minor technical defects existed); *Gise v. Dep't of Highway Safety and Motor Vehicles,* 11 Fla. L. Weekly Supp. 394a (Fla. 9th Cir. Ct. 2004) (holding that the failure to indicate whether the officer was personally known or produced identification did not render the affidavit a nullity and was not fatal to the sworn statement because the officer's statement was still made under oath and subjected the officer to perjury if the affidavit proved untrue).

The Petitioner claims that "the arresting officer did not swear and affirm the "offense report" was true and correct." However, the jurat sheet specifically states as follows:

> I, the arresting law enforcement officer, swear and affirm that I have established probable cause to believe the DEFENDANT listed did commit the offense as detailed on the attached charging affidavit.

Officer Barnhorst did not type his name on this statement, but he signed the jurat directly below this statement, he printed his name next to his signature, and he did swear and affirm that the facts detailed in the charging affidavit and initial report were true and correct. The hearing officer received the offense report with the jurat sheet, and the offense report is the only document in the record containing the facts that Officer Barnhorst relied upon in finding probable cause to charge the Petitioner with DUI. We find that the label the report is given, whether it be a narrative in an "offense report" or a "charging affidavit" is irrelevant because, as set forth above, courts routinely reject the notion that these types of defects render an affidavit a nullity. Additionally, the Petitioner argues that the jurat is defective because it does not contain the Petitioner's name. However, the hearing officer addressed this issue by noting that the case number on the jurat matched the case number on the offense report, which only names one person charged for DUI in violation of section 316.193—the Petitioner. Accordingly, we find that the hearing officer did not depart from the essential requirements of the law in relying upon the offense report to make the required probable cause determination and to sustain the driver's license suspension.

II. The odor of alcohol prior to arrest is not a requirement to conduct a lawful arrest for DUI and the absence of such does not preclude a finding of probable cause.

Probable cause for an arrest may be based on circumstantial evidence and common sense inferences coupled with the general knowledge and experience of the officer. *See Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] ("Generally, probable cause sufficient to justify an arrest exists where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offence has been committed."). The State may satisfy its burden to prove the lawfulness of a DUI arrest by a preponderance of the evidence by simply submitting the arresting officer's written report, as was done in the instant case. *See Dep't of Highway Safety & Motor Vehicles v. Dean,* 662 So. 2d 371, 372-73 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c] ("By statute, [determination of whether a preponderance of the evidence supports probable cause for an arrest] may be made based on the written documents and reports generated by law enforcement.").

We have previously held that "[w]hile it is permissible that a review hearing can be conducted on documentary evidence alone, the documentary evidence nevertheless must make it clear how the arresting officer arrived at his or her conclusions supporting probable cause, rather than merely reciting conclusions without reciting factual support for the conclusions." *Roberts v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 27a (Fla. 9th Cir. Ct. 2005), *cert. denied,* 938 So. 2d 513 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D868a]. We find that the offense report here was more than adequate to support the hearing officer's findings. The record shows that the Petitioner was found at fault in a crash in which he collided into the passenger side of a parked vehicle. The record shows that after Officer Barnhorst arrived on scene and made contact with the Petitioner, Officer Barnhorst observed the following signs of impairment: the Petitioner had to lean against his vehicle for balance, his movements were slow and deliberate, he had trouble answering simple questions, he had slurred, thick-tongued and mumbled speech, his eyes were bloodshot, and his clothing was disheveled. Based upon these observations, Officer Barnhorst concluded that the Petitioner appeared to be under the influence of something. The Petitioner then refused to perform field sobriety exercises. We find that with or without the odor of alcohol, Officer Barnhorst's observations of the Petitioner provided him probable cause to arrest the Petitioner for DUI.[4] *See Dep't of Highway Safety and Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 530-31 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (holding that there was competent, substantial evidence to support finding of hearing officer reviewing suspension of motorist's driver's license that probable cause existed to believe that motorist was driving

under the influence of alcohol, though there was no direct evidence that motorist drank alcohol prior to his involvement in single-vehicle *accident); Dep't of Highway Safety and Motor Vehicles v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a] (bloodshot watery eyes, slow movements, and poor performance on field sobriety exercises constituted competent substantial evidence of impairment that should not have been reweighed by the circuit court merely because no odor of alcohol was observed).

Additionally, our prior decision in *Perry-Ellis v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 942a (Fla. 9th Cir. Ct. 2006), is instructive because it involved a traffic crash that did not occur in the presence of law enforcement officers. There, we held that the officer's investigation, including his personal observations of Perry-Ellis after the accident where she exhibited slurred speech, unsteady gait, and an inability to perform the field sobriety exercises, constituted competent substantial evidence to find that she was driving the vehicle while under the influence. Moreover, no other person was present at the scene with Perry-Ellis with actual or physical authority over the vehicle that was involved in the crash. Thus, we held that even without Perry-Ellis' admission, the reasonable inferences from the facts and circumstances of the case were sufficient to place her in apparent control of her vehicle.[5] *See also State v. Benyei,* 508 So. 2d 1258, 1259 (Fla. 5th DCA 1987) (holding that, although the vehicle may have been inoperable at the time the officer arrived at the scene, the circumstantial evidence was sufficient for the jury to find that the defendant was driving while intoxicated when her car went off the highway onto a median). Accordingly, we find that the offense report in the instant case provided ample factual support for Officer Barnhorst's probable cause determination.

This Court's review of the record indicates that the hearing officer's decision to sustain the suspension of the Petitioner's driving privilege is supported by competent substantial evidence and was in accordance with the essential requirements of law. Where competent substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency's determination. *Cohen v. Sch. Bd. of Dade Cnty.,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). The hearing officer, as the trier of fact, was responsible for resolving any conflicts in the evidence and was free to weigh and reject any testimony, as long as that decision was based on competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Wiggen,* 152 So. 3d 773, 776 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2532b]. It is not this Court's task to reweigh evidence presented to the hearing officer, evaluate the pros and cons of conflicting evidence, and reach a conclusion different from that of the agency. *Id.* Accordingly, the Petition for Writ of Certiorari is denied. (WILSON and MUNYON, JJ., concur.)

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[1]The following exhibits were admitted at the hearing: 1) DDL-1: Florida Uniform Traffic Citation #A915XNE, 2) DDL-2: Florida Class E Driver License of Frederick Joseph Brian, 3) DDL-3: Apopka Police Department Offense Report (Five pages including the Jurat), 4) DDL-4: Apopka Police Department Statement by Wailani Colon, 5) DDL-5: Request for Test, 6) DDL-6: Orange County Sheriff's Office Alcohol Influence Form, 7) DDL-7: Implied Consent Warning, 8) DDL-8: Affidavit of Refusal to Submit to Breath and/or Urine Test, 9) DDL-9: For Official Use Only Driver Record of Frederick Joseph Brian.

[2]"Proof by a preponderance of the evidence means proof which leads the Hearing Officer to find that the existence of a contested fact is more probable than its nonexistence." *Smith v. State,* 753 So. 2d 703, 704 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D664a] (citations omitted).

[3]*See Gupton v. Dep't of Highway Safety and Motor Vehicles,* 987 So. 2d 737, 738 n. 2 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1700a] (noting that the formalities with respect to the submission of evidence are somewhat relaxed in the context of administrative proceedings).

[4]We reiterate that "[p]robable cause sufficient to justify an arrest exists where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Sosnowski v. State,* 245 So. 3d 885, 888 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D789a] (citation omitted).

[5]*See also Dep't of Highway Safety and Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (circumstances surrounding the accident together with the officer's observations provided ample probable cause for the driver's DUI arrest).

* * *

Criminal law—Competency to stand trial—Petition for writ of certiorari requesting that trial court be compelled to make independent determination of competency based on opinion of single doctor presented at competency hearing, rather than ordering additional evaluation, is denied—Trial court did not violate rules or abuse discretion by requesting additional evaluation and evidence in order to determine competency—Where court found evidence from single doctor insufficient to deem defendant incompetent, he remains competent—Alternative request that defendant, who has allegedly been in custody for maximum penalty for charged offense, be released on own recognizance is denied where appellate court cannot determine maximum penalty for charged offense and defendant provides no authority to establish basis for relief

ROBERT STEVEN ORTIZ, JR., Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2019-CA-2850-OC. L.T. Case No. 2019-CT-2372. March 18, 2020. Petition for Writ of Certiorari, Christine E. Arendas, County Court Judge. Counsel: Robert Wesley, Public Defender and Sarah L. B. Jordan and Emily Adams, Assistant Public Defenders, for Petitioner. No appearance required for Respondent.

(Before SCHREIBER, WOOTEN, and MADRIGAL, III, JJ.)

(PER CURIAM.) Petitioner alleges the trial court failed to make a competency determination in Osceola County criminal case number 2019-CT-2372 within 20 days of having reasonable grounds to believe Petitioner was incompetent to proceed, as required by Florida Rule of Criminal Procedure 3.210. According to the record provided to this Court, Petitioner was arrested for obstruction of a public street without a permit on July 8, 2019. On July 18, 2019, Petitioner pled not guilty and his case was set for pre-trial conference on September 25, 2019.

On August 3, 2019, defense counsel filed a "Motion that Defense Counsel has Reasonable Grounds to Believe Defendant is not Competent to Proceed and Request for Hearing" (hereinafter, the "Competency Motion"). Along with the Competency Motion, Petitioner filed a "Notice of Confidential Information within Court Filing" and a Forensic Psychological Evaluation conducted by Dr. Leonard Skizynski. Dr. Skizynski's recommendation was for the trial court to consider Petitioner incompetent to proceed.

The Competency Motion was set for hearing on August 23, 2019. At the hearing, defense counsel advised the trial court that she had reasonable grounds to believe Petitioner was incompetent, and she requested to present Dr. Skizynski's testimony regarding Petitioner's incompetency. (Hr'g Tr. at 5.) When defense counsel advised the trial court that Dr. Skizynski's evaluation was conducted confidentially, the State objected and requested a court-ordered evaluation with notice to allow the State to attend. (Hr'g Tr. at 5.) The trial court then asked whether there was any reason Dr. Skizynski could not testify at the hearing, since he was already present, and the parties did not object. Defense counsel did object to the State's request for a court-ordered evaluation on the basis that "[t]he rule clearly states that a motion for examination should be made within the 20 days of filing the motion for reasonable grounds and the State failed to do that." (Hr'g Tr. at 6.)

After hearing Dr. Skizynski's testimony, the trial court stated: "We're not even close to a final hearing yet. Because based on the testimony of Dr. Skizynski as well as this Court's review of his report, there are lots of questions about the competency or incompetency of

Mr. Ortiz." (Hr'g Tr. at 42.) The Court could not conclude, based solely on Dr. Skizynski's report and opinion, whether Petitioner was incompetent or competent to proceed. The trial court ordered that an evaluation be conducted by Dr. Davis and that Dr. Davis be given access to Petitioner's records at Park Place as part of his evaluation since Dr. Skizynski did not have the opportunity to review those records. (Hr'g Tr. at 42.) The trial court denied Petitioner's request for release and ordered that Petitioner remain in custody at least until Dr. Davis' evaluation was complete or a hearing was set on the matter of Petitioner's release. (Hr'g Tr. at 43.) Florida Rule of Criminal Procedure 3.210(b) provides, in relevant part:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, *has reasonable grounds to believe that the defendant is not mentally competent to proceed,* the court shall *immediately enter its order setting a time for a hearing to determine the defendant's mental condition,* which *shall be held no later than 20 days after the date of the filing of the motion,* and *may order the defendant to be examined by no more than 3 experts,* as needed, *prior to the date of the hearing.*

Fla. R. Crim. P. 3.210(b). (Emphasis added.)

"When a trial court orders an evaluation, it suggests there are reasonable grounds to believe the defendant is incompetent." *Flaherty v. State,* 266 So. 3d 1187, 1188 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D806a] (citations omitted). "Once a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue." *Simmons v. State,* 271 So. 3d 997, 999 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D526a] (citations omitted); *see also* Fla. R. Crim. P. 3.212(b).

Per rule 3.210, when defense counsel files a motion with reasonable grounds that her client is incompetent to proceed, the court must immediately set a hearing to determine the defendant's mental condition, which shall be heard no later than 20 days after the filing of defense counsel's motion. Here, the certificate of service in defense counsel's Competency Motion indicates the Motion was "E-Filed" on August 3, 2019, which means the trial court was to hold the hearing no later than on or about August 23, 2019. Rule 3.210 allows a court to order that a defendant be examined by no more than three experts as necessary "prior to the date of the hearing."

In Petitioner's case, the trial court heard the Competency Motion within the time required under rule 3.210—August 23, 2019. The State objected to the confidential evaluation conducted by Dr. Skizynski and asked for a court-ordered evaluation to be conducted and to be provided notice of the evaluation. As correctly noted by defense counsel, the State did not have the right to be present at the confidential examination. *See Sanfeliz v. State,* 58 So. 3d 390, 392 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D798c].

However, rule 3.210 does not prohibit a court from ordering a second evaluation, or even a third evaluation. The rule provides that a court *may* order that Petitioner be examined by no more than three experts, *as needed,* before the hearing. Thus, it is not mandatory for the trial court to order additional evaluations prior to the hearing and, more importantly, in some cases, it may not be necessary to order additional evaluations at all.

There is nothing prohibiting a trial court from deciding Petitioner's competency based on one evaluation. Likewise, there is nothing in rule 3.210 nor rule 3.212 that requires a trial court to accept the findings made by one doctor. Before the hearing, the trial court did not have the benefit of Dr. Skizynski's testimony to decide Petitioner's competency. At the hearing, the State argued that a court-ordered evaluation was required. (Hr'g Tr. at 11.) Yet, that is not completely accurate. The trial court can order an evaluation (no more than three), if requested by a party, or may do so *sua sponte,* but a court-ordered evaluation is not required. And as previously noted, the trial court can order the evaluation prior to the hearing, but it is not prohibited from doing so at the hearing, if it deems it necessary to determine Petitioner's competency.

The trial court was required to hold a hearing on defense counsel's Competency Motion within 20 days of the date the Competency Motion was filed, which it did. At the close of the August 23 hearing, the trial court set the matter for a Competency Status Hearing on October 23, 2019. Petitioner is essentially demanding that the trial court be forced to make an independent determination of competency based on the opinion of a single doctor, without stipulation by the parties. This Court cannot mandate that relief

This Court notes that as a general rule, defendants are presumed sane when they enter the courtroom. *See Moreno v. State,* 232 So. 3d 1133, 1136 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2379b] (citing to *Flowers v. State,* 353 So. 2d 1259, 1260 (Fla. 3d DCA 1978)). They are deemed competent until there is a judicial determination of incompetency. *See Peoples v. State,* 251 So. 3d 291, 297 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1557c] ("once a defendant has been declared competent, he is presumed competent in subsequent proceedings. . ."); *see also Golloman v. State,* 226 So. 3d 332 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1815d] (an individual adjudicated incompetent is presumed to remain incompetent until adjudicated competent to proceed by a court). Therefore, in this Court's review of the record, if the lower court found the evidence at the hearing was insufficient to deem Petitioner incompetent as a matter of law, Petitioner remains competent. The Court concludes the lower court did not violate the rules, nor abuse its discretion in requesting an additional evaluation and evidence in order to determine whether Petitioner is incompetent.

Petitioner's alternative request for relief is to be released on his own recognizance since he has been in custody for the maximum penalty of the charged offense. First, the Court cannot decipher the maximum penalty for the offense charged because the record provided does not reference the charges the State filed against Petitioner. A copy of the Information was not provided. Second, Petitioner's sole argument is that he should be released because he has been in custody for the statutory maximum amount of time for the charge.

This alternative request amounts to a petition for writ of habeas corpus. However, Petitioner provides no authority to establish a basis for relief. According to the record provided to this Court, if he was determined incompetent to proceed at the hearing, he likely should have been released. *See generally Paolercio v. State,* 129 So. 3d 1174, 1176 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D153a] (where a court cannot order treatment to restore an incompetent defendant to competency, the defendant cannot remain in jail indefinitely, and the only remedy is for the State to institute civil commitment proceedings).

Rule 3.210 allows a court to order a defendant into custody so that an evaluation can be conducted, if the court determines the defendant will not submit to the evaluation or it is unlikely that he will. *See* Fla. R. Crim. P. 3.210(b)(3). Notwithstanding rule 3.210(b)(3), there is nothing prohibiting a trial court from releasing a defendant subject to pre-trial release conditions it deems appropriate, after the evaluation is completed. Ultimately, the Court concludes that it cannot grant the alternative relief Petitioner requests.

Accordingly, based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for a Writ of Certiorari is **DENIED**. (WOOTEN and MADRIGAL, III, JJ., concur.)

* * *

Insurance—Personal injury protection—Discovery—Documents—Insurer has standing to seek relief from order compelling production of its confidential materials in possession of third party with which it contracts to provide medical bill processing services and technology—Subpoena for discovery of insurer's manuals and documentation regarding auditing of emergency medical conditions and evaluation of records for purpose of determining emergency medical conditions is unreasonable and oppressive in first-party breach of contract action and amounts to premature discovery in support of unripe and unpled bad-faith claim—No merit to argument that insurer has not established irreparable harm warranting certiorari relief because third party could object to disclosure is without merit where trial court has already ordered third party to produce materials—Petition for writ of certiorari is granted

VICTORIA FIRE & CASUALTY COMPANY, Petitioner, v. FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Cindy Guajardo, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-000747-O. March 11, 2020. Petition for Writ of Certiorari from Victoria Fire & Casualty Company. Counsel: Hinda Klein, Conroy Simberg, Hollywood, for Petitioner. Robert J. Hauser, Pankauski Hauser, PLLC, West Palm Beach, for Respondent.

(Before KEST, JORDAN, MARQUES, JJ.)

(**PER CURIAM**.) Victoria Fire & Casualty Company ("Petitioner") seeks certiorari review of the trial Court's order compelling the deposition of a non-party, Auto Injury Solutions ("AIS"), and requiring the production of certain documents, dated December 20, 2018. We have jurisdiction and dispense with oral argument. *See* Art. V, § 4(b)(3), Fla. Const.; Fla. R. App. P. 9.030((b)(2)A). For the reasons discussed herein, we grant the instant Petition.

BACKGROUND

This is a first-party breach of a Personal Injury Protection ("PIP") contract case by Florida Hospital ("Respondent'), as assignee of the Petitioner's insured, Cindy Guajardo, against the Petitioner. The Respondent alleged that Cindy Guajardo was injured in a motor vehicle accident, and it provided her necessary medical care for which the Petitioner failed to entirely reimburse it, leaving $427.59 outstanding. The Petitioner defended that it exhausted the maximum $2,500 in PIP coverage available when there is no determination that the insured had an "emergency medical condition." In February 2017, the Petitioner moved for final summary judgment, arguing that, in accordance with the PIP statute, its policy limited coverage to $2,500 because there was no determination that Cindy Guajardo had an emergency medical condition, and it already paid that amount for her treatment.

After deposing the Petitioner's corporate representative, the Respondent refused to agree to a hearing date for the Petitioner's motion for final summary judgment, claiming it was premature because it needed to depose a corporate representative of AIS, a third-party with whom the Petitioner contracts to provide medical bill intake and administrative services and technology that the Petitioner utilizes to access medical information when adjusting insurance claims. The Respondent moved to compel the deposition of AIS' representative and the Petitioner agreed to coordinate that deposition. The trial court entered an agreed order on the Respondent's motion to compel, but it did not address the scope of the items listed in the Respondent's notice of taking deposition duces tecum.

The parties could not agree on what documents AIS was to produce at the deposition. The Respondent then filed a new "notice" of deposition duces tecum, listing a total of nine items for AIS to produce; however, only relevant to this Petition are numbers 4 and 5:

> 4. Any and all instructions or manuals in Auto Injury Solutions' possession regarding auditing associated with "emergency medical condition" provided to Auto Injury Solutions by Defendant, or any related entity/affiliates or provided to Defendant by Auto Injury Solutions.
>
> 5. Any and all documentation regarding evaluation of medical records and bills for purposes of determining "emergency medical condition" provided to Auto Injury Solutions by Defendant, or any related entity/affiliated or provided to Defendant by Auto Injury Solutions.

The Petitioner moved to set aside the trial Court's order compelling the deposition of AIS' corporate representative or, alternatively, for a protective order, emphasizing that the parties never agreed on the documents AIS' representative would have to produce at the deposition. The Petitioner argued that, because the only issue in the case was whether Cindy Guajardo had an emergency medical condition, and because the hospital had already deposed the Petitioner's corporate representative, it did not need to depose a representative of AIS. The Petitioner also argued that, even if the trial court permitted the deposition to take place, Florida law prohibits the discovery of an insurer's internal policies, procedures, claims file, and other materials relating to the manner in which it adjusted the claim, all of which are irrelevant to the issues in a simple breach of contract case.

At the hearing on the motion, the Petitioner argued that the sole issue in this case is whether or not Cindy Guajardo had an emergency medical condition, such that she would be entitled to up to $10,000 in PIP benefits. The Petitioner requested that the trial court either relieve it of the initial agreement altogether or, alternatively, limit the scope of the deposition to relevant issues by not requiring AIS to produce any claims handing manuals, internal procedures, and similar items. The Respondent argued that the bill it provided to the Petitioner reflected that Cindy Guajardo received emergency services, and therefore it established proof of an emergency medical condition. The Respondent reasoned that it needed to depose an AIS representative to determine the manner in which it reviewed the bills and adjusted the claim. The Respondent also argued that, insofar as the Petitioner and AIS had a procedure for adjusting claims, it was entitled to know whether they followed that procedure in this case, regardless of whether the answer to that inquiry had any relevance to its breach of contract claim.

The Petitioner responded that the case law provides that the reasons for which an insurer denied a claim has no bearing on a first-party breach of contract claim, but rather, that information is discoverable only after the insured establishes a breach of the underlying contract and then sues for bad-faith. The Petitioner also noted that because the hospital itself treated Cindy Guajardo, it already had the records it needed to establish whether its treating physicians determined she had an "emergency medical condition." The Petitioner emphasized that Florida law clearly prohibits discovery into the manner in which an insurer adjusts a claim and its ultimate reasons for denying benefits in a breach of contract case. Because the materials would not be discoverable from the Petitioner itself, it argued that the trial court should not permit Florida Hospital to circumvent the case law by instead seeking those materials from AIS, citing *Nationwide Mutual Fire Insurance Co. v. Joseph*, 10 Fla. L. Weekly Supp. 379a (Fla. 9th Cir. App. Mar. 3, 2003), as support for that proposition. The Respondent argued it was entitled to know what records AIS reviewed, how it interpreted those records, what words it relied on, and other matters involved in the adjustment of the underlying claim.

The trial Court entered an order granting the Petitioner's motion in part and denying it in part. The trial Court granted the motion as to item 3, finding it irrelevant to the Respondent's claim. It also limited item 4 only to instructions or manuals between AIS and the Petitioner, not any related entities or affiliates, but it still failed to address item 5. The trial Court denied the Petitioner's motion for reconsideration,

clarification, and/or to stay without a hearing. The trial Court subsequently entered an amended order and attached the notice of deposition, but made no substantive changes to its ruling. This Petition followed.

STANDARD OF REVIEW

It is axiomatic that a petition for writ of certiorari is the proper remedy to review a non-final order compelling discovery. *Bogert v. Walther,* 54 So. 3d 607, 6610 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D379a]. To demonstrate entitlement to certiorari relief, a petitioner must establish that the order at issue: 1) departs from the essential requirements of the law; 2) causes a material injury throughout the proceedings; and 3) the injury cannot be remedied on appeal from a final order. *Mims v. Broxton,* 191 So. 3d 552, 553 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D1207b]. An order compelling a deposition that departs from the essential requirements of the law "results in harm that cannot be remedied on appeal in that once the deposition is taken, it cannot be un-taken." *U.S. Bank Nat'l Ass'n v. Williamson,* 273 So. 3d 190, 191 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1251b] (citation omitted).

DISCUSSION

The Petitioner argues that the trial court's order departed from the essential requirements of law in denying the Petitioner's motion for protective order and compelling the production of its and AIS' internal manuals, policies, and procedures because Florida law prohibits the discovery of these materials in a first-party breach of contract case. Additionally, it argues that the trial court's order will cause irreparable harm because the Respondent will be permitted to review the Petitioner's privileged materials that have no bearing on the issues in this case and the Respondent will be able to improperly use this information in other lawsuits involving these parties.

The Respondent argues that the Petitioner does not have standing to assert any objections on behalf of AIS because they are two different and independent corporate entities; thus, once the deposition goes forward, only AIS has the right to object to and decline to produce any privileged or confidential documents. Additionally, it argues that the instant Petition is premature because the Petitioner and/or AIS can object after the Respondent subpoenas AIS for deposition, therefore, establishing the Petitioner has not or will not suffer any irreparable harm. Lastly, the Respondent contends that the discovery it seeks from AIS is relevant to "debunk [the Petitioner's] excuse for non-payment of benefits in excess of $2,500, and that certiorari relief is not available based on the irrelevance or over breadth of discovery."

At the outset, we hold that the Petitioner has standing to seek relief from the trial Court's order compelling the production of its confidential materials in AIS' possession. Florida law recognizes that a party has standing to object to discovery directed to a third-party when necessary to protect its own confidentiality rights and to object to a subpoena to a third-party that is unreasonable or oppressive. *See Dade Cty. Med. Ass'n v. Hlis,* 372 So. 2d 117, 121 (Fla. 3d DCA 1979) ("Nevertheless, the DCMA surely has standing to assert its own interest in preserving confidentiality as a means to the effective self-discipline of its members. It likewise may assert the similar interest and concern of those who report and comment upon alleged medical improprieties."); *Sunrise Shopping Ctr., Inc. v. Allied Stores Corp.,* 270 So. 2d 32, 33-35 (Fla. 4th DCA 1972) (holding that an opposing party had standing on behalf of a non-party witness to move to quash a subpoena duces tecum as unreasonable and oppressive, contrary to the contention that only the witness had such standing); *see generally State Dept. of Highway Safety & Motor Vehicles v. State Career Serv. Comm'n,* 322 So. 2d 64, 65-66 (Fla. 1st DCA 1975) (holding that it is the fundamental right of party to an administrative proceeding to question legality of any phase of proceeding which may adversely affect it, therefore, the Department of Highway Safety which was a party to proceeding before Career Service Commission regarding discharge of a Department employee had standing to question subpoenas issued by the Commission to other Department employees). Because AIS is directly involved in the intake and claims adjusting processes on behalf of the Petitioner, we find that the Petitioner clearly has a legally cognizable interest that would be affected by the outcome of this controversy, should the trial Court's order be enforced.

Because the trial Court's order compelled the production of discovery from a subpoena that is contrary to the requirements of Florida law, we find the subpoena to be unreasonable and oppressive. Florida courts have long held that an insurer's internal manuals, policies, procedures, claim files, and other materials relating to the manner in which it adjusts a claim are not discoverable in a first-party breach of contract case until the obligation to provide coverage and damages has been established. *See Allstate Indem. Co. v. Ruiz,* 899 So. 2d 1121, 1129-30 (Fla. 2005) [30 Fla. L. Weekly S219c]; *Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 94 (Fla. 1995) [20 Fla. L. Weekly S217a]; *State Farm Mut. Auto. Ins. Co. v. Premier Diagnostic Ctrs., LLC,* 185 So. 3d 575 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D278a]; *Illinois Nat'l Ins. Co. v. Bolen,* 997 So. 2d 1194, 1195-96 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2870c]; *Old Republic Nat'l Title Ins. Co. v. HomeAm. Credit, Inc.,* 844 So. 2d 818, 819 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1214c]; *Am. Bankers Ins. Co. of Fla. v. Wheeler,* 711 So. 2d 1347, 1348 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D1449b]; *State Farm Fire and Cas. Co. v. Martin,* 673 So. 2d 518, 519 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D959e]; *Allstate Ins. Co. v. Swanson,* 506 So. 2d 497 (Fla. 5th DCA 1987). This Court in *Nationwide Mutual Fire Insurance Co. v. Joseph,* 10 Fla. L. Weekly Supp. 379a (Fla. 9th Cir. App. Mar. 3, 2003), quashed an order compelling an insurer to provide information regarding a third-party with whom the insurer contracted to provide medical services at a pre-arranged contractual rate, which is analogous to the third-party relationship between the Petitioner and AIS, and held that the reasons or motivations for an insurer's actions have no bearing on a breach of contract claim. As we explained in *Joseph,* disclosure of an insurer's internal manuals, policies, procedures, claim files, and other materials relating to the manner in which it adjusts a claim, like the materials in this case, are irrelevant and amount to premature discovery in support of an unripe, unpled bad-faith claim that causes irreparable harm because the disclosure cannot be undone. *Joseph,* 10 Fla. L. Weekly Supp. 379a. The Respondent's claim that the Petitioner has not established irreparable harm because AIS could object to the disclosure is also without merit. The trial court has already compelled AIS to produce these materials at the deposition of its corporate representative, therefore, there is no speculation as to whether AIS must comply with the order, absent relief from this Court.

Based on the foregoing, we find that the trial court's "Order on Defendant's Motion to Set Aside and/or Reform the July 23, 2018, Order on Plaintiff's Motion to Compel the Deposition of Auto Injury Solutions' Corporate Representative, or in the Alternative Amended Motion for Protective Order," as it pertains to items 4 and 5, departs from the essential requirements of the law and causes the Petitioner harm that cannot be remedied on appeal.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petitioner's Petition for Writ of Certiorari is **GRANTED** and the trial Court's "Order on Defendant's Motion to Set Aside and/or Reform the July 23, 2018, Order on Plaintiff's Motion to Compel the Deposition of Auto Injury Solutions' Corporate Representative, or in the Alternative Amended Motion for Protective Order," as it pertains to

items 4 and 5, dated December 20, 2018, is **QUASHED**. The Respondent's Conditional Motion for Appellate Attorneys' Fees is **DENIED**. (JORDAN and MARQUES, JJ., concur.)

* * *

Criminal law—Driving under influence—Argument—Prosecutor's closing argument telling jury that arrest was appropriate improperly invaded province of jury—Comment does not rise to level of fundamental error in view of amount of inculpatory evidence introduced at trial

ALEATHIA CRYSTAL DUPREE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-AP-10-A-O. L.T. Case No. 2019-CT-1910-A-O. March 5, 2020. Appeal from the County Court, for Orange County, David P. Johnson, County Judge. Counsel: Sarah Jordan, Assistant Public Defender, for Appellant. Kelly Barbara Hicks, Assistant State Attorney, for Appellee.

(Before HIGBEE, ADAMS, and BLECHMAN, JJ.)

(PER CURIAM.) Appellant, Aleathia Crystal Dupree, appeals her judgment and sentence entered on May 14, 2019, after a jury found her guilty of driving under the influence. This Court has jurisdiction under Florida Statute section 26.012(1) and Florida Rule of Appellate Procedure 9.030(c)(1)(A).

We affirm and write only to address the improper statement made by the State during closing argument.

Specifically, Appellant challenges the State's following comment regarding Appellant's performance on field sobriety exercises:

> Officer Junco said based on, you know, the driving pattern, the demeanor, the speech, the smell of alcohol, the poor performance on the field sobriety exercises, he thought it was appropriate to arrest this person, and he did. Because we're not going to let somebody just drive on the road, wreck—waste on the—driving drunk on the road, putting other lives in jeopardy.

(Transcript of trial 270.)

Because Appellant failed to object to the State's comment, the standard of review is fundamental error. *Brinson v. State,* 153 So. 3d 972, 975 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D98c]. "In order for an error to be fundamental and justify reversal in the absence of a timely objection, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " *Randolph v. State,* 853 So. 2d 1051, 1068 (Fla. 2003) [28 Fla. L. Weekly S360a] (quoting *Brown v. State,* 124 So. 481, 484 (Fla. 1960)).

The remark invaded the province of the jury by telling the jury that the arrest was appropriate, rather than allowing the jury to decide the issue. *See Brown v. State,* 36 So. 3d 826, 829-830 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1208a] (Telling the jury to determine the lawfulness of police conduct does nothing to further the ends of justice. The jury decides disputed issues of fact.)

While such a statement is improper, in view of the entire record and given the amount of inculpatory evidence introduced at trial, it does not rise to the level of fundamental error.

Based on the foregoing, it is here by ORDERED AND ADJUDGED that Appellant's judgment and sentence are **AFFIRMED.** (ADAMS and BLECHMAN JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Actual physical control of motor vehicle—Crash report, including statements of eyewitnesses and observations of officers, constitutes competent substantial evidence to support finding that licensee was in actual physical control of vehicle—No merit to claim that licensee was denied due process by not being allowed to present testimony of man who alleges that he was actual driver but fled scene of crash where hearing officer allowed witness to testify, and there is competent substantial evidence that she gave his testimony same consideration and weight as any other evidence

THOMAS WEST, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-002937-O. March 20, 2020. Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles, Donna Robinson, Hearing Officer. Counsel: Jessica A. Travis, Jessica Travis, P.A., Orlando, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(Before BLACKWELL, CALDERON, and TENNIS, JJ.)

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(**PER CURIAM.**) **THIS MATTER** comes before the Court for consideration of Thomas Scott West's ("Petitioner") Petition for a Writ of Certiorari Jurisdiction filed on March 6, 2019, seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Respondent") Findings of Fact, Conclusions of Law and Decision upholding the suspension of his driver's license. This is filed pursuant to Florida Rules of Appellate Procedure 9.030(c)(2) and (3).

Arguments on Appeal

Petitioner argues that the Hearing Officer departed from the essential requirements of law by: 1) using statements in the crash report in making a probable cause determination of physical control, and 2) denying Petitioner due process in presenting witnesses and evidence.

Respondent argues that: 1) the crash report privilege does not apply because this was an administrative proceeding, not a criminal or civil proceeding, and other evidence showed Petitioner was in control of the vehicle; and 2) the Hearing Officer allowed Petitioner's witness to testify despite his absence at the scene.

Standard of Review

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed, whether there was a departure from the essential requirements of law, and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter,* 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

Further, because the scope of the Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decisions, the Court's review cannot go further to reweigh the evidence presented. *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (holding that once the reviewing court determines that there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end as the issue is not whether the hearing officer made the best, right, or wise decision; instead, the issue is whether the hearing officer made a lawful decision).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the Hearing Officer must find that the following elements have been established by a preponderance of the evidence:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat.

Discussion

Petitioner argues that the Hearing Officer lacked competent substantial evidence to find he was in actual physical control of the motor vehicle in question and could not use statements in the crash report to make this finding. However, pursuant to § 322.2615(2)(b), Florida Statute, a hearing officer can properly consider the crash report in such a hearing. Further, the offense report did not include Petitioner's statements; it included statements by the eyewitnesses and observations by the officers. Therefore, the privilege against self-incrimination is not violated by the introduction of the offense report, to which the crash report privilege does not apply. *See State v. Jones,* 283 So. 3d 1259, 1262 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2661f].

At the hearing, the Hearing Officer listened to testimony from Officer Schoen and reviewed the offense and crash reports admitted into evidence along with written statements and affidavits from the women whose vehicles were struck. In the offense report, Officer Yovino wrote that Ms. Duguay and Ms. Bessa told him they witnessed an older white male driving a truck and striking their vehicles. Offense Report, 3. Officer Yovino saw the offending vehicle and found it occupied by a white male and female. *Id.* Ms. Duguay and Ms. Bessa told Officer Yovino that Petitioner exited the truck, spoke with them both, and apologized for hitting their vehicles. *Id.* They also said the male in the car was the only driver of the vehicle and was operating the truck when it struck their vehicles. *Id.* In the crash report, Officer Yovino wrote that he made contact with Petitioner, who advised he was backing up and did not realize he struck the vehicles. Florida Traffic Crash Report ("Crash Report"), 3. The Hearing Officer heard testimony to the contrary from Juan Diaz who testified he was the individual operating the vehicle, but that he left out of fear because he has a criminal record and believed he would go back to prison for this accident. Hearing Transcript, 36-37. No reports or testimony mentioned another man leaving the scene or in the truck.

This Court finds that the offense report revealing that Petitioner was the driver of the truck that crashed into two stationary vehicles as evidenced by his presence in the truck and the eyewitness testimony of two people was competent substantial evidence for the Hearing Officer to find that Petitioner was driving or in physical control of the vehicle.

Additionally, Petitioner argues that the Hearing Officer denied his due process rights by not allowing him to present evidence and testimony, specifically from Mr. Diaz. This is contrary to the record. The Hearing Officer allowed Mr. Diaz to testify even though he was not present at the scene, and there is competent substantial evidence that she gave his testimony the same consideration and weight as any other evidence in this case.

Accordingly, it is hereby **ORDERED AND ADJUDGED** the Petitioner's Petition for Writ of Certiorari is **DENIED.** (CALDERON and TENNIS, JJ., concur.)

* * *

Landlord-tenant—Eviction—Attorney's fees—Premises in receivership—Although receiver agreed to prevailing tenant's entitlement to award of attorney's fees under section 83.48, tenant's sole remedy for award of fees was to make claim in receivership court to any funds that might have been available in receivership estate—Where receivership judge has concluded that there is not enough money in receivership estate to pay tenant's attorney's fees claim, tenant may not seek fees from condominium association or receiver

EDUARDO ORBE, Appellant, v. LEYZA F. BLANCO, the court appointed Successor Receiver for THE HORIZONS WEST PROPERTY OWNERS ASSOCIATION, INC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000083-AP-01. L.T. Case No. 2013-006323-CC-26. March 25, 2020. An Appeal from the County Court in and for Miami-Dade County, Gloria Gonzalez-Meyer, Judge. Counsel: Ignacio M. Alvarez, Alvarez, Gonzalez, Menezes, LLP, and Christopher F. Zacarias, for Appellant. Fernando J. Menendez, Sequor Law, for Appellee. Robert E. Paige, Paige Law Group, P.A., for Amicus Curiae Horizons West Property Owners Association, Inc.

(Before TRAWICK, WALSH and REBULL, JJ.)

(REBULL, J.) "Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." *McNulta v. Lochridge*, 141 U.S. 327, 332 (1891). This statement of the law by the United States Supreme Court over 120 years ago was true then, and it is true now. Based on the "tipsy coachman doctrine," we affirm the trial court's result as right for the wrong reasons.[1] Because there is no basis for entry of an attorney's fee award against Horizons West Property Owners Association, we affirm the trial court's decision not to enter such an award. Mr. Orbe's sole remedy for his award of attorney's fees was to make a claim in the receivership to any funds which may have been available in the receivership estate. And as the receivership judge concluded that no such funds exist to compensate him for his atttorney's fees, he may not seek such fees from Horizons West here.

I.

Mr. Orbe originally signed a lease with Condo Court Receivers, LLC, the original receiver appointed at the request of the Association. This lease was for Mr. Orbe to be a residential tenant in Unit 305 of Horizons West Condominium # 9 for $700 a month. Condo Court Receivers never signed the lease. Not long after Mr. Orbe signed that lease, the trial court presiding over the receivership of the various Horizons West properties and condo associations appointed attorney Leyza Blanco to replace Condo Court Receivers as the receiver for the various Horizons West entities.

Soon after her appointment, Ms. Blanco sought and received direction from the receivership court regarding the amount of rent which should be paid for Mr. Orbe's unit. That court entered an order authorizing Ms. Blanco to enter into a lease with Mr. Orbe for $950 a month. When Ms. Blanco and Mr. Orbe couldn't come to an agreement, Ms. Blanco filed an eviction lawsuit against Mr. Orbe. That eviction action gave rise to this appeal.

After a nonjury trial in the eviction, the trial judge entered a final judgment in favor of Mr. Orbe. The court found that Mr. Orbe had a month to month tenancy at $700 per month, because Condo Court Receivers never signed the written lease, but there was part performance by Mr. Orbe. The court further found that because the receiver did not give the 15-day notice required to properly terminate a month to month tenancy [§ 83.57(3), Fla. Stat. (2013)], the eviction was improper. Accordingly, the trial court entered judgment for the tenant, Mr. Orbe.

After the final judgment in his favor, Mr. Orbe filed a motion for entitlement to attorney's fees. Mr. Orbe argued for fees under section 83.48 of the Florida Statutes, and under the written lease he signed, but which was not signed by Condo Court Receivers. We fail to see how there was a legal basis for Mr. Orbe to argue for fees under the written lease, where the final judgment in his favor declared: "In this case the court finds that the Defendant was a tenant on a month to month because the lease was not executed by both parties but there was part performance by the tenant." In finding that Mr. Orbe was a month to month tenant, the court necessarily found that the ***one-year***

written lease was not effective.

Mr. Orbe was clearly entitled, on the other hand, to fees under the plain language of section 83.48 of the Florida Statutes: "In any civil action brought to enforce the provisions of the rental agreement ***or this part,*** the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs from the nonprevailing party." § 83.48, Fla. Stat. (2014). Recognizing that she was the "nonprevailing party" in the eviction action, and that Mr. Orbe was the party in whose favor the final judgment was rendered, the receiver agreed to Mr. Orbe's claim for entitlement to an award of attorney's fees. As a result, on September 5, 2014, the trial court entered an agreed order granting Mr. Orbe's entitlement to attorney's fees and costs.

Soon thereafter, the trial court in the receivership action entered a very significant order on September 23, 2014 which, among other things, terminated and discharged the receiver. The language of that order bears repeating in full:

> The Court finds that there are no funds remaining in the receivership estate and that all estate funds have been properly distributed in accordance with this Court's receivership orders.
>
> Leyza F. Blanco as Receiver, having fully and faithfully discharged the duties given her under the Amended Receivership Order and any other prior receivership order of this Court, is hereby released and discharged as the Receiver from all further and future duties, obligations, and responsibilities as Receiver under the Amended Receivership Order and any other prior receivership order of this Court. All actions of the Receiver, her legal counsel, special eviction counsel and other professional advisors and consultants taken pursuant to and in reliance upon the Amended Receivership Order and any other prior receivership orders of this Court, are hereby ratified and approved having fully, effectively and faithfully represented the Receiver in this case. Notwithstanding the release and discharge of the Receiver and the termination of this estate, ***the Receiver and her agents acting in furtherance of the Amended Receivership Order and any other prior receivership orders of this Court shall be subject to judicial immunity and the protections afforded to them, which shall survive, the discharge of the Receiver and the termination of the Receivership.***
>
> In connection with the motions pending in the eviction case of Leyza F. Blanco as Receiver vs. Eduardo Orbe, Case Number 2013-6323-CC-26 (03), ("Eviction Case"), the Court finds that there is no benefit to the receivership estate for the Receiver and her counsel to incur legal fees and costs to defend Non-Party Eduardo Orbe's Motion to Determine Reasonable Attorneys' Fees and Costs in the Eviction Case and as such, ***this Court releases and discharges the Receiver from having to defend and hire an expert in the Eviction Case in connection with such motion.*** However, Receiver is ordered to file this Order in the Eviction Case to advise the judge in the Eviction Case of same.
>
> ***Again, the Court finds that there is no money in this estate and as such there are insufficient funds to pay Orbe's claim, but this Court will nonetheless permit for the filing of Orbe's claim in this case for the record.*** The Court reiterates that the Receiver and her agents acting in furtherance of the Amended Receivership Order and any other prior receivership order of this Court ***are subject to judicial immunity and the protections afforded to them, which shall survive the discharge of the Receiver and the termination of the Receivership.***

(emphasis added).

At this point, what is not clear from the record, is how Mr. Orbe's award of entitlement to attorney's fees from the "nonprevailing party" in the eviction action, that is, Leyza Blanco as receiver, morphed into him seeking and obtaining a judgment for fees against The Horizons West Property Owners Association, Inc. But that is what happened. The record reflects that on April 15, 2015, the trial court rendered an approximately $42,000 judgment for attorney's fees against the Horizons West entity. That judgment was the subject of the earlier appeal in this case.

This Court reversed that judgment because Horizons West was not a party to the eviction action. Among other things, this Court wrote:

> A receiver is an officer of the court. *Se. Bank, NA. v. Ingrassia*, 562 So. 2d 718, 721 (Fla. 3d DCA 1990). *See also Edenfield v. Crisp*, 186 So. 2d 545, 549 (Fla. 2d DCA 1966). A receiver is a disinterested person appointed by the court for the protection or collection of property. *Granada Lakes Villas Condo. Ass'n, Inc. v. Metro-Dade Invs. Co.*, 125 So. 3d 756, 758 (Fla. 2013) [38 Fla. L. Weekly S777a] (quoting Black's Law Dictionary 1383 (9th ed. 2009)) (internal quotation marks omitted).
>
> * * *
>
> ***The Receiver was not a representative of the Appellant and was not acting directly on its behalf,*** even if Appellant was aware of the ongoing litigation. The Final Judgement was entered against the Appellant, an entity which was not a party to the case and which was not served with initial process or notice of hearing. As such, the trial court should not have entered the Final Judgment against the Appellant because it could not adjudicate the rights of a non-party.

(emphasis added). Having reversed the attorney's fee judgment entered against Horizons West, this Court then remanded this case to allow Horizons West to intervene in the action.

On remand, in light of the fact that this Court had reversed the judgment entered against it, Horizons West withdrew its motion to intervene in the eviction action. Mr. Orbe, on the other hand, sought to have the trial court force Horizons West to be a party to the eviction proceeding. The trial judge held a hearing on all pending issues on February 14, 2019.

We have reviewed the transcript of that hearing, and we sympathize with the trial judge's frustration. Among several concerns she had to address was the fact that she "inherited" the final judgment entered against Horizons West from a predecessor judge. Ultimately, the trial judge entered the order now on appeal. That order is titled as an Amended Order Denying Defendant's Motion for Award of Attorney's Fees. While the trial court wrote that it denied Mr. Orbe's motion for an award of attorney's fees because it believed it lacked jurisdiction to enter such an award; we affirm the trial court's order because it reached the right result, that is, not entering any attorney's fee award against Horizons West.

II.

As the trial judge correctly recognized at the February 14, 2019 hearing, the outcome of these issues turns on a proper application of the law governing receiverships. As we noted in our earlier opinion, a "receiver is an officer of the court . . . ." *Se. Bank, N.A. v. Ingrassia,* 562 So. 2d 718, 721 (Fla. 3d DCA 1990). Put differently, a "receiver is an arm of the court and the funds in its possession are as though they were in the hands of the court and held for the benefit of all lawful claimants." *Sunland Mortg. Corp. v. Lewis*, 515 So. 2d 1337, 1338 (Fla. 5th DCA 1987). Conversely, in this case, what the receiver clearly was not, was an agent or representative of Horizons West Property Owners Association.

At all times, Mr. Orbe knew that he was dealing with a receiver. At the beginning of his lease he was dealing with Condo ***Court Receivers.*** The party who filed the eviction complaint against him was "Leyza F. Blanco, the Court appointed Successor Receiver for the Horizons West Property Owners Association, Inc." Like Mr. Orbe, his counsel certainly also knew he was dealing with a receiver.

As we noted at the outset of this opinion in quoting the United States Supreme Court in *Lochridge*, claims against receivers are only payable from receivership funds (with some exceptions not applicable to this case). Over one hundred years ago, the Florida Supreme Court

described doing business with a receiver in this way:

> A receiver is the agent of the court, and those who deal with him as such do so with reference to his authority as receiver, the nature and extent of which authority those who so deal should take notice. Those who sell goods to a receiver as such do so upon faith of the property or business of the receivership, and with presumed knowledge of the lawful authority of the receiver.

Knickerbocker Tr. Co. v. Green Bay Phosphate Co., 56 So. 699 (Fla. 1911).

A leading treatise has similarly described the situation:

> One contracting with a receiver is bound to take notice of the limitation on her authority. As has been said:
>
> > The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law. . . . Thus, every one dealing with such receiver knows of the limitations, or lack of limitations, to his power to transact the business of the institution. He cannot without approval of the court relinquish any of the rights of the trust.

Receivers, 12 Williston on Contracts § 35:85 (4th ed. July 2019 Update) (internal footnotes omitted).

Here, although Mr. Orbe and the receiver did not enter into the one-year written lease contract, they nonetheless entered into a month to month tenancy which is governed by the same limitations on the receiver's authority. Any claim against the receiver arising out of this relationship would have to be made against the receivership estate.

> Florida law is clear that a receiver is the custodian for the court, through which the court controls ***the receivership estate***. *Murtha v. Steijskal*, 232 So.2d 53 (Fla. 4th DCA 1970) held:
>
> > The custody of property by the court through its receiver is the custody of the sovereign power or government acting through the courts, possession by the court of the res gives jurisdiction over the res to the court appointing the receiver and gives such court power to determine all questions concerning the ownership and disposition of the property. *Murtha*, 232 So.2d at 55.

In re Chira, 343 B.R. 361, 368 (Bankr. S.D. Fla. 2006) [19 Fla. L. Weekly Fed. B292a], aff'd, 367 B.R. 888 (S.D. Fla. 2007) (emphasis added) [20 Fla. L. Weekly Fed. D831a].

To be clear, no argument or claim has ever been made in this case that Ms. Blanco has any personal liability for the nonprevailing party attorney's fees arising out of the eviction. Nor could such a claim ever be made in good faith. It is clear that all times Mr. Blanco was acting in her official receivership capacity, and with the express authorization and sanction of the receivership court.

> Receivers ordinarily enjoy a qualified immunity from personal liability for actions taken within the receivership authority. In other words, receivers are only liable for actions taken in their official capacity. ***If a receiver obeys the orders of the appointing court, the receiver cannot be held personally liable although the actions taken are erroneous or are subsequently reversed.***

16 Fletcher Cyc. Corp., *Receivers Liabilities* § 7864 (Sep. 2019 Update) (emphasis added) (footnotes omitted). Moreover, a "receiver is not personally liable on a contract made in his or her official capacity unless made without authority." *See id*. at § 7864.10 (footnotes omitted).

In this case, Mr. Orbe entered into a month to month tenancy with the receiver. The receivership court later authorized Ms. Blanco to seek a higher monthly rental payment from Mr. Orbe and to enter into a written lease with him. When that was unsuccessful, Ms. Blanco was authorized to file the eviction action against Mr. Orbe. Although Ms. Blanco was unsuccessful in the eviction suit, that did not render her personally liable for attorney's fees as the nonprevailing party.[2]

The fact that Ms. Blanco agreed to an order on Mr. Orbe's entitlement to an award of attorney's fees does not change the analysis at all. Indeed, acquiescing to Mr. Orbe's motion for attorney's fees was the only thing Ms. Blanco was authorized to do. In its September 23, 2014 order, the receivership court "released and discharged" Ms. Blanco from having to defend against the motion for attorney's fees. That court also found that while there was not enough money in the receivership estate "to pay Orbe's claim," the court would allow his claim to be filed in the receivership "for the record." The record on appeal does not reflect that Mr. Orbe or his counsel ever submitted a claim to the receivership court or the estate. But that was their sole remedy.

> Contract and tort claimants must proceed against a receiver as receiver and get their satisfaction from the property held in the receiver's representative capacity, and not from the receiver's personal property. Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands.

Bogert's The Law of Trusts and Trustees § 14 (June 2019 Update) (internal quotations and footnotes omitted).[3]

III.

All of the foregoing discussion regarding the limitations on the liability of receivers is entirely consistent with general Florida cases concerning receiverships. For instance, in *Christian Broad. Network, Inc. v. Turner Communications Corp.*, 368 So. 2d 1345 (Fla. 4th DCA 1979), a lessor sued the lessee for breach of an equipment lease in federal court. The lessor obtained a money judgment against the lessee for over one million dollars. The lessee was in receivership. The Court held that the lessor had to be allowed to submit its claim in the receivership proceeding, and reversed the trial court's order striking the claim.

In *Asset Recovery Group, LLC v. Cabrera*, 233 So. 3d 1173 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2484a], Cabrera was the victim of a stabbing at an apartment complex. Cabrera sued the owner of the apartment complex for negligent security. The owner of the apartment complex, however, was subject to a court-appointed receiver who had control over the property. The Cabrera Court quashed the trial court's order denying the receiver's motion to dismiss Cabrera's claims.

> Therefore, pursuant to *Barton*,[4] prior to filing suit, Cabrera was required to seek leave of court from the court that appointed the Receiver. Thus, we grant the petition for writ of prohibition, quash the order under review, and remand with instructions for the trial court in Case No. 16-31938 to enter an order granting the Receiver's motion to dismiss counts IV and V of the amended complaint without prejudice to allow Cabrera to move to amend his complaint in an attempt to sufficiently allege that the acts or the omissions of the Receiver were outside the authority granted to him by the appointing court, or to seek leave to file the negligence action from the court that appointed the Receiver.

Asset Recovery Group, LLC v. Cabrera, 233 So. 3d 1173, 1178 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2484a].

In yet another receiver-controlled apartment complex stabbing case, the Third District Court of Appeal once again quashed an order denying the receiver's motion to dismiss, "without prejudice to Wright seeking leave to file suit against the Receiver from the foreclosure court that appointed the Receiver." *Asset Recovery Group, LLC v. Wright*, 271 So. 3d 1088, 1089 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D461a].

Finally, in *Desulme v. Rueda*, 252 So. 3d 293, 294 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1587a], Desulme owned "a unit in a distressed condominium that is subject to a court-ordered receivership." She alleged "that the receiver took possession of her unit, displaced her tenant, altered or repaired the unit without her consent,

and collected higher rents from a new tenant." *See id*. Desulme sued the receiver. The Court affirmed the trial judge's order dismissing her claims without prejudice to her seeking leave from the receivership court to proceed with her case against the receiver.

The weight of authority discussed herein makes it abundantly clear that if a person has a claim (in tort or contract) against an entity in receivership, absent an allegation that the receiver acted outside of her authority, the person must look to the receivership court for redress of that claim. In *Cabrera* and *Wright*, the claimants alleged they were involuntary victims of the receiver's negligence. In *Christian Broadcasting Network*, the claimant entered into a lease with a business which ended up in receivership. For all of these claimants, their sole remedy was with the court who appointed the receiver. Likewise, in this case, Mr. Orbe's remedy was the receivership court.

Conclusion

We have sympathy for Mr. Orbe's argument that the receiver wrongly filed the eviction suit against him and that someone should have to pay for his attorney's fees. But in a very real legal sense, as we've noted, Mr. Orbe is in the same position as the claimants in *Cabrera*, *Wright*, and *Christian Broadcasting Network*: he was "damaged" by someone in receivership. While this may unfortunately leave Mr. Orbe without a remedy, it is no different than having a claim against someone who is involved in bankruptcy proceedings, or having a claim or judgment against an uncollectible defendant.

There is thus no lawful basis for holding Horizons West liable for Mr. Orbe's claim. This was official action taken solely by the receiver, with the express authorization of the receivership court. As a result, Mr. Orbe must look solely to that court for redress. We affirm the order appealed declining to take further action for attorney's fees in the eviction case.

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

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[1]"This longstanding principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' ***so long as 'there is any basis which would support the judgment in the record.***' *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) [27 Fla. L. Weekly S829a] (emphasis added)(internal citation omitted).

[2]Additionally, Ms. Blanco relied on the services of her counsel in the eviction action, Jonathan R. Rubin. *See Athanason v. Hubbard*, 218 So. 2d 475, 478 (Fla. 2d DCA 1969) ("The general rule is that in cases involving legal questions which make it necessary for a receiver to take the advice of counsel, and competent counsel is employed whose advice is followed in good faith, the receiver is not liable for loss resulting therefrom.").

[3]

> "A receiver has been described as an arm of the court and therefore funds or property in the possession of a receiver are as though in the hands of the court, held for the benefit of all lawful claimants. The court therefore has the power to determine all questions concerning the disposition of the property. ***Accordingly, anyone claiming a right to receivership property must submit a claim to the court.*** Failure to submit a claim to the court and/or resort to self help, with respect to receivership property, could precipitate an action for contempt. Once a receiver is appointed for a business or a person, that entity loses the power to transfer its property subject to receivership. In addition, third parties cannot obtain a valid transfer or effect a valid lien on the property through filing suits and obtaining judgments."

Bruce J. Berman, Generally—The Court's Control Over Receivership Property, 4 Fla. Prac., Civil Procedure § 1.620:4 (April 2019 Update) (emphasis added).

[4]"*Barton v. Barbour*, 104 U.S. 126, 128, 26 L.Ed. 672 (1881), in which the Supreme Court of the United States held that 'before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.' ("Barton doctrine")." *Asset Recovery Group, LLC v. Cabrera*, 233 So. 3d 1173, 1175 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2484a].

* * *

Criminal law—Leaving scene of accident

MISTI DAWN PRICE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000140-AC-01. L.T. Case No. A93C22E. April 15, 2020. An Appeal from the County Court for Miami-Dade County, Judge Eleane Sosa-Bruzon. Counsel: James Odell, Assistant Public Defender, Miami, for Appellant. Jason Scott Duey, Assistant State Attorney, Miami, for Appellee.

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

(PER CURIAM.) Affirmed. Indisputably, the evidence established that Ms. Price was the driver of a vehicle involved in a crash resulting in damage to other property and that she failed to "immediately stop such vehicle" and "in ***every event*** . . . remain at, the scene of the crash until . . . she . . . fulfilled the requirements of s. 316.062." § 316.601(1), Fla. Stat. (2017) (emphasis added). We affirm the judgment and sentence.

* * *

KAMELINE FUENTES, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-37-AC-01. L.T. Case No. B18-29832. March 27, 2020. An Appeal from the County Court in and for Miami-Dade County, Hon. Michael Barket, County Court Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and Susan S. Lerner, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Joshua H. Hubner, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

ON CONFESSION OF ERROR

(PER CURIAM.) In light of the State's confession of error, we reverse the order withholding adjudication and assessing court costs on misdemeanor possession of marijuana, and remand to the trial court where the State has indicated it intends to nolle prosse the charges. (TRAWICK, WALSH, AND REBULL JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Failure of subpoenaed witness to appear—Department of Highway Safety and Motor Vehicles was not required to invalidate license suspension due to nonappearance of subpoenaed deputy who was not arresting officer or breath technician—Nonappearance did not deny licensee due process where hearing officer issued subpoena for deputy and offered licensee opportunity to seek enforcement of subpoena—Licensee was not denied due process by arresting trooper's failure to produce video pursuant to subpoena duces tecum where trooper did not have possession of, or control over, video—Lawfulness of arrest—Trooper had probable cause for DUI arrest where licensee involved in single-vehicle crash had odor of alcohol, watery bloodshot eyes and difficulty answering questions and admitted to drinking all day—Despite evidence that licensee suffered from effects of concussion at time of arrest, hearing officer's finding that licensee refused to submit to breath test is supported by competent substantial evidence—Statute does not require that refusal to submit to breath test be made knowingly and, even if knowing refusal were required, hearing officer was not required to accept evidence that concussion prevented licensee from acting knowingly—Petition for writ of certiorari is denied

JERRY ALEX SHEILDS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Jackson County. Case No. 19-346 CA . March 19, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JAMES J. GOODMAN, JR, J.) THIS MATTER is before the Court on the Petitioner's Petition for Writ of Certiorari and Appendix filed on July 9, 2019, pursuant to Fla. R. App. P. 9.100, and Notice of Filing Court Transcript filed on October 4, 2019, and the Respondent's Response to Petition for Writ of Certiorari filed on February 17, 2020. Having considered the same, the Court finds and orders as follows.

1. After the Petitioner, JERRY ALEX SHEILDS ("Petitioner"), was arrested for driving under the influence on April 27, 2019, he requested a formal administrative review of his license suspension by the Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department") pursuant to Section 322.2615, Fla. Stat. (2019). An evidentiary hearing was held on May 29, 2019. The Hearing Officer issued his Findings of Fact, Conclusions of Law and Decision on June 10, 2019.

THE RECORD

2. The transcript reflects that at the beginning of the hearing, the presiding Hearing Officer stated that the scope of the review would be limited to the following issues: (1) whether the law enforcement officer had probable cause to believe the Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; (2) whether the Petitioner refused to submit to any such test after being requested to do so by a law enforcement or correctional officer; and (3) whether the Petitioner was told that if he refused to submit to any such test, his privilege to operate a motor vehicle would be suspended for a period of one year; in the case of a second or subsequent refusal, for a period of eighteen months.

3. The Hearing Officer identified the following documents and entered them into the record without objection:

- DDL Number 1: Florida DUI Uniform Traffic Citation, A7680CE, which included the Notice of Suspension, issued by Florida Highway Patrol Trooper Jeffrey O'Pry
- DDL Number 2: Florida Highway Patrol Arrest Report, three pages long, completed by Trooper O'Pry on April 27, 2019, which includes information related to Trooper O'Pry by Washington County Deputy Kade Smith when Trooper O'Pry arrived on the scene
- DDL Number 3: State of Florida, Department of Highway Safety and Motor Vehicles, Affidavit of Refusal to Submit to Breath, Urine or Blood Test, signed by Trooper O'Pry on April 27, 2019, which stated that the Trooper O'Pry read the Implied Consent Warning to the Petitioner and requested a breath test and the Petitioner refused.
- DDL Number 4: Florida Highway Patrol Alcohol Drug Influence Report, four pages, completed by Trooper O'Pry on April 27, 2019, which indicated that the Petitioner appeared to be impaired; was swaying, unsteady, or had balance problems; had thick tongued/ mumbled/ slurred speech; was slow to respond to officer/officer must repeat; provided incorrect information or changed answers; had an odor of alcoholic beverages; was sleepy and confused; was flushed; and had bloodshot, watery eyes. This report included information related to Trooper O'Pry by Deputy Smith when Trooper O'Pry arrived on the scene.
- DDL Number 5: FHP Incident Report, 3 pages, completed by Trooper O' Pry on April 27, 2019, which includes information related to Trooper O'Pry by Deputy Smith when Trooper O'Pry arrived on the scene
- DDL Number 6: Florida Traffic Crash Driver Information Exchange, completed by Trooper O'Pry
- DDL Number 7: Florida Highway Patrol Vehicle Tow, completed by Trooper O'Pry
- DDL Number 8: Florida Uniform Traffic Citation AB5YOSE, careless driving citation, issued by Trooper O'Pry
- DDL Number 9: Florida Uniform Traffic Citation AV5YOTE, refusal to submit to a breath alcohol level test citation, issued by Trooper O'Pry
- Driver's Exhibit #1, photographs of the Petitioner's injury
- Driver's Exhibit #2, Flowers Hospital, Emergency Department Discharge Instructions (Patient), indicating a diagnosis of concussion with brief loss of consciousness, post-concussion syndrome, and that a CT of the head or brain and an x-ray of the cervical spine were ordered due to injury to the head, face and neck

4. The Petitioner's Counsel called two witnesses, Florida Highway Patrol Trooper O'Pry and Petitioner.

1. Trooper O'Pry testified first as follows. The crash occurred in Jackson County, Florida. Trooper O'Pry arrived on the scene around 6:30 am and saw a black Toyota truck in the edge of the wood line of a residential property, against a small utility trailer. The back tires of the truck were spun down. The truck had hit a mailbox, bushes, flower shrubs and a tree in the yard, and then hit the utility trailer in the wood line. Washington County Sheriff's Office Deputy Kade Smith, who was at the scene when Trooper O'Pry arrived, told Trooper O'Pry that he saw the black truck while he was driving to work and stopped. When Deputy Smith approached the vehicle, he saw the Petitioner sitting in the truck behind the steering wheel with the vehicle in drive, and the Petitioner appeared to be asleep. Deputy Smith told Trooper O'Pry he had been able to arouse the Petitioner and get his driver's license, which Deputy Smith handed to Trooper O'Pry. Trooper O'Pry first inspected the black truck, which was in drive and running. Trooper O'Pry placed the black truck in park and turned off the engine. Trooper O'Pry did not see any evidence of alcoholic beverages such as bottles or beer, in or around the crashed vehicle. Trooper O'Pry opened the glove box and obtained the vehicle registration and insurance information and initiated a crash report. Once Trooper O'Pry had enough information to do his crash report, he started a criminal investigation. Trooper O'Pry then went back to Deputy Smith's vehicle. The Petitioner was in the back seat of Deputy Smith's patrol vehicle, and the Petitioner was in handcuffs. At that point, Trooper O'Pry turned on his video. Trooper O'Pry advised the Petitioner of his *Miranda* rights. Trooper O'Pry told the Petitioner he was doing a DUI investigation. The Petitioner identified himself as Jerry Shields and said he did not know where he was or how he got there. The Petitioner stated he would talk to Trooper O'Pry because he had nothing to hide. Trooper O'Pry testified that the Petitioner was not able to answer any questions. Trooper O'Pry did not think the Petitioner was having trouble comprehending, but the Petitioner was having trouble compiling his responses and the Petitioner was not understandable. The Petitioner was able to tell Trooper O'Pry that he went to his sister's house the day before and they drank all day, and then the Petitioner did not remember leaving his sister's house. Trooper O'Pry asked the Petitioner to perform field sobriety exercises because Trooper O'Pry smelled a strong odor of alcohol on the Petitioner and the odor got stronger as the Petitioner spoke. The Petitioner refused to do the field sobriety exercises, and Trooper O'Pry placed the Petitioner under arrest. Trooper O'Pry took the Petitioner out of Deputy Smith's vehicle, took Deputy Smith's handcuffs off the Petitioner, and then Trooper O'Pry placed his handcuffs on the Petitioner. Trooper O'Pry read the Implied Consent Warning to the Petitioner and the Petitioner said no. Trooper O'Pry stated some of the information he related in his testimony was not in his report, but it was on the video taken at the scene. Trooper O'Pry testified that he gave the video of his interactions with the Petitioner to the Department, and that the clerk at the Florida Highway Patrol Station should have the video. Trooper O'Pry did not have the video with him for the hearing and he had not reviewed it.

2. The Petitioner then testified as follows, relying on his memory and apps on his cell phone. On April 27th, he went to a friend's house around 12:30 p.m. and left around 6:30 p.m. According to his phone apps, the crash occurred approximately 13 minutes after he left his friend's house, and the Petitioner was driving 40 miles per hour at most. The Petitioner remembered traveling down the road, but he did not remember the accident. The next thing he remembered was being in jail. He did not remember talking to Deputy Smith or Trooper O'Pry, being placed in Deputy Smith's patrol vehicle, the handcuffs being switched, Trooper O'Pry reading him his *Miranda* rights or his implied consent, or whether he refused or not. The Petitioner was later

told he hit a tree and possibly a trailer. The air bag did not deploy because it had been disconnected. After the Petitioner was released from jail, he went to see a doctor in the emergency room, which was two days after the accident. The Petitioner had a black eye and a knot above his right eyebrow as a result of the crash. In the emergency room, he was given an MRI or a CAT scan of his head. His neck was examined, and the Petitioner was told he had a concussion, loss of consciousness. Prior to the crash, nothing had happened that would have caused this, so Trooper O'Pry could have been right that the Petitioner was not able to comprehend. The Petitioner believes this was due to his concussion. The Petitioner was not allowed to work until he was checked out further and then he was good to go, about a week and a half later. The Petitioner was prescribed medication, but he could not remember the name of the medication. The Petitioner's job was to train soldiers in combat shooting for the Army. He had to be checked out by the Army and an Army psychologist did a full workup on the Petitioner. The Petitioner went to his Counsel's office a few days later, and his Counsel took pictures of his injuries, which were admitted into evidence.

3. The Appendix also includes a return of service showing that Deputy Smith was served with a subpoena duces tecum for the administrative hearing, and a return of service showing Trooper O'Pry was served with a subpoena duces tecum for the administrative hearing which listed the video from Trooper O'Pry's camera.

4. The Hearing Officer reserved ruling on four motions made by the Petitioner, and included his rulings in his Findings of Fact, Conclusions of Law and Decision issued on June 10, 2019, as follows. First, the Petitioner moved to invalidate the administrative suspension due to Deputy Smith not appearing although he was subpoenaed. This motion was denied because the Petitioner was given the opportunity to continue to review to enforce the subpoena, and the Petitioner declined. Further, Deputy Smith was not the breath test operator nor the arresting office, so he was not a material witness. Second, the Petitioner moved to invalidate the administrative suspension based on Trooper O'Pry's failure to bring the DUI arrest video pursuant to the subpoena duces tecum served on Trooper O'Pry. This motion was denied because Trooper O'Pry was not the records custodian for the video. Third, the Petitioner moved to invalidate the administrative suspension due to no probable cause for the arrest. This motion was denied because the totality of the evidence submitted provided sufficient probable cause for the DUI arrest. Fourth, the Petitioner moved to invalidate the administrative suspension due to no lawful arrest for a DUI because the Petitioner had a concussion and could not have knowingly refused to submit to the test. This motion was denied because the totality of the evidence submitted provided sufficient proof that the arrest was lawful. There was no mention of a possible injury at the time in which the field sobriety exercises, and the breath test, were requested.

5. The Hearing Officer's Findings of Fact, Conclusions of Law and Decision further stated as follows:

> "I find that the following facts are supported by a preponderance of the evidence: On April 27, 2019, Deputy Kade Smith of the Washington County Sheriff's Office observed the Petitioner's vehicle in the wood line. Deputy Kade Smith made contact with the Petitioner, who was asleep at the wheel with the engine running, and the vehicle was still in drive. After, Deputy Kade Smith was able to wake the Petitioner, he got the Petitioner out of the vehicle and observed a strong odor of alcoholic beverages coming from the Petitioner's person. Deputy Kade Smith detained the Petitioner in the back of his patrol vehicle.
>
> Trooper O'Pry of the Florida Highway Patrol was dispatched to the same scene due to the crash and made contact. Deputy Kade Smith who advised him of his observations to that point. Trooper O'Pry made contact with the Petitioner and observed a strong odor of alcoholic beverages coming from the Petitioner's breath and person. Trooper O'Pry observed that the Petitioner's eyes were bloodshot, watery and glassy, his face was flushed, and his speech was mumbled, slurred, and thick tongued. Trooper O'Pry requested that the Petitioner perform field sobriety exercises, and the Petitioner refused. Based on his observations, Trooper O'Pry placed the Petitioner under arrest for DUI.
>
> On scene, Trooper O'Pry requested the Petitioner to submit to a breath test, and the Petitioner refused. Trooper O'Pry read the Implied Consent Warning, and the Petitioner maintained his refusal. The Petitioner was then transported to the jail. Based on the foregoing, I find that the Petitioner was placed under lawful arrest for DUI."

6. The hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain the Petitioner's suspension. The Department informed the Petitioner in an Order dated June 10, 2019, that the suspension of his driving privilege had been sustained. The Petitioner seeks review of the Department's Order.

7. The Court's scope of review in conducting certiorari review of an administrative decision is limited to determining (1) whether due process was afforded the Petitioner; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Florida Dept. of Highway Safety and Motor Vehicles,* 209 So. 3d 1165- 1170-1171 (Fla. 2017) [42 Fla. L. Weekly S85a]. "[W]here competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination." *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984); *Campbell v. Vetter,* 293 So. 2d 6 (Fla. 4th DCA 1980), *pet. for review denied,* 399 So. 2d 1140 (Fla. 1981). The arguments raised by the Petitioner are reviewed by the Court as follows.

ISSUES FOR CERTIORARI REVIEW AND ANALYSIS

I. WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE DEPUTY SMITH WAS A MATERIAL WITNESS AND HE FAILED TO ATTEND THE HEARING EVEN THOUGH HE WAS SUBPOENAED

8. "[T]he procedural due process rights afforded a driver when seeking review of a license suspension pursuant to section 322.2615 include "the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." *See* Fla. Admin. Cod R. 15A-6.013(5)." *Lee v. Department of Highway Safety and Motor Vehicles,* 4 So. 3d 754, 756-757 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D520a].

9. The Hearing Officer issued a subpoena for Deputy Smith pursuant to the Petitioner's request, and that subpoena was served. Because Deputy Smith did not attend the hearing, the Hearing Officer offered to allow the Petitioner a continuance in order to enforce the subpoena, but the Petitioner declined and instead moved to invalidate the suspension based on Deputy Smith's failure to appear.

10. Florida Statutes section 322.2615(6)(c) provides,

> "The failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension. If a witness fails to appear, a party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides or by filing a motion for enforcement in any criminal court case resulting from the driving or actual physical control of a motor vehicle that gave rise to the suspension under this section. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged."

11. However, Florida Statutes section 322.2615(11) provides the

following two exceptions,

> "If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension."

12. Because Deputy Smith was not the arresting officer or the breath technician, the Department was not required to invalidate the suspension and the Hearing Officer correctly denied the Petitioner's motion to invalidate his suspension based on Deputy Smith's failure to appear at the hearing.

13. To the extent the Petitioner wished to compel Deputy Smith's attendance and have the opportunity to elicit and confront Deputy Smith's testimony, the Petitioner's remedy was to seek enforcement of the subpoena. However, the Hearing Officer asked him three times if he wanted a continuance for that purpose, and the Petitioner firmly declined.

14. "[I]it was not a denial of due process when a subpoenaed witness failed to appear because the hearing officer properly issued the subpoena and offered the suspendee the opportunity to seek enforcement of the subpoena in the circuit court; however, the suspendee did not pursue the available statutory remedy." *Dep't of Highway Safety & Motor Vehicles v. Robinson,* 93 So. 3d 1090, 1093 (Fla. 2d DCA. App. 2012) [37 Fla. L. Weekly D1542a] (in which the Second District addressed its denial of a petition for writ of certiorari in *McKenney v. Dep't. of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 1030a (Fla. 13th Cir. Ct. Jan. 12, 2011) *cert denied,* 75 So. 3d 1259 (Fla. 2d DCA 2011) (table decision). In *McKenney,* the circuit court found that it was not a denial of due process when a subpoenaed witness failed to appear because the hearing officer properly issued the subpoena and offered the suspendee the opportunity to seek enforcement of the subpoena in the circuit court but the suspendee did not pursue the available statutory remedy.

II. WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE TROOPER O'PRY FAILED TO COMPLY WITH A SUBPOENA DUCES TECUM TO BRING VIDEO EVIDENCE

15. The Hearing Officer also issued a subpoena duces tecum for Trooper O'Pry, pursuant to Petitioner's request, and that subpoena was served. The subpoena duces tecum listed any and all videos from body cameras and/or in car cameras relating to the Petitioner on April 27, 2019.

16. However, a witness may not be required to produce items not in his possession. "In requiring Fritz and Upington to produce records and documents of Boyle Engineering, which are not in their possession or under their control, the lower court's order departed from the essential requirements of law. The order and subpoena should only require production of documents which the deponent has in his possession, or which are under his control and supervision." *Fritz v. Norflor Const. Co.,* 386 So. 2d 899, 901 (Fla. 5th DCA 1980) (internal citations omitted).

17. Trooper O'Pry did not have possession of or control over the video, because he turned it over to the Florida Highway Patrol Station after the incident. Accordingly, the Hearing Officer correctly denied the Petitioner's motion to invalidate his suspension based on Trooper O'Pry's failure to bring the video to the hearing.

III. WHETHER THERE WAS COMPETENT SUBSTANTIAL EVIDENCE THAT TROOPER O'PRY HAD PROBABLE CAUSE TO ARREST PETITIONER FOR DUI

18. The Petitioner asserts that the smell of alcohol coming from his body and the fact that his car was wrecked were not sufficient to give Trooper O'Pry probable cause to arrest him for DUI, and that the Hearing Officer should not have considered the statements made by Deputy Smith to Trooper O'Pry when Trooper O'Pry arrived on the scene.

19. " "Probable cause" is "a reasonable ground of suspicion supported by circumstances strong enough in themselves to warrant a cautious person in belief that the named suspect is guilty of the offense charged." *Johnson v. State,* 660 So. 2d 648, 654 (Fla.1995) [20 Fla. L. Weekly S347a]. Probable cause for a DUI arrest must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *State, Dept of Highway Safety & Motor Vehicles, Div. of Driver Licenses v. Possati,* 866 So. 2d 737, 740-41 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a], citing *State v. Kliphouse, 771* So. 2d 16, 22 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

20. "While the odor of alcohol on a driver's breath is considered a critical factor, other components central to developing probable cause may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises." *Kliphouse*, 771 So. 2d. at 23.

21. The smell of alcohol coming from Petitioner's body, his bloodshot or watery eyes, his difficulty responding to Trooper O'Pry's questions, his admission that he had been drinking all day the day before, and the fact that the Petitioner crashed his vehicle were sufficient grounds for a finding of probable cause for a DUI arrest. As such, the Hearing Officer's finding of probable cause was supported by competent, substantial evidence. "In combination, the smell of alcohol on Possati's breath, his observably bloodshot and watery eyes, and, most significantly, the uncontested fact that he had just crashed his car into a parked police vehicle, were more than sufficient to establish probable cause for a lawful DUI arrest by the arresting officer. Therefore, Possati's refusal to take a breath test, under the plain language of the statute, justified the suspension of his driver's license." *Possati,* 866 So. 2d at 741.

22. This Court may not reweigh the evidence before the Hearing Officer. "On certiorari review to the circuit court, "[t]he relevant issue . . . was whether there was competent, substantial evidence to support the hearing officer's factual finding of probable cause." *Dept of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 30809 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. The circuit court was not permitted to "reweigh [ ] the evidence and substitute [[its] judgment for that of the hearing officer." *Id.* at 309 (holding that "by rejecting the hearing officer's findings when there was competent, substantial evidence in the record to support these findings," circuit court improperly reweighed the evidence). When the circuit court reweighs the evidence, it fails to apply the correct standard of review and thus fails to apply the correct law. Id. This court has stated that "the circuit court exceed[s] its scope of review by making an independent probable cause determination" after reviewing the evidence de novo. *Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (holding that circuit court improperly rejected trial court's findings and made its own determination that no probable cause existed); see also *Dep't of Highway Safety & Motor Vehicles v. Haskins,* 752 So.2d 625, 627 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2730a] (holding that circuit court applied the incorrect law when it "reviewed the evidence and formed its own opinion, without deference to the findings of the hearing officer")." *Department of Highway Safety and Motor Vehicles v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

23. The procedures applicable to the formal review of a driver's license suspension are outlined in Florida Statutes section 322.2615 and in the administrative regulations adopted by the Department in Chapter 15A-6 of the Florida Administrative Code. *State Dep't of*

Highway Safety & Motor Vehicles v. Saxlehner, 96 So. 3d 1002, 1006-07 (Fla. 3d DCA. 2012) [37 Fla. L. Weekly D1932a]. "Pursuant to those provisions, a formal review may be conducted without any witnesses at all, and a hearing officer's decision may be based solely upon the documents submitted by the arresting agency. See § 322.2615(11), Fla. Stat. (2010). These documents are admissible into evidence for the hearing officer's consideration without any further requirement of authenticity. See Ch. 15A-6.013(2), Fla. Admin. Code." *Id.* at 1007. "Neither the statute nor the administrative regulation prohibits the admission of hearsay evidence. Nor do these provisions require non-hearsay evidence to corroborate any hearsay evidence admitted at the hearing." *Id.*

24. Several documents were admitted into evidence without objection and pursuant to section 322.2615, that were prepared by Trooper O'Pry and included Deputy Smith's statements to Trooper O'Pry regarding what he observed before Trooper O'Pry arrived on the scene. These were properly considered by the hearing officer. "The arrest affidavit and its contents were admissible evidence in a formal review hearing conducted pursuant to section 322.2615 and Chapter 15A-6.013." *Id.*

IV. WHETHER THERE WAS COMPETENT SUBSTANTIAL EVIDENCE THAT PETITIONER KNOWINGLY REFUSED TO SUBMIT TO THE FIELD SOBRIETY EXAM AND/OR BREATH TEST WHEN PETITIONER WAS UNDER THE EFFECTS OF A CONCUSSION

25. The Petitioner argues that he could not have knowingly refused to submit to the field sobriety exam or the breath test because he was under the effects of a concussion.

26. Under section 322.2615(7), Florida Statutes, in a formal review of a license suspension, if the license was suspended for refusal to submit to a breath, blood, or urine test, the scope of the hearing officer's review is limited to three issues: (1). whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; (2) whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer; and (3) whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

27. The Hearing Officer stated at the beginning of the review hearing that these were the three issues that would be considered, and in his decision, the Hearing Officer found that all three elements were met and supported by a preponderance of the evidence.

28. Florida Statutes section 322.2615, as worded and enacted by the Florida Legislature, does not require, in order to sustain a suspension based on a driver's refusal to submit to a breath, blood, or urine test, that the driver's refusal had to be a knowing refusal.

29. In *Perryman v. State,* 242 So. 2d 762, 763 (Fla. 1st DCA 1971), the First District rejected a driver's argument that he was too drunk to perform a breath test, stating "The remaining question raised by appellant resolves itself into whether a driver who is voluntarily intoxicated can circumvent the purpose and intent of the so-called implied consent law by professing to be too drunk to perform the simple task—even for a drunk, we are told—of blowing breath into a tube or similar device for chemical testing. We think not." Further, there was no showing that the driver was in such a drunken state so as to not have sufficient control of his faculties to knowingly refuse to take the test in question. As such, the lower tribunal was justified in ruling that the driver had failed to cooperate by refusing to take the test.

30. If the Petitioner's claim that he did not knowingly refuse to take the breath test is a viable defense, that was an issue of fact for the Hearing Officer, and the Hearing Officer found the Petitioner's evidence unpersuasive. "[T]he hearing officer is not required to believe the testimony of any witness, even if unrebutted." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. *See also, Stafford v. State, Dep't of Highway Safety & Motor Vehicles,* 18 Fla. L. Weekly Supp. 37a (Fla. 14th Cir. Ct. Sept. 23, 2010), in which the reviewing circuit court, citing *Luttrell,* ruled that the hearing officer was not required to accept a driver's testimony, or medical records and an affidavit from his treating doctor, in support of the driver's claim that he was incapable of understanding the implied consent warning and incapable of knowingly refusing to take a breath test because he had suffered a concussion in the crash.

Therefore, it is

ORDERED that the Petitioner's Petition for Writ of Certiorari is denied.

* * *

Criminal law—Violation of domestic violence injunction—Pre-trial release—No-contact order—Where petitioner was accused of violating domestic violence injunction that precluded any contact with ex-wife except communications about exchange of minor children by sending ex-wife text stating that he could not wait to show someone pornographic picture she had on child's iPad, trial court abused its discretion by entering new no-contact order as condition of pre-trial release that included children and refusing to modify no-contact order to exclude children where there is no evidence that children ever saw text or were otherwise affected by it—On remand, trial court must remove children from no-contact order and should appoint third party to facilitate petitioner's contact with children

JOSE VELASCO, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal AC Division. Case No. 502019AP000099AXXXMB. L.T. Case No. 502019MM004414AXXXMB. March 31, 2020. Petition for Writ of Certiorari from the County Court in and for Palm Beach County, Judge Debra Moses Stephens. Counsel: Carla Lowry, Fort Lauderdale, for Petitioner. Joseph Kadis, Office of the State Attorney, West Palm Beach, for Respondent.

(PER CURIAM.) Petitioner, Jose Antonio Velasco, filed a timely Petition for Writ of Certiorari requesting that this Court reverse the trial court's entrance of a no-contact order that included Petitioner's two minor children. We find that the trial court's decision to include the children on the no-contact order, as well as its subsequent denial of Petitioner's Motion to Modify No-Contact Order, constituted a departure from the essential requirements of the law.

On October 26, 2017, the trial court entered a domestic violence injunction in favor of Petitioner's ex-wife. The injunction included a no-contact provision, stating that Petitioner could not contact his ex-wife except to communicate regarding the exchange of their two minor children according to their parenting plan. On March 26, 2019, Petitioner allegedly violated the terms of the injunction by sending his ex-wife a text message that was unrelated to the exchange of their two minor children. Based on this alleged violation, Petitioner was arrested and charged with violating a domestic violence injunction. As a condition of Petitioner's pretrial release, the trial court entered a new no-contact order naming Petitioner's ex-wife—and their two minor children—as victims with whom Petitioner was precluded from having contact. Due to the children's inclusion in the no-contact order, Petitioner sought to modify the no-contact order pursuant to an April 26, 2019 Motion to Modify No-Contact Order. But on June 3, 2019, following several hearings on the matter, the trial court denied Petitioner's motion. It is of that order Petitioner now seeks our review.

A non-final order for which no appeal is provided in Florida Rule of Appellate Procedure 9.130 is reviewable by certiorari in limited circumstances. *Palm Beach Cty. Sch. Bd. v. Morrison*, 621 So. 2d 464, 468 (Fla. 4th DCA 1993). "To obtain certiorari relief, a petitioner must show a departure from the essential requirements of law, causing material injury which cannot be adequately remedied on appeal from a final order." *Cruz v. State*, 279 So. 3d 154, 157 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2076b] (citing *Williams v. Oken*, 62 So. 3d 1129, 1132-33 (Fla. 2011) [36 Fla. L. Weekly S202a]). Departure from the essential requirements of law means "an inherent illegality or irregularity, an abuse of judicial power, [or] an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a] (citation omitted). In other words, a departure from the essential requirements of the law is not a mere legal error, but instead is a "gross miscarriage of justice." *Sutton v. State*, 975 So. 2d 1073, 1081 (Fla. 2008) [33 Fla. L. Weekly S76a].

We find that including the children in the no-contact order constituted a departure from the essential requirements of the law. Absent a capital offense or an offense punishable by life, "every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions." Art. I, § 14, Fla. Const. As a condition of pretrial release, an individual must refrain from criminal activity, and, if the court issues a no-contact order, must "[r]efrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure." § 903.047(1), Fla. Stat. (2018). Conditions of pretrial release are reviewed under an abuse of discretion standard. *Hernandez v. Roth*, 890 So. 2d 1173, 1174 (Fla. 3d DCA 2004) [30 Fla. L. Weekly D97a].

Here, we find that precluding contact between Petitioner and his children was not a reasonable condition of pretrial release. Petitioner is accused of sending his ex-wife a text message in violation of an October 26, 2017 injunction precluding Petitioner from contacting his ex-wife—not his children. According to the probable cause affidavit supporting Petitioner's violation of injunction charge, the text message sent to Petitioner's ex-wife stated "[c]ant wait to show him your pornograph [sic] picture u had on [Minor Child's] I pad." While it is understandable the trial court had concerns about the welfare of the parties' children when considering these allegations, there was in fact no evidence presented showing that Petitioner's children even saw the text message or were otherwise affected by it. Petitioner has a fundamental liberty interest in the care, custody, and management of his children, and such an interest cannot be impeded by a no-contact order without any evidence indicating such an order is required for their protection. *See D.M.T. v. T.M.H.*, 129 So. 3d 320, 334-35 (Fla. 2013) [38 Fla. L. Weekly S812b]. To the extent the trial court had concerns about Petitioner's continued ability to communicate with his ex-wife about the exchange of their children, section 903.047(1), Florida Statutes, specifically allows for the designation of an appropriate third person to facilitate contact between a victim and defendant when they have children in common. § 903.047(1)(b)1., Fla. Stat. (2018). Thus, we find the trial court abused its discretion by including Petitioner's children in the no-contact order, and that their inclusion departed from the essential requirements of law, causing injury that cannot be adequately remedied on appeal from a final order.

We also understand the trial court's hesitation to modify the no-contact order given the hostilities between Petitioner and his ex-wife, and the perhaps inevitable impact of such hostilities on the minor children. However, we find the trial court's refusal to modify the no-contact order resulted in a further departure from the essential requirements of the law. The trial court had before it no evidence the children saw the contents of the text message sent to Petitioner's ex-wife, and no evidence concerning any emotional or mental impact such message had on the children.

Accordingly, we **GRANT** the Petition for Writ of Certiorari and **REMAND** the cause to the trial court with instructions that it remove Petitioner's children from the no-contact order. However, because we find the no-contact order still appropriate as to Petitioner's ex-wife, the trial court should appoint an appropriate third party to facilitate contact with the children. § 903.047(1)(b)1., Fla. Stat. (2018). (CARACUZZO, GILLEN, and G. KEYSER, JJ., concur.)

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Where officer observed that defendant was slumped over in running vehicle blocking drive-through lane at fast food restaurant and had glassy eyes, slurred speech and difficulty answering questions, officer had reasonable suspicion to initiate DUI investigation even in absence of odor of alcohol—Error to grant motion to suppress

STATE OF FLORIDA, Appellant, v. SHANE PATRICK BRYAN, Appellee. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 18-39-AP. L.T. Case No. 18-MM-2802-A. September 16, 2019. Appeal from the County Court for Seminole County, Honorable Mark E. Herr, County Court Judge. Counsel: Phil Archer, State Attorney and Olivia Yergey, Assistant State Attorney, for Appellant. Stuart I. Hyman, for Appellee.

(NELSON, D.) This appeal comes from an order granting a motion to suppress. It raises the issue of whether there was reasonable suspicion based on specific and articulable facts to allow officers to detain the Appellee and proceed with a DUI investigation absent the odor of alcohol.

On Friday, March 30, 2018 around 12:20 a.m., Officer Matthew Blunt of the Casselberry Police Department responded to a 911 call about a vehicle blocking a Steak n' Shake drive through lane. The Appellee was found passed out in his car sitting in the drive through lane. Officer Blunt conducted a well-being check on him. He noted that the engine was running, the car was still in gear, and the Appellee's was slumped over with his foot was on the brake. It took ten minutes of calling out to the Appellee, sternum rubs through an open driver's side window, and a car alarm to wake the Appellee. Officer Blunt testified that after being roused, the Appellee had trouble answering questions, slurred speech, and glassy eyes. The officer further testified that he was unable to smell anything because his sinuses were clogged, but Officer Hash relayed that he smelled the odor of alcohol. After the Appellee was cleared by the Seminole County Fire Department, the officers detained him to conduct field sobriety tests.

In its order granting the motion to suppress, the trial court explained that no credible evidence was presented regarding the odor of alcohol prior to the Appellee's detention for a DUI investigation. Because the odor of alcohol was not initially present, the trial court explained that there was no reasonable suspicion to justify a DUI investigation.

The standard of review from an order on a motion to suppress is whether the trial court's finding of fact is supported by competent, substantial evidence, however the application of the law to the facts is reviewed de novo. *Carter v. State,* 120 So. 3d 207, 208 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1802a]. It is not the job of the appellate court to reweigh the evidence and substitute their own factual findings for that of the trial judge, and the court must affirm unless the trial court's determination was clearly erroneous. *State v. Smith,* 632 So. 2d 1086, 1088 (Fla. 5th DCA 1994). The trial court acting as the trier of fact must weigh the credibility of the evidence. The judge is not required to believe police officer testimony in a suppression hearing even when it is the only evidence presented. *Maurer v. State,* 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D559b]. In

addition to hearing the testimony, the trial court received into evidence the body cam video of the events as they occurred. According to *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1175 (Fla. 2017) [42 Fla. L. Weekly S85a], a court applies the correct law by rejecting officer testimony as being competent, substantial evidence when it is contradicted and refuted by objective real-time video evidence. The trial court explained that video evidence did not support Officer Blunt's assertion that the smell of alcohol was present prior to the Appellee's detention.

While the odor of alcohol may be an important factor in finding probable cause for DUI, it is not a critical element. *Mathis v. Coats,* 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b] (explaining that while the odor of alcohol on a driver's breath is considered a significant factor for developing probable cause, there are also other components relevant to developing probable cause). Reasonable suspicion is a less demanding standard than probable cause. *Baptiste v. State,* 995 So. 2d 285, 291 (Fla. 2008) [33 Fla. L. Weekly S662a] (quoting from *Illinois v Wardlow,* 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)). It can be established from information that is less reliable than probable cause, different in quality and content probable cause requirements, and is considered under the "totality of the circumstances." *Baptiste,* 995 So. 2d at 291 (quoting *Alabama v. White,* 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990)). Furthermore, the main issue regarding the legality of an investigatory stop "is the existence of a reasonable suspicion that is based upon specific and articulable facts, and the rational inferences that may be drawn from those facts." *Baptiste,* 995 So. 2d at 290.

An officer may temporarily detain any person if the officer "encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county." §901.151 Florida Statutes (2018). In *State v. Jimoh,* 67 So. 3d 240, 241 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2469a], deputies observed a woman slumped over in her car in a parking lot with the engine running and the headlights on. They banged on the car and attempted to wake the woman. *Id.* When she failed to respond, they reached into the car, shut it off, and shook the woman until she woke up. *Id.* Deputies observed bloodshot and glassy eyes as well as the odor of alcohol. *Id.* Because of this, the deputies conducted a DUI investigation. *Id.* The court held that under the totality of the circumstances, officers established reasonable suspicion of the woman's impairment allowing them to conduct a DUI investigation. *Id.* at 242. The court reasoned that a "determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Jimoh,* 67 So. 3d at 242 (quoting *United States v. Arvizu,* 534 U.S. 266, 277, 122 S. Ct. 744, 753 (2002) [15 Fla. L. Weekly Fed. S81a]).

An investigatory stop is not lawful when an officer does not make observations about impairment until after he has given the defendant a direction to step out of the vehicle. *Danielewicz v. State,* 730 So. 2d 363, 364 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a]. In *Danielewicz,* an officer noticed a car legally parked in near a business. *Id.* at 363. The headlights were on, engine was running, and the officer observed no traffic infractions. *Id.* at 364. The doors to the car were locked and the windows were up. *Id.* The officer instructed the defendant to exit the vehicle, and at this point the officer made observations about possible impairment. *Id.* The court held that the investigatory stop was not based on a well-founded suspicion and reversed the trial court's denial of the motion to suppress. *Id.* The court reasoned that the stop was investigatory because officer's instructions restrained the defendant's movements and amounted to a seizure of her person. *Id.*

Furthermore, observing bloodshot eyes and acting strange are not enough to satisfy reasonable suspicion. *A.N.H. v. State,* 832 So. 2d 170, 172 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2433a]. In *A.N.H.,* a school counselor noticed that a student was not acting like himself and had bloodshot eyes. *Id.* at 171. The counselor instructed the student to empty his pockets and found marijuana. *Id.* The court held that bloodshot eyes and not acting like himself did not satisfy reasonable suspicion. *Id.* at 172. The court reasoned that these facts alone could encompass a wide variety of non-criminal activity. *Id.*

In the present case, Officer Blunt made several observations that, when taken together, established reasonable suspicion even with his ability to smell diminished. Like the deputies in *Jimoh* who observed a woman slumped over in her parked car with the engine running, Officer Blunt observed the Appellee slumped over in his car with the engine running. The Appellee's car was also still in gear and he was not parked in a designated parking space. The woman in *Jimoh* had bloodshot and glassy eyes. Similarly, the Appellee had glassy eyes. While deputies in *Jimoh* observed the smell of alcohol, Officer Blunt observed that the Appellee had difficulty answering questions and slurred speech. These observations were supported by the body cam video. The trial judge noted that the body cam shows "good impairment with [Defendant] in the vehicle," "he was awfully out. Okay. So that's reasonable possible suspicion," and "objectively it is just as likely that he was asleep because of alcohol." The judge also pointed out that the Appellee "made some blunders, and some slurred not just slurred speech, but some remarks" and that his mannerisms and the way he acted was bad.

Danielewicz is distinguishable from this case. In *Danielewicz,* the defendant's car was legally parked when law enforcement officers approached her. To the contrary, in the present case, the Appellee was not legally parked but was blocking a business' active drive through lane with his car in gear. Unlike law enforcement observations in *Danielewicz* that were made after the initiation of an investigatory stop, Officer Blunt made observations while conducting a lawful well-being check. Additionally, in *Danielewicz,* law enforcement was not responding to a 911 call, whereas Officer Blunt was dispatched to the scene because of a 911 call.

A.N.H. is also distinguishable from the present case. In *A.N.H.,* the student only exhibited bloodshot eyes and not acting like himself. However, in the present case, the Appellee was asleep at the wheel, had the car in gear, was blocking a drive through lane just past midnight, took ten minutes to wake up even after sternum rubs and the officer calling out to him, had glassy eyes, slurred speech, and difficulty answering questions. Many more factors went into Officer Blunt's calculation for reasonable suspicion than the school counselor in *A.N.H.*

The trial judge indicated that the odor of alcohol must be present to find reasonable suspicion. Reasonable suspicion does not need to rule out the possibility of innocent conduct. It must only establish that under the totality of the circumstances, the rational inferences from specific and articulable facts reasonably indicate that person has committed, is committing, or is about to commit a violation of the criminal law allowing law enforcement to temporarily detain that person to conduct further investigation. Reasonable suspicion of DUI can be established without the odor of alcohol. The facts of this case and the trial court's comments show that there was reasonable suspicion to initiate a DUI investigation even though the officer was unable to detect the odor of alcohol. Therefore, the order suppressing evidence should be reversed.

REVERSED AND REMANDED with instructions. (RECKSIEDLER and McINTOSH, JJ. concur.)

* * *

Licensing—Driver's license—Suspension—Appeals—Certiorari—Timeliness—Petition for writ of certiorari filed 31 days after rendition of final administrative order of license suspension is dismissed as untimely filed—No merit to argument that day after order is rendered should be counted as "zero" in calculating filing deadline

BENJAMIN SLABY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-15471-O. March 25, 2020.

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

(BARBOUR, J.) THIS MATTER came before the Court for consideration of the Petition for Writ of Certiorari, filed on December 19, 2019; Petitioner's Motion for Attorney's Fees and Costs, filed on December 19, 2019; Respondent's Motion to Dismiss for Lack of Jurisdiction, filed on December 23, 2019; the Court's Order to Show Cause Why Petition for Writ of Certiorari Should Not Be Dismissed, filed on January 30, 2020 (Show Cause Order); Petitioner's Response, filed on February 18, 2020; and Respondent's Reply, filed on February 28, 2020. Petitioner is seeking review of a final administrative order of driver's license suspension rendered on November 18, 2019.[1] The Court finds as follows:

Under Florida Rule of Appellate Procedure 9.100(c)(1), a petition for writ of certiorari must be filed "within 30 days of rendition of the order to be reviewed." The 30 day time limit imposed by Rule 9.100(c)(1) is jurisdictional. *See Penate v. State,* 967 So. 2d 364 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2455a] (appellate court lacked jurisdiction over petition for writ of certiorari that was filed more than 30 days from the date of rendition of the opinion). In the instant case, it is undisputed that the final administrative order of driver's license suspension was rendered on November 18, 2019. As the Motion to Dismiss for Lack of Jurisdiction points out, the deadline to file the Petition was December 18, 2019, so the Petition, filed on December 19, 2019, was filed one day past the 30 day deadline set forth in Florida Rule of Appellate Procedure 9.100(c)(1). Thus, this Court's January 30, 2020 Show Cause Order directed Petitioner to show cause why the Petition should not be dismissed for lack of jurisdiction as untimely.

\ As Petitioner correctly acknowledges, Florida Rule of Judicial Administration 2.514(a)(1)(A), (B) & (C) is the applicable rule for the computation of time in appeals. *See* Fla. R. App. P. 9.420(e). In pertinent part, Rule 2.514(a)(1)(A) & (B) provides that in computing a time period, the counting starts "from the next day that is not a Saturday, Sunday, or legal holiday" and includes "every day, including intermediate Saturdays, Sundays, and legal holidays." Under Rule 2.514(a)(1)(C), the "last day of the period" is counted, but "if the last day is a Saturday, Sunday, or legal holiday, or falls within any period of time extended through an order of the chief justice . . . the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any period of time extended through an order of the chief justice."

The Court determines that the Petition for Writ of Certiorari was untimely filed. As indicated, the final administrative order was rendered on November 18, 2019, which was a Monday. Therefore, the first day to be counted was Tuesday, November 19, 2019, since the counting starts "from the next day that is not a Saturday, Sunday, or legal holiday" under Florida Rule of Judicial Administration 2.514(a)(1)(A). The 30th day for timely filing the Petition, December 18, 2019, a Wednesday, was "last day of the period" for purposes of Rule 2.514(a)(1)(C) as it was not "a Saturday, Sunday, or legal holiday," and did not fall "within any period of time extended through an order of the chief justice." As a result, the Petition was untimely by one day as it was not filed until Thursday, December 19, 2019, which was 31 days after rendition of the final administrative order. *See* Fla. R. App. P. 9.100(c)(1) (petition for writ of certiorari must be filed "within 30 days of rendition of the order to be reviewed").

To be sure, Petitioner, reasoning that "the day being counted from is counted as zero," argues that the "starting date" for computing the 30 days is November 19, 2019, with the result that the Petition was timely filed on December 19, 2019. The Court rejects this argument. Since the final administrative order was rendered on November 18, 2019, it is November 18, 2019 that is the actual "starting date," so that the "the next day that is not a Saturday, Sunday, or legal holiday" to "begin counting" for purposes of Florida Rule of Judicial Administration 2.514(a)(1)(A) was November 19, 2019. Under Petitioner's own reasoning, with "the day being counted from is counted as zero," it is November 18, 2019 that would be the day "counted as zero," with the result that the 30th day, the "last day of the period," would be December 18, 2019.

Petitioner makes the additional argument that *Penate v. State,* 967 So. 2d 364 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2455a] and related "older" cases do not specifically address "whether the day of the order or the next day is counted as zero when calculating a deadline" under the current version of Florida Rule of Judicial Administration 2.514(a)(1)(A), (B) & (C). Thus, in Petitioner's view, since the "plain text" of the current rule now says to begin counting "from the next day," this Court "must follow the common and ordinary meaning of that language." However, contrary to Petitioner's position, in construing the "plain text" of the current version of Rule 2.514(a)(1)(A), (B) & (C), the Court determines that it is the "day of the order" that is "counted as zero," since counting begins "from the next day." Additionally, as indicated, Florida Rule of Appellate Procedure 9.100(c)(1) requires that a petition for writ of certiorari be filed "within 30 days of rendition of the order to be reviewed." Petitioner's interpretation of Rule 2.514(a)(1)(A), (B) & (C) would effectively ignore the date of rendition specified in Rule 9.100(c)(1) in determining whether its Petition was timely filed. *See CPI Mfg. Co. v. Industrias St. Jack's, S.A.,* 870 So.2d 89, 92-93 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2673b] ("As in statutory construction, the rules must be read as a cohesive whole, and a rule should not be construed in such a way as to render another rule meaningless.").

Based on the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DISMISSED. Petitioner's Motion for Attorney's Fees and Costs is DENIED. The Clerk of the Court is directed to CLOSE this case forthwith. (WHITE and LEBLANC, JJ., concur.)

[1]We deny Petitioner's request for oral argument.

* * *

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CIRCUIT COURTS—ORIGINAL

Criminal law—Evidence—Blood toxicology of victim is not admissible unless defendant is able to show nexus between blood toxicology and causation

STATE OF FLORIDA, v. LARK DANA HODGE, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 2017 CF 4614, Division CR-I. May 10, 2019. Counsel: John Kalinowski, Assistant State Attorney, for State. Lewis Fusco, for Defendant.

ORDER ON STATE'S THIRD MOTION IN LIMINE TO EXCLUDE REFERENCE TO VICTIM'S BLOOD TOXICOLOGY

(LINDA F. McCALLUM, J.) This matter came before this Court on State's Third Motion in Limine to Exlcude Reference to Victim's Blood Toxicology filed on November 20, 2018.

The Court finds unless the Defendant is able to show a nexus between the victim's toxicology and the causation, the results of the victim's blood toxicology are not relevant. *Edwards v. State,* 39 So. 3d 447 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1452a].

Accordingly,

ORDERED AND ADJUDGED that State's Third Motion in Limine to Exclude Reference to Victim's Blood Toxicology filed on November 20, 2018 is **GRANTED.**

* * *

Criminal law—Search and seizure—Vehicle—Officer who smelled odor of cannabis when defendant voluntarily rolled down her vehicle window had probable cause for warrantless search of vehicle, even though odor of cannabis is indistinguishable from odor of now-legal hemp—Officer's sighting and recognition of ecstasy pill in plain view within vehicle before he opened vehicle door provided additional probable cause for vehicle search—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. SAMIKA CHREE PLUMMER, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CF-12834-A-O, Division 14. March 7, 2020. Tom Young, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court for hearing of Defendant's Motion to Suppress on March 5, 2020. The State appeared through attorney David Scott Messinger, and Defendant appeared personally through her attorneys, Ethan Goode and Robert Adams.

Upon calling Defendant's motion for hearing, the State conceded Defendant's standing and assumed the burden of proving that the warrantless search of Defendant's motor vehicle was justified under an exception to the Fourth Amendment warrant requirement. To meet its burden, the State called Orlando Police Officer Jerry Pergerson.

Pergerson testified that he has 10 years of law enforcement experience between the police departments of the cities of Titusville and Orlando, Florida. During that time, Pergerson completed basic drug identification training at Daytona State College and advanced drug-related courses through the federal Drug Enforcement Administration and a multi-jurisdictional taskforce. He has conducted at least 1,000 cannabis investigations during his career, including around 200 through the Orlando Police Department. He has also completed about 200 ecstasy investigations between his seven year tenure in Titusville and three year tenure in Orlando. Pergerson testified that he is trained to recognize ecstasy pills and added that he often sees a rock-like crystalline form of ecstasy in Orlando's Parramore neighborhood.

When the search of Defendant's vehicle occurred, Pergerson worked as part of a "proactive" bike unit in the Parramore area. He distinguished "proactive patrol" by saying that his unit did not respond to calls for assistance but, rather, patrolled high crime areas. Pergerson's unit also patrolled in unmarked police cars from time to time, and he was using an unmarked car during the early morning hours that he encountered Defendant.

Defendant's motor vehicle caught Pergerson's eye, he testified, because he knows the area and the people well, and he knows from his regular patrols what vehicles are "supposed to be there." Other circumstances Pergerson considered were the time—close to 2:00 a.m.—and the fact that one individual was seated in the vehicle alone with the dome light on.

Pergerson testified that he drove into the parking lot in which Defendant's vehicle was parked without sirens or lights and that Defendant voluntarily rolled down her window without being asked to do so. Pergerson then smelled the odor of cannabis.

Cross-examination pointed out differences between Pergerson's arrest affidavit and hearing testimony. In the affidavit Pergerson said that he smelled unburnt cannabis, while at hearing he said that he smelled burnt cannabis. On redirect examination, Pergerson said that he smelled both odors. Also on cross-examination, Pergerson testified that review of his body-worn camera footage refreshed his recollection of the sequence in which he saw an ecstasy pill inside Defendant's vehicle. He conceded that legal hemp and illegal cannabis are indistinguishable by smell.

The State also introduced video footage recorded by Pergerson's body-worn camera. The video footage corroborates Pergerson's testimony that he exited his patrol vehicle with a flashlight in hand, and that Defendant rolled down the window next to her as Pergerson approached. Pergerson can be seen shining his flashlight into the passenger side window at various angles as he speaks with Defendant. Pergerson is heard asking Defendant about marijuana and telling Defendant to quit trying to hide a marijuana cigarette or blunt. Shortly before Pergerson is seen opening the front, passenger door next to Defendant, he shone the flashlight at an upper right to lower left angle as if to illuminate the interior of the door. Then, when Pergerson opened the door, he immediately shone the flashlight onto the door grab handle area where the ecstasy pill was sitting.

Having considered Pergerson's testimony, the video evidence, and the arguments of counsel, the Court concludes that Defendant's Motion to Suppress should be denied.

Although hemp no longer meets the definition of a controlled substance in Florida and has an odor that is indistinguishable from cannabis, those facts do not negate the existence of probable cause. The smell of what Officer Pergerson believed to be marijuana provided probable cause for a warrantless search under either the automobile exception to the warrant requirement or the exception for searches incident to a lawful arrest. *See, e.g. State v. Tigner,* 276 So. 3d 813, 816 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1914a] ("The smell of marijuana alone was sufficient to give the officers the requisite probable cause to search both the vehicle and its occupants."). *See also United States v. Clark,* 2019 WL 8016712, *5 (E.D. Tenn. Oct. 23, 2019) (Report & Recommendation) (Guyton, M.J.), *adopted by* 2020 WL 869969 (E.D. Tenn. Feb. 21, 2020) ("The active odor of marijuana gave officer Bailey probable cause to search the vehicle. Defendant's argument that hemp and marijuana are 'the same plant,' and that hemp is legal in Tennessee, does not change the fact that Officer Bailey testified that he smelled marijuana."); *United States v. Harris,* 2019 WL 6704996, *3 (E.D. N.C. Dec. 9, 2019) (holding that the smell of marijuana supports a determination of probable cause even if some use of industrial hemp products is legal under state law because "[o]nly the probability, and not a prima facie

showing, of criminal activity is the standard of probable cause.").

The Court also concludes that Officer Pergerson saw and recognized an ecstasy pill inside Defendant's vehicle in plain view before he opened the door next to Defendant. That sighting, combined with the odor of cannabis and the other circumstances described by Pergerson, constitutes a second ground for determining that probable cause authorized the search of Defendant's vehicle. *See, e.g., Maryland v. Pringle,* 540 U.S. 366, 371 (2003) [17 Fla. L. Weekly Fed. S83a] (stating that probable cause "depends on the totality of the circumstances"); *Illinois v. Gates,* 462 U.S. 213, 231 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED.

* * *

Criminal law—Search and seizure—Vehicle—Officer who smelled odor of cannabis coming from defendant's vehicle during traffic stop had probable cause for warrantless search of vehicle, even though odor of cannabis is indistinguishable from odor of now-legal hemp—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. JAMALE OMAR RUISE, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 48-2019-CF-012934-O, Division 22. March 20, 2020. Bob LeBlanc, Judge.

Order Denying Defendant's Motion to Suppress

THIS CAUSE coming on to be heard upon the Defense Motion to Suppress and the Court having been duly advised in the premises on March 11, 2020. The State stipulated to the Defendant having Standing to bring this cause and the Court took Judicial Notice of the lack of warrant introduced into the Court file.

The State called Officer Dennis Viner and Officer Adam Villar who testified to their years of law enforcement experience and ability to recognize the odor of cannabis. Both officers further testified as to their training in the field of drug enforcement and their educational background regarding drug enforcement investigations.

The Court heard testimony from both officers regarding the facts of the case. Both officers testified they were conducting patrol in the area of Balboa Drive and Hacienda Court in Orange County, FL. Officer Viner testified that he conducted a traffic stop after he observed a blue vehicle driving with its headlights off. The time of day was after 9 pm. Officer Viner further testified that he observed the vehicle make a wide left-hand turn going past the middle lane and turning into the most outside lane. Officer Viner made contact with the defendant who was the only occupant of the vehicle and smelled a faint odor of cannabis. Officer Villar testified that he was able to smell the odor of cannabis coming from the passenger side of the vehicle.

The State introduced body worn camera footage of both officers which showed the Officers approaching the defendant's vehicle and asking for his license and registration. Officer Viner then conferred with Officer Villar as to smell of cannabis coming from the vehicle and continued to run defendant's information. Officer Viner then asked defendant to exit the vehicle and inquired with defendant as to whether he had any illegal narcotics inside of the vehicle. Officer Viner particularly asked defendant if he smokes inside the vehicle and "it's not hemp or anything you're smoking, it's weed" to which defendant replied, "no it's hemp". Officer further clarified with defendant as to what he was speaking about and defendant stated he smokes to get high.

Officers conducted search of the vehicle and located inside the door panel of the front driver side a baggie containing what they believed to be cannabis. Under the baggie was a pill bottle which contained several multi-colored pills divided up in small baggies that were later confirmed to be methamphetamine and 3,4-Methylenedioxy-N-benzylcathinone.

After careful consideration of the facts presented as well as the video provided, the Court finds that officer's had probable cause to conduct search of vehicle. The Court finds that the odor of hemp and the odor of cannabis have smell indistinguishable from each other. The defense on cross-examination had officers agree that they could not tell the difference between these two substances. However, the Court finds that because one substance, that being hemp, is legal and the other, that being cannabis, is not legal gives the Officers probable Cause to search a vehicle.

The State relies on *State v. Tigner,* 276 So. 3d 813 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1914a] ("The smell of marijuana alone was sufficient to give the officers the requisite probable cause to search both the vehicle and its occupants."); *Hilliard v. State,* 285 So. 3d 1022 [(Fla. 1st DCA 2019) 44 Fla. L. Weekly D2932a] ("[T]he odor of burnt cannabis emanating from a vehicle constitutes probable cause to search all occupants of that vehicle"); *United States v. Harris,* 2019 WL 6704996, *3 (E.D. N.C. Dec. 9, 2019) (holding that the smell of marijuana supports a determination of probable cause even if some use of industrial hemp products is legal under state law because "[o]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.". The Court Agrees. The Court finds that until the legislature legalizes recreational marijuana, law enforcement still have probable cause to conduct a search on the basis of the smell of cannabis. In the case before the Court, the officer, based on the testimony provided as to the traffic infractions observed and the odor of cannabis coming from the vehicle, the Officers had probable Cause to search. Thus the defendant's motion to suppress is denied.

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress, is hereby DENIED.

* * *

Creditors' rights—Execution on judgment—Where creditor objects to debtor's inventory of personal property claimed to be exempt from levy, and parties have not waived appointment of appraiser or evidentiary hearing, court must appoint appraiser and conduct hearing to determine validity of exemption—Motion to postpone sale is granted

RUDEN MCCLOSKY, P.A., Plaintiff, v. THOMAS P. TREVISANI, M.D., Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2009-CA-15010-O, Division 39. March 13, 2020. Chad K. Alvaro, Judge. Counsel: Hugh Shafritz, for Plaintiff. Alex McClure, Law Office of Alex McClure, Lake Mary, for Defendant.

ORDER GRANTING THE DEBTOR'S MOTION TO POSTPONE SALE

THIS MATTER came before the Court on March 12, 2020 on Defendant's Amended Emergency Motion for Injunction to Postpone Sale of 2018 Cadillac Escalade ("Motion to Postpone Sale") and the Court, being duly advised in the premises and having heard arguments of counsel, finds as follows.

This case is in post-judgment proceedings in execution on a judgment. Greenspoon Marder, P.A., as assignee of Ruden McClosky, P.A. ("Creditor"), has caused a levy in execution on a 2018 Cadillac Escalade ("Vehicle") owned by Thomas P. Trevisani, M.D. ("Debtor") and the sale is set for March 17, 2020. Pursuant to the applicable provisions of Section 222.061, Fla. Stat., the Debtor filed an inventory of personal property, to which the Creditor filed a timely objection.

Section 222.061(3), Fla. Stat., provides that "[u]pon the filing of an objection. . .*the court shall* automatically schedule a prompt evidentiary hearing to determine the validity of the objection. . ." (emphasis

added).[1] Section 222.061(4), Fla. Stat., further requires the Court to appoint a disinterested appraiser to "assist in its evidentiary hearing" unless the Debtor and Creditor mutually waive the appointment of an appraiser. Both statutes employ mandatory "shall" language in describing the Court's role in conducting the evidentiary hearing.

Here, the parties have not waived appointment of an appraiser. They have not waived the evidentiary hearing provided for in Section 222.061(3), Fla. Stat. The Court questions the utility of appointing an appraiser to appraise the Vehicle (since its value almost certainly exceeds the $1,000 exemption the Debtor claims in it) and the utility of an evidentiary hearing to determine the validity of the exemption (since the Creditor does not appear to contest the validity of the $1,000 exemption asserted in the Vehicle).[2] However, the Court must adhere to the procedure designated by the legislature for determination of the validity of an exemption. It is therefore

ORDERED and ADJUDGED as follows:

1. The Debtor's Motion to Postpone Sale is GRANTED.

2. The Sheriff shall not proceed with the sale of the Vehicle until further order of this Court and shall safeguard same until such time as the Court determines the validity of the exemption claimed. § 222.061(5), Fla. Stat.

3. The parties are directed to schedule an evidentiary hearing before the Court to determine the validity of the exemption claimed.

4. Within fourteen days of the date of this order, the parties shall provide to the Court the identity and contact information of a mutually-agreeable disinterested appraiser. If the parties cannot agree, they are to each provide to the Court the identities of two potential disinterested appraisers acceptable to each party, and the Court will determine which potential disinterested appraiser will assist the Court in determining the facts at issue at the evidentiary hearing. § 222.061(4), Fla. Stat.

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[1]The Court notes that the clerk of court is tasked with sending the case file to the Court that issued the writ. § 222.061(3), Fla. Stat. That did not happen here.

[2]Although the Creditor objects to other aspects of the inventory filed by the Debtor.

* * *

Contracts—Purchase option—Public housing project—Purchase price for managing general partner to exercise option to purchase limited partner's interest in low-income housing project does not include credit for limited partner's capital account balance where unambiguous language of limited partnership agreement requires price to be calculated as if there is hypothetical sale of project, not as if partnership were being liquidated or dissolved—Where purchase price calculation was performed in accordance with partnership agreement, general partner tendered purchase price to limited partner, limited partner refused to accept purchase price and has not transferred limited partner interests to general partner, limited partner breached its obligations under agreement—Limited partner's allegations of default by general partner, which were not raised until after exercise of purchase option, are baseless and intended to deprive general partner of contractual right to exercise option—General partner is entitled to specific performance

CED CAPITAL HOLDINGS 2000 EB, L.L.C., Plaintiff, v. CTCW-BERKSHIRE CLUB, LLC, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-013886-O. April 8, 2020. John E. Jordan, Judge. Counsel: David A. Davenport, Winthrop & Weinstine, P.A., Minneapolis, MN; and Tucker H. Byrd and Scottie C. Allison, Byrd Campbell, P.A., Winter Park, for Plaintiff. Steven F. Griffith, Jr. and Laura E. Carlisle, Baker Donelson Bearman Caldwell & Berkowitz, PC, New Orleans, LA; and Zachary J. Bancroft, Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court on February 10, 2020, on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Partial Summary Judgment (hereinafter sometimes collectively referred to as the "Cross Motions for Summary Judgment"). The Court, having heard argument of counsel, and having been otherwise fully advised in the premises, enters this Order thereon; therefore, it is

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED for the reasons set forth below.

2. Defendant's Motion for Partial Summary Judgment is DENIED for the reasons set forth below.

3. The Court finds the following material facts are undisputed and relevant to the Court's ruling on the Cross Motions for Summary Judgment:

a) Plaintiff, CED, is the General Partner of Berkshire Club Partners, Ltd. (the "Partnership" or "Berkshire"), a Florida limited partnership engaged in the acquisition, development, construction, ownership, management, and operation of a 288-unit qualified low-income housing project in Florida (the "Project");

b) The Project was developed, in part, with financing secured by CED through the federal government's low income housing tax credit ("LIHTC") program under Section 42 of the Internal Revenue Code;

c) Under the LIHTC program, the federal government awards tax credits to affordable housing projects through corresponding state agencies in a competitive application process;

d) Typically, and as in this case, the affordable housing project owner is organized as a limited partnership wherein a managing general partner (here CED) owns a *de minimis* legal interest (0.01%) in the fee owner entity (here, the Partnership) of the project. Despite the *de minimis* fee ownership interest, the general partner controls the day-to-day operations of the affordable housing apartment complex, and guarantees that the development will comply with all Section 42 rules and guidelines, including, but not limited to, financially and operationally guaranteeing project completion, cost overruns, operating deficits, costs to investors of all tax credits recaptured by the IRS, and monthly replacement reserve requirements;

e) A third-party tax credit investor with large, annual, and predictable tax liability (here, originally Key, as defined below) is admitted into the partnership as an investor limited partner, agreeing to contribute capital in exchange for an allocation of substantially all of the tax credits available to the project commensurate with its ownership interests (i.e., a 99.99%) as well as certain other expected tax benefits;

f) In addition, the tax credit investor often agrees to a contractually mandated process by which the general partner may acquire the tax credit investor's interests in the partnership after the end of a fifteen-year compliance period required under Section 42;

g) This typical pattern for LIHTC affordable housing projects was followed with the development of the Project in the instant case as well as in the organization and funding of Berkshire;

h) Specifically, on May 31, 2002, CED entered into the Amended and Restated Limited Partnership Agreement for the Partnership as its General Partner (the "LPA"), with Key Investment Fund Limited Partnership XII as the Limited Partner ("Key");

i) Notably, CTCW was not originally a partner in the Partnership;

j) Instead, Key initially invested approximately $11.5 million in the Partnership, principally, for the right to receive an allocation of well over $11.5 million in tax credits awarded to Berkshire under the LIHTC program. Key purchased the right to receive the allocation of tax credits at a discount and because the tax credits provided a dollar-for-dollar reduction on income taxes it allowed Key's corporate investors to reduce their large, annual and predictable tax liability;

k) Consistent with the typical practice in LIHTC projects, the LPA also contained an option for CED, as general partner, to purchase the

limited partner's interest after the expiration of the fifteen-year compliance period required by Section 42;

l) After establishing the Partnership in this fashion, CED thereafter successfully developed, operated, and managed the Partnership and the Project without incident for more than fifteen years;

m) As CED was doing this, and specifically on or about October 1, 2006, Key was replaced as limited partner in the Partnership when Defendant, CTCW, acquired Key's limited partnership interest by virtue of the Assignment and Assumption Agreement and Third Amendment to the Amended and Restated Limited Partnership Agreement;

n) After the fifteen-year compliance period expired and consistent with the intent of the original parties and the practice in the LIHTC industry, on February 9, 2018, CED exercised its purchase option under Section 8.6(b) of the LPA ("Option") by sending written notice of its intent to purchase CTCW's limited partnership interest in Berkshire, which states in pertinent part:

> At any time after the conclusion of the Compliance Period, the General Partner shall have the option, exercisable by written notice to all of the Partners in the Partnership to purchase the Limited Partner's interest in the Partnership for the greater of: (a) the cash that the Limited Partner would receive under Section 4.2 if the Project were sold (and assuming reasonable costs of sale) for an amount to equal to the fair market value of the Project as determined by an M.A.I. appraiser unanimously agreed upon by all Partners, or if there is no such unanimous agreement, the average of values determined by an M.A.I. appraiser selected by the General Partner and an M.A.I. appraiser selected by the Limited Partner, which appraisals shall be paid for the by Partnership and shall take into consideration any continued restrictive use agreement affecting the Project required by the State Housing Finance Agency; or . . . .;

o) Prior to CED exercising its Option to purchase CTCW's limited partnership interest, CTCW had never, nor had its predecessors ever, declared any defaults under the LPA nor raised any issues with CED's performance thereunder;

p) After the exercise of its purchase Option, the parties engaged in the valuation process required under Section 8.6(b). CED engaged an M.A.I. appraiser to determine the fair market value of the Project. Because CED and CTCW did not unanimously agree upon the M.A.I. appraiser, CTCW subsequently selected its own M.A.I. appraiser to determine the value of the Project;

q) CED received an appraisal from its appraiser with a value of $20,800,000.00. Likewise, CTCW received an appraisal from its appraiser with a value of $26,300,000.00. The average of the two appraisals determined the value of the Project to be ***$23,550,000.00.***

r) Utilizing the average value between the two appraisals as required under Section 8.6(b) and calculating the purchase price under Section 4.2, the value of CTCW's limited partnership interest is ***$1,652,582.00*** *("Purchase Price").*

s) On October 4, 2018, Hunt Capital Partners took over management of CTCW.

t) On December 7, 2018, CED tendered the Purchase Price to CTCW, together with the necessary contractual documents to effect the transfer of CTCW's limited partner interests in Berkshire to CED no later than December 31, 2018.

u) CTCW refused to accept the tender or make the transfer of its limited partnership interest;

v) On December 7, 2018, for the first time since CTCW was admitted to the Partnership, CTCW sent notice of alleged defaults by CED under the LPA. CED received a copy of the notice on December 11, 2018.

w) CTCW alleged in the default notice that CED violated the LPA by: (i) unilaterally changing the Partnership's accountant without CTCW's consent; (ii) allowing certain Partnership indebtedness to mature without a modification or extension without CTCW's consent; (iii) refusing to provide CTCW certain documents and information; and (iv) allowing CED's affiliate to acquire certain Partnership indebtedness.

x) Consistent with the terms of the LPA, CED was entitled to thirty days to cure any default.

y) CED vigorously disputes that any default occurred and alleges that CTCW has attempted to manufacture a default of the LPA in an effort to prevent CED from exercising and completing the transaction permitted by its already exercised Option.

z) Notwithstanding CTCW's allegations of default by CED and CED's denial of the same, it is undisputed that CED exercised the purchase Option and tendered the Purchase Price to CTCW before CTCW alleged any default by CED and before the 30-day period to cure the alleged defaults under the LPA had run.

4. Based upon the foregoing undisputed material facts, the Court reaches the following conclusions of law:

a) A court must construe a contract according to its plain language, and effect the intent of the parties as reflected in their contract. *See Whitley v. Royal Trails Property Owners' Ass'n,* 910 So. 2d 381, 383 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2207a] (stating that "[t]he parties' intention governs contract construction and interpretation; the best evidence of intent is in the contract's plain language"); *see also Dirico v. Redland Estates, Inc.,* 154 So. 3d 355, 357 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1941a] (holding that a contract must be construed according to its plain language). Moreover, "a court may not interpret a contract so as to render a portion of its language meaningless or useless.") *TRG Columbus Dev. Venture, Ltd. v. Sifontes,* 163 So. 3d 548, 552 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D796a]; *U.S.B. Acquisition Co., Inc. v. Stamm,* 660 So. 2d 1075, 1080 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1790a] ("Every provision in a contract should be given meaning and effect. . ."); *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co.,* 215 So. 2d 336, 338 (Fla. 4th DCA 1968) ("[N]o word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it . . .").

b) Applying these principles, the Court agrees with Plaintiff's interpretation of the Partnership Agreement.

c) The plain and unambiguous language of Section 8.6(b) of the LPA requires the Purchase Price to be calculated pursuant to Section 4.2 of the LPA as if there were a hypothetical sale of the Project, not as if the Partnership were being dissolved or liquidated as CTCW argues.

d) Accordingly, the Court rejects Defendant's interpretation of the LPA that the Purchase Price must also include credit for Defendant's capital account balance under Sections 10 and 3 of the LPA. More specifically, the Court finds that CED's exercise of its Option and the transaction contemplated by it does not involve a liquidation or dissolution of the Partnership, thus Sections 10 and 3 of the LPA are not applicable to determine the Purchase Price, and there is accordingly no need to consider capital account balances in the hypothetical sale used to determine the Purchase Price. Any other interpretation of the LPA would render Section 8.6's directive to calculate the Purchase Price pursuant to Section 4.2 meaningless and runs afoul of well-settled principles of contract interpretation.

e) Because there is no material fact in dispute that the Purchase Price calculation was performed pursuant to Section 4.2 of the LPA, no dispute that CED tendered the Purchase Price to CTCW, and no dispute that CTCW refused to accept the Purchase Price and has not transferred its limited partner interests to CED, the Court finds that CTCW has breached its obligations under the LPA since December 7, 2018, the date CED tendered the Purchase Price.

f) When CED exercised its Option on February 9, 2018, "the option became a bilateral contract, binding on both parties, and susceptible of enforcement by a court of equity in a suit for specific performance." *Doolittle v. Fruehauf Corp.,* 332 So.2d 107, 109 (Fla. 1st DCA 1976); *see also Power v. Power,* 864 So. 2d 523, 24 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D188a] ("[w]hen there is an exercise of the option, a mutually binding and enforceable contract to purchase is created"); *Vorpe v. Key Island, Inc.,* 374 So.2d 1035 (Fla. 2d DCA 1979).

g) CED committed no default under the LPA and no default had been declared by CTCW prior to CED's exercise of its Option. CTCW's efforts to declare defaults all took place after CED exercised its Option on February 9, 2018, after the parties both engaged in the appraisal process to determine the Project's value under the LPA, after Hunt Capital Partners took over management of CTCW, and after CED tendered the Purchase Price to CTCW. As such, CTCW's allegations of default were baseless and intended to deprive CED of its contractual right to purchase CTCW's interest in the Partnership pursuant to its purchase Option.

5. The Court finds that the plain and unambiguous language of Section 8.6(b) of the LPA requires that the Purchase Price be calculated pursuant to Section 4.2 of the LPA.

6. Based on the undisputed facts and the conclusions of law described above, the Court finds that summary judgment is appropriate to enforce CED's purchase Option under the LPA. The Court further finds that CTCW's request for summary judgment that CED be removed from the Partnership based on the alleged defaults described above is without basis and the Court therefore denies CTCW's motion in its entirety.

WHEREFORE, based upon the foregoing findings of fact and conclusions of law, the Court orders the following:

a. Plaintiff's Motion for Summary Judgment is **GRANTED**;

b. Defendant's Motion for Summary Judgment is **DENIED**;

c. the Court reserves jurisdiction to enter an appropriate order as to the amount of damages suffered by Plaintiff and to award Plaintiff its attorneys' fees and costs;

d. CED is entitled to specific performance, thus CTCW must, no later than 3 days from entry of this Order, immediately transfer its limited partner interests in Berkshire to CED through execution of the aforementioned contractual transfer documents; and

e. the Purchase Price shall be deposited with the Court to be released upon further order following a trial that will conducted to determine the amount of offset for any damages caused by CTCW's breaches of the LPA, or upon such terms as the Court orders.

* * *

Insurance—Declaratory actions—Complaint for declaratory relief filed by insurer against eight defendants is deficient where complaint is drafted in manner in which each succeeding count incorporates by reference prior averments not attributed to any one defendant, requiring that defendants respond to claims against other unrelated defendants—Further, complaint does not show doubt or uncertainty as to existence of some right, status, immunity, power or privilege and, accordingly, does not state cause of action for declaratory relief—Motion to dismiss granted

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. GINA JACKSON, MICHAEL NORMAN, AMANDA BELAMONTE, MICHAEL BELAMONTE, AUSTIN HOPPER, NEXT MEDICAL FLORIDA, FLORIDA EMERGENCY PHYSICIANS, and STAND UP MRI OF ORLANDO, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-012235-O, Division 37. March 24, 2020. John Marshall Kest, Judge. Counsel: Eric Nelsestuen, Savage Villoch Law, PLLC., Tampa, for Plaintiff. Michelle R. Reeves, Simoes Davila, PLLC, Ocala, for Next Medical of Florida; John P. Gaset, Dinsmore & Shohl, LLP, Tampa, for Florida Emergency Physicians Kang & Associates, M.D., Inc.; and Keith M. Petrochko, Simoes Davila, PLLC, Ocala, for Stand Up MRI of Orlando, Defendants.

ORDER ON DEFENDANT, STAND UP MRI OF ORLANDO'S RENEWED MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE having come before the Court upon Defendant, STAND UP MRI OF ORLANDO's Motion to Dismiss, or, in the alternative, Motion for More Definite Statement, and the Court having considered the Motion, having reviewed the record, heard argument of counsel, and being otherwise fully advised in the premises, it is hereby CONSIDERED, ORDERED and ADJUDGED as follows:

PROCEDURAL BACKGROUND

1. Direct General insurance Company (the "Insurance Company") filed a one-count Complaint for Declaratory Relief against seven defendants, including Stand Up MRI Of ORLANDO ("Stand Up"), on November 8th, 2018.

2. Stand Up filed a Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement on August 16, 2019.

3. The Insurance Company filed a Motion to Amend the Complaint to add an eighth defendant on April 11, 2019; the Court granted the Motion to Amend on July 17, 2019.

4. Stand Up renewed its Motion to Dismiss, or, in the Alternative, Motion for More Defendant Statement on January 22, 2019. This motion is the subject of this order.

5. At the hearing held on March 4th, 2020, and within its filed motion, Stand Up advanced the position that, as eight unrelated defendants are required to answer a one-count Complaint, which incorporates by reference all preceding paragraphs, which are not directed to any one defendant, the Complaint is legally unintelligible and should be dismissed. Stand Up further states that the Complaint shows no doubt or uncertainty, and therefore is not ripe as a Declaratory Action, thus it should be dismissed.

6. At the hearing held on March 4th, 2020 the Insurance Company argued that the defendants should simply deny allegations which are not unique to them. There was no written response.

ANALYSIS

In Florida, every cause of action, whether derived from statute or common law, is comprised of necessary elements which must be proven for the plaintiff to prevail. See *Barrett v. City of Margate,* 743 So.2d 1160, 1162 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2398a]. To state a cause of action, the pleading must contain a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." *Id.* Additionally, the body of a pleading is comprised of averments, which must be made in consecutively numbered paragraphs, the contents of which should be limited to a statement of a single set of circumstances. *Doyle v. Flex,* 210 So.2d 493, 494 (Fla. 4th DCA 1968). Only those paragraphs that are applicable to a particular cause of action should be realleged and incorporated by reference. *Id.*

In the matter sub judice, the Complaint is drafted in such a way that each succeeding count incorporates by reference averments which are not attributed to any one of the eight defendants. As an example, Paragraph 21 incorporates paragraphs 1-19. Further, it requires that the eight individual defendants respond to claims against other, non-related defendants. Commingling various claims against all defendants together may warrant dismissal of a complaint pursuant to Fla. R. Civ. P. 1.110(f). See generally *Collado v. Baroukh,* 226 So. 3d 924, 926 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1916a].

Additionally, the test recognized in Florida as to whether or not a complaint will state a cause of action under the Florida Declaratory Judgment Act is "whether or not the party seeking a declaration shows that he is in doubt or is uncertain as to the existence of some right, status, immunity, power or privilege and has an actual, practical and

present need for the declaration." See *Lutz v. Protective Life Ins. Co.,* 951 So. 2d 884 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D160a]. The Complaint shows no such doubt or uncertainty.

THEREFORE, IT IS HEREBY ORDERED that:

1. The Court finds that the individual Defendants have a right to know specifically what is being alleged against them. A more definite statement will not cure the issue presented. Therefore, Defendant's Motion to Dismiss is ***GRANTED***. Plaintiff may cure with an amended complaint; and

2. The Court finds that Plaintiff must show the basis for its requested Declaratory Relief as to each individual defendant.

* * *

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. GINA JACKSON, MICHAEL NORMAN, AMANDA BELAMONTE, MICHAEL BELAMONTE, AUSTIN HOPPER, NEXT MEDICAL FLORIDA, FLORIDA EMERGENCY PHYSICIANS, and STAND UP MRI OF ORLANDO, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-012235-O, Division 37. April 28, 2020. John Marshall Kest, Judge. Counsel: Eric Nelsestuen, Tampa, for Plaintiff. Keith Petrochko, Simoes Davila, Deland, for Defendant.

ORDER ON DEFENDANTS STAND UP MRI OF ORLANDO AND NEXT MEDICAL FLORIDA's JOINT MOTION FOR CLARIFICATION

THIS CAUSE having come before the Court upon Defendants' Motion for Clarification of the Court's Order dated April 2, 2020, and the Court having considered the Motion, having reviewed the court record, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby CONSIDERED, ORDERED and ADJUDGED as follows:

DEFENDANTS' MOTION IS HEREBY GRANTED.

1. The Orders entered April 2, 2020 regarding Plaintiff's Motion for Final Default Judgment as to Defendant Michael Norman and Motion for Court's Default against Defendant Gina Jackson will not operate to extinguish any rights conveyed to any third party. The remaining Defendants rights remain intact.

* * *

Torts—Employer-employee—Fraudulent misrepresentation—Interference with contract—Where plaintiff was an at-will employee pursuant to an employment agreement that expressly addressed the duration of plaintiff's employment and precluded any oral modifications, employer's alleged misrepresentations of "forever" employment did not "give rise to an independent fraud claim"—Further, fraud claim was not pled with sufficient particularity as required by rule 1.120(b) and court's prior order of dismissal with leave to amend—Tortious interference—Defendant, the sole shareholder, officer, and director of corporation which employed plaintiff was, for purposes of the tort of intentional interference with a contractual/business relationship, a party to the employment contract between the corporation and plaintiff and may not, as a matter of law, be sued for having intentionally interfered with that contract—Counts seeking damages for fraudulent misrepresentation and interference with contractual/business relationship dismissed with prejudice

ANDREA MOLINA, Plaintiff, v. STEPHEN BITTEL, individually and TERRANOVA CORPORATION, a Florida for-profit corporation, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Circuit Civil Division. Case No. 18-37998 CA (22). January 3, 2020. Michael A. Hanzman, Judge. Counsel: Karen Coolman Amlong, Amlong & Amlong PA, The Amlong Firm, Fort Lauderdale; Rani Nair Bolen, The Amlong Firm, Nolensville, TN; Robert J. Kuntz, Devine Goodman & Rasco, LLP, Miami, for Plaintiff. Michael W. Moskowitz and William Salim Jr., Moskowitz, et. al., Fort Lauderdale, for Defendant.

ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff, Andrea Molina ("Plaintiff" or "Molina") brings this action against Defendants Stephen Bittel ("Bittel") and Terranova Corporation ("Terranova") (sometimes collectively referred to as "Defendants"), advancing causes of action for: (a) Fraudulent Misrepresentation Against Bittel and Terranova; (b) Battery Against Bittel; (c) Tortious Interference Against Bittel; (d) Violation of the FCRA/Sexual Harassment Against Terranova; and (c) Violation of the FCRA/Retaliation Against Terranova.[1]

In its Order dated October 1, 2019, the Court dismissed Count I of Molina's First Amended Complaint (Fraudulent Misrepresentation) with leave to amend; took Bittel's motion to dismiss count III (Tortious Interference) under advisement, and denied the Defendants' motion to dismiss Counts II (Battery), IV (Violation of the FRCA/Sexual Harassment) and V (Violation of FRCA/Retaliation). Plaintiff has now filed her "Corrected Second Amended Complaint" (SAC) which attempts to cure the defects that resulted in the Court's dismissal of Count I, and Defendants again move for dismissal of that claim—this time with prejudice. The parties, per the Court's prior Order, also have filed supplemental memoranda on the issue of whether the "**sole** owner" of a corporation (here Bittel) may be sued for interfering with a contract between the entity he/she owns and a third party—an issue dispositive of Bittel's motion to dismiss Count III (Tortious Interference), as it is alleged (and stipulated) that he is, and at all material time was, the sole owner, officer and director of Terranova.

On December 30, 2019 the Court entertained oral argument on the two remaining issues framed by Defendants' motion to dismiss: (a) whether Count I states a cause of action for fraudulent misrepresentation; and (b) whether Count III states a cause of action against Bittel for tortious interference. The motion is now ripe for disposition.

II. FACTS AS ALLEGED

A. Molina's Hiring

The facts alleged in the SAC, which for purposes of deciding the pending motion must be taken as true,[2] are detailed and disturbing. Molina, a 2006 graduate of Dartmouth College with a degree in economics, previously worked as a senior financial analysist with CBRE and earned a "mid-six figure annual income in 2012." SAC ¶ 9. At some point in 2011/2012 CBRE "sold a shopping center that Bittel owned" and Molina—who had "been involved in the sale and had spoken to Bittel," met him at a February 2012 celebratory dinner. SAC ¶ 10. Molina then "ran into" Bittel again at a December 8, 2012 charity gala. *Id*.

At the time of their second encounter Bittel was looking to hire a "Director of Acquisition" for Terranova, a company that both owned (and acted as a third party operator of) commercial real estate, primarily in South Florida. SAC ¶ 11. Bittel "founded" Terranova and, since its inception, he has been its sole owner. SAC ¶ 1. He also "controlled" the company. *Id.* Molina, who knew that Bittel "was a shrewd businessman and successful real estate developer and investor," viewed "the chance to work" with him "as an amazing opportunity to work for and learn from a successful investor on large and exciting deals, to meet and manage relationships with billion-dollar Wall Street funds and to build her own personal wealth." SAC ¶ 12.

After "negotiations over her compensation, Bittel offered Molina" a job at a base salary of $90,000.00 plus a "discretionary performance-based bonus from time to time, which together Molina expected would equal or exceed her compensation from CBRE . . . ." SAC ¶ 13. She therefore decided to accept this opportunity, quit her job at CBRE, and in January 2013 became Terranova's "Director of Acquisitions." SAC ¶ 14. The terms of her employment were set forth in a written "Employment Agreement" dated January 25, 2013; a detailed contract which contained, among other material provisions, garden variety non-disclosure, non-compete, and non-solicitation covenants.

See Agreement ¶¶ 8-10.

B. The Alleged Sexual Harassment

According to the SAC, "within a week after starting her job" Bittel informed Molina that he had been sued for sexual harassment; that "those cases, and many others against him, were 'unwinnable' " as they did not involve a "quid pro quo" demand for "sexual acts in exchange for continued employment or promotion"; that he "knew all the judges in Miami," and that he was "unbeatable in court." SAC ¶¶ 18-19. He also, from the "start of her employment," began discussing "topics of a sexual nature," including:

a. suggesting that she "date one of his sons, men who were 'worth much more' than her husband." SAC ¶ 20(a);

b. "describing his preferences in pornography." SAC ¶ 20(b);

c. "graphically catalogued descriptions of his various lovers' pubic hair," SAC ¶ 20(c);

d. repeatedly describing himself as a " "sapio-sexual," and directing Molina to a website that "contained porn content for sapiosexuals." SAC ¶ 20 (d); and

e. frequently recounting his "sexual exploits," and relating to Molina on several occasions how "former employees had shown him their breasts and asked his opinion, suggesting Molina should do the same." SAC ¶ 20 (f).

The SAC also alleges that Bittel constantly harassed Molina during her pregnancies, forcing her to "endure his endless comments and observations about her weight and physical appearance," and that Bittel "incessantly asked about her weight and barraged her with requests for a picture of the scale with her pregnancy weight"—a demand Molina eventually relented to, sending him "a picture looking down at the register of the scale over her grossly swollen feet and ankles"; a picture "Bittel had framed" and placed on Molina's desk. SAC ¶ 20(h)(ii), (iv). After the birth of her twins, Bittel would then "repeatedly" inquire about how "the breast-feeding was going" and ask [Molina] whether her "breasts were 'real.' " SAC ¶¶ 20 h(iii), (i), (j).

According to the SAC, in the summer of 2015 Bittel also began to question Molina about her "preferences in undergarment, pressuring her to allow him to take her lingerie shopping." SAC ¶ 20(j). Undeterred by her refusal, Bittel then scheduled a "one-on-one lunch" at a sushi restaurant on Lincoln Road and pressured her, during and after lunch, to "go shopping [with him] at Victoria's Secret." SAC 20(j). After Molina eventually told Bittel that "he could buy her a gift certificate," but she would not "enter" the store with him, Bittel "groused, 'That's not the point,' and made an about-face," walking away from the store. *Id.* He later allegedly told Molina that "every woman had her 'price,' " and that "even" she would "would expose her breasts or perform oral sex for enough money," suggesting that Molina "respond with" her number. SAC ¶ 20(l). When he persisted in asking Molina her "price," she "finally" and facetiously told him that "if he wanted a number, "how about $1 million," SAC ¶ 20(l). The next day, as they entered an elevator together, Bittel announced that "I have your money" and proceeded to hand Molina a "novelty 'One Million Dollar Bill." *Id*.

The SAC also alleges that in September 2015 Molina accompanied Bittel "to a business meeting" in Philadelphia where they had dinner with the mayor. SAC ¶ 20(m).[3] When they returned to Florida via private jet, Bittel suggested that Molina "take . . . her shoes off to be more comfortable." SAC ¶ 20(m). He then told her "she would love how it felt for him to pull on her toes and, without receiving permission, grabbed Molina's foot and began pulling on her toes, one by one." *Id.* When Molina feared that this would arose him, she "demanded he stop and pulled back her foot." *Id.* Molina also alleges that Bittel had a "preoccupation with the size of male genitalia"; that his "sexually themed" office and "workspace" was decorated with "offensive sexual paraphernalia"; and that Bittel insisted on one-on-one meetings in his office, "forcing her into an environment saturated with tawdry, offensive, and embarrassing reminders of his preoccupation with all things sexual." SAC ¶ 22.

C. The Alleged Misrepresentation

After describing in vivid detail Bittel's alleged sexual harassment, the SAC then asks—and attempts to answer—the 64 thousand dollar question of "why Molina didn't just leave". SAC pp. 14-18. The answer—according to the SAC—is because Bittel spoke "disdainfully" about companies being left to members of the "lucky sperm club"; vowed that "he would never bring his children into Terranova"; and "represented to Molina that he was positioning and grooming her as an heir to the company." SAC ¶ 25.

This so-called "forever" litany, SAC ¶ 25, continued into 2017 when Bittel reassured Molina that she had nothing to worry about with respect to her "non-compete" because he intended to "take [care] of her professionally" and "do whatever it took to make sure Molina worked with Terranova 'forever.' " SAC ¶ 28. He would then "repetitively" use this " 'forever' litany in response to Molina's questions about her bonuses and future," assuring her that he did not want his children to be "actively part of Terranova," and that she "would be with him 'forever' and would someday take over the running of Terranova." SAC ¶ 29. What he did not tell her, according to the SAC, is that he had "changed his mind and no longer (or ever?) envisioned her as taking over the reins to Terranova someday . . . ." SAC ¶ 30. These representations and non-disclosure induced Molina to continue working for Terranova "at a compensation level well below what Molina expected to earn and was capable of earning in an open market." SAC ¶ 30.

D. Bittel's Alleged Retaliation

In November 2017, news sources reported that six Florida Democratic Party staffers and consultants had "anonymously claimed Bittel had created an unprofessional workplace for women due to his inappropriate comments, leering and crude behavior." SAC ¶ 34. The following week Bittel "appeared at a Thanksgiving lunch attended by all Terranova employees and, in tears, apologized to everyone for his behavior," vowing to be "a changed man." SAC ¶ 35. "But despite his admission and apology, within two weeks, he resumed his lewd comments, leers, and inappropriate behavior toward Molina whenever she was in his presence." SAC ¶ 35. He also "insinuated" that Molina may have "been among the women who accused him of sexual harassment." SAC ¶ 36.

According to the SAC, Bittel then manufactured an adverse employment incident, suggesting that due to "family commitments" Molina had missed part of a conference in New York that she regularly attended when, in reality, she flew up later on the first day "because she was attempting to close a deal for Terranova for the former Pepsi-Cola bottling site in Doral and was attending to preparations for the conference." SAC ¶¶ 37, 38. In response to this "manufactured incident," Molina received an "Employee Written Warning" from the HR Department, reprimanding her for " "[r]epeated excessive tardiness and absences from scheduled meetings . . . ." SAC ¶ 41. Sensing that "Bittel was creating a paper trail to cover his intention to terminate" her, Molina met with a human relations representative, Bonnie Lopata, and Terranova's general counsel, Zena Dickstein, and "spilled out to both women her detailed account of Bittel's sexually harassing words and deeds." SAC ¶¶ 41, 42. Dickstein advised Molina not to put "anything in writing" as it could "negatively affect" Molina's discretionary bonus, and suggested that Molina "would be better served by riding things out till year-end . . . ." SAC ¶ 42.

Molina "heeded" Dickstein's advice and on January 4, 2018, the day after returning from the holiday break, she was called into "the conference room, where Yelena Fernandez, a newly hired HR person,

fired her in Bittel's presence." SAC ¶ 43. "Fernandez offered Molina $9,615.38 in exchange for her execution of an Agreement and General Release" in favor of Terranova and Bittel, individually. SAC ¶ 45. Molina rejected that offer.

III. ANALYSIS

A. Defendant's Motion to Dismiss Count I (Fraudulent Misrepresentation)

Defendants seek dismissal of Count I (Fraudulent Misrepresentation), claiming that Plaintiff fails to allege any "precise representation" made by Bittel, and insisting that Bittel's alleged post-contract representations [*i.e.*, that Bittel would "take care" of Molina; (b) that she would work for him "forever" (SAC ¶23); (c) that she "deserved to run the company one day," and that he was "positioning and grooming her as an heir to the company" (SAC ¶25); (d) that he "intended to do whatever it took to make sure Molina would work for Terranova 'forever' " (SAC ¶28); and (e) that she "would be with him forever and would someday take over the running of Terrranova" (SAC ¶ 29)] are not representations of fact at all, but rather "puffery which is not actionable in fraud." Def. Mot. to Dismiss pp. 18-20. Defendants also contend that Molina's fraud claim is foreclosed by the terms of her employment agreement and that allowing it to proceed would circumvent the contract's non-modification clause. *Supra* at 7-18. The Court agrees.

First, the post-contract representations pled are not representations of fact that may form the basis for a claim of actionable fraud. An employer telling an employee that she will work here "forever," and someday "take over" the business is the type of motivational talk/puffery that, as Judge Learned Hand observed, "no sensible man [or woman] takes seriously, and if he [or she] does he [or she] suffers from his [or her] credulity." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918). *See also Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1320 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C119a] (defining "puffery" as statements or comments which are "excessively vague, generalized, and optimistic"); *Wasser v. Sasoni*, 652 So. 2d 411 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D615a] ("[a] seller's 'puffing' or statements of opinion do not relieve the buyer of the duty to investigate the truth"); *Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330 (S.D. Fla. 2011) citing *Wasser* at 412 ("[s]eller's representation that an apartment building was " 'a very good building' requiring 'normal type of maintenance' " was merely puffing and not a fraudulent misrepresentation. A statement of opinion, such as occurs in 'puffing,' is not a statement of fact, but is one of opinion. 'Puffing' is not to be taken seriously, is not to be relied upon, and is not binding as a legal obligation or promise.").[4]

Putting aside the fact that these alleged statements are not actual representations of material fact, they are also belied by the terms of Plaintiff's Molina's employment agreement; a contract wherein Molina unequivocally "acknowledges that [she] is an employee-at-will and acknowledges this Agreement may be terminated by either party for any reason effective immediately upon notice to the other party." Employment Agreement ¶ 3.[5] The contract also provides that it may "not be modified unless such modification is in writing and signed by both Employee and an authorized employee of Terranova." Agreement ¶ 17. Allowing a claim for fraud based upon oral representations of employment "forever" would judicially rewrite the parties' contract and, in particular, gut the Agreement's "at-will" and "no oral modification" provisions. *See, e.g., Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973) (when parties bargain for the terms of their contract, it is not a court's prerogative to substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain").

Because the Agreement expressly addresses the durational term of Molina's employment, and precludes any oral modifications, Bittel's alleged misrepresentations of "forever" employment do not "give rise to an independent fraud claim" *Peebles v. Puig*, 223 So. 3d 1065 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1080a]; *B & G Aventura, LLC v. G-Site Ltd. P'ship*, 97 So. 3d 308 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2197a] ("[t]he purchaser's claim of fraudulent inducement fails as a matter of law because the alleged oral misrepresentations 'are adequately covered or expressly contradicted in a later written contract' "); *Deschler v. Brown & Williamson Tobacco Co.*, 797 F.2d 695 (8th Cir. 1986) (affirming dismissal of fraud claim based upon alleged promises made to employee, during course of employment, of "lifetime employment," noting that employment agreement addressed the duration of employment by expressly stating that relationship was terminable at will); *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926 (7th Cir. 1997) (same); *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984) (same); *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a] (when a contract contains a non-modification clause the parties have "bargained for predictability and certainty and have foreclosed (or at least attempted to foreclose) any chance of being subjected to litigation premised upon alleged oral modifications of their written document").[6]

Finally, the Court also concludes that this fraud claim is not pled with particularity, as required by Rule 1.120(b) and this Court's Order of dismissal with leave to amend. Rather, the SAC is replete with cryptic allegations, such as that "over the years" Bittel "vowed" to "take care" of Molina; that he repeatedly told her that Terranova would employ her "forever"; and that his [Bittel's] "explanation" of why it would be "unfair" to turn the company over to his children, somehow "represented to Molina that he [Bittel] was positioning and grooming her as an heir to the company." SAC ¶¶ 23-25. No specific terms of this "forever" employment are alleged; no detail is offered as to how or when Molina would become the "heir to the company", or "someday take over the running of Terranova"; and no particulars as to how these representations induced Molina "to stay" at Terranova are pled. *See, e.g., Thompson v. Bank of New York*, 862 So. 2d 768 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2536d].

In sum, these vague representations are: (a) not representations of material fact; (b) contradicted by the express terms of the employment agreement; and (c) pled with an abject lack of precision.[7]

B. Defendant's Motion to Dismiss Count III (Tortious Interference)

The SAC alleges that Bittel "founded, owned and controlled Terranova." SAC ¶ 1. Bittel is then sued for tortious interference with Molina's employment contract with the entity he alone owns and controls. The question, then, is whether the sole and controlling shareholder of a corporation can be liable for tortious interference when he/she uses that control to terminate a contractual relationship, even if motivated by an improper purpose, or the decision is arguably contrary to the best interests of the entity. The Court ordered supplemental briefing, requesting that the parties bring to its attention case law "in Florida and other jurisdictions throughout the United States . . ." directly addressing or touching upon this precise issue. Upon reviewing the parties' supplemental briefs, and the precedent cited, the Court concludes that one cannot, as a matter of law, tortuously interfere with a contract entered into by an entity he/she wholly owns and controls.

Over fifty (50) years ago our appellate court held that a "controlling stockholder" of an entity may not be "sued in tort for allegedly procuring a breach of contract" by that entity. *Covert v. Terri Aviation, Inc.*, 197 So. 2d 12 (Fla. 3d DCA 1967). In support of this rule the court cited *Days v. Florida E. Coast Ry. Co.*, 165 So. 2d 434 (Fla. 3d DCA 1964), where the court, in affirming the dismissal of an interference claim against an "employer who was necessarily a party to their

contract of employment," held that "[t]he courts of this State recognize the existence of a cause of action for wrongful interference with contractual rights when this interference is by a third person," and if the employer defendant "breached its contract to employ the plaintiffs, this breach of contract may not be converted into a tort by an allegation that it was maliciously done." *Id*.

The rule announced in *Days* and *Covert* is not subject to any exceptions. Nor is it based upon any "privilege/justification" that a controlling shareholder has to interfere. It is based upon the simple premise that one cannot, as a matter of common sense, interfere with a contract/relationship they are a party to, and this rule of law has been repeatedly reinforced by the Third District over the last half century. *See Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3d DCA 1980) ("a cause of action for interference does not exist against one who is himself a party to the contract allegedly interfered with"); *Genet Co. v. Annheuser-Busch, Inc.*, 498 So. 2d 683, 684 (Fla. 3d DCA 1986) ("[u]nder Florida law, a cause of action for tortious interference does not exist against one who is himself a party to the business relationship allegedly interfered with").

This rule recognizes that the tort of intentional interference is intended to protect against meddling by interlopers who, without justification, stick their noses in other people's business relationships. The tort does not provide an additional remedy against those who breach a contract (even maliciously) that they are a party to or, even worse, a remedy against those who decide to terminate contracts/relationships in circumstances, such as this, where the termination is not a breach at all. That is why Florida appellate courts, and federal courts applying Florida law, have consistently held that this cause of action is not available unless the defendant is a third-party (stranger) to the contract/relationship at issue. *See, e.g., Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1992a] ("[f]or the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship"); *Volvo Aero Leasing, LLC v. VAS Aero Services, LLC*, 268 So. 3d 785 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D678a] (affirming dismissal of tortious interference claim against a defendant who was not a stranger to the business relationship allegedly interfered with); *West v. Troelstrup*, 367 So. 2d 253 (Fla. 1st DCA 1979) ("[a] cause of action for malicious interference with a contractual relationship exists only against persons who are not parties to the contractual relationship"); *Romika-USA, Inc. v. HSBC Bank USA, N.A.*, 514 F. Supp. 2d 1334, 1338 (S.D. Fla. 2007) (". . . interfering defendant must be a third party, a stranger to the business relationship.' "); *Powerhouse Two, Inc. v. WBC Elecs., Inc.*, 2010 WL 11626638 (M.D. Fla. Apr. 8, 2010) (same); *Genet Co., supra* 498 So. 2d at 684 ("[u]nder Florida law, a cause of action for tortious interference does not exist against one who is himself a party to the business relationship allegedly interfered with"); *Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1028 (Fla. 3d DCA 1981) ("cause of action for wrongful interference with a business relationship is recognized only when the interference is by one who is not a party to that relationship").

This rule also is not limited to circumstances where the defendant is named party (*i.e.*, signatory) to the contract alleged to have been interfered with. It applies with equal force in circumstances where the defendant, though not a party in the legal sense, "was the source of the business opportunity allegedly interfered with." *Genet Co.*, 498 So. 2d at 684; *A.R.E.E.A., Inc. v. Goldstein,* 411 So.2d 310 (Fla. 3d DCA 1982) (cause of action for conspiracy "could not exist since defendant was source of business opportunity which defendant and plaintiff's former employee allegedly conspired to deprive plaintiff of"). So the question here is whether Bittel, as the sole shareholder of Terranova, can possibly be considered a "stranger" to Plaintiff's contract and therefore sued for interference. *Covert, Ethyl, Genet* and common sense says no, as do the vast majority of courts that have addressed the issue, including but not limited to:

A. *Longmire v. Wyser-Pratte*, 05 CIV. 6725 (SHS), 2007 WL 2584662 (S.D.N.Y. Sept. 6, 2007)—dismissing tortious interference claim brought by former employee against sole shareholder of corporation which terminated his employment, concluding that:

> . . .Wyser-Pratte was the Chief Executive Officer of WPMC, its sole owner, and Longmire's direct supervisor. He was also the person who originally hired Longmire to work at WPMC. "[U]nder New York law, a party cannot be held liable for interfering with [his] own contract." *Campbell v. Grayline Air Shuttle, Inc.,* 930 F.Supp. 794, 804 (E.D.N.Y.1996); *see also Israel v. Wood Dolson Co.,* 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956) (plaintiff bringing tortious interference claim must show that defendants were not parties to the contract); *Winicki v. City of Olean,* 203 A.D.2d 893, 894, 611 N.Y.S.2d 379 (4th Dep't 1994) (only "a stranger to a contract" may be liable for tortious interference.) In this case, it would be nonsensical to find that Wyser-Pratte induced his wholly owned corporation to terminate Longmire's employment where it was Wyser-Pratte himself-Longmire's only supervisor-who had the sole authority to make that decision. *See* Schacht Aff. ¶ 4; *see also Finley,* 79 F.3d at 1295 (dismissal of tortious interference with employment claim upheld based in part on finding that defendant "had the authority to hire and fire" plaintiff). Simply put, the Court cannot construe Wyser-Pratte as a "third-party" to Longmire's employment arrangement for purposes of this claim.

B. *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983)—affirming district court's conclusion that under Illinois law a corporation's sole shareholder cannot, as a matter of law, tortuously interference with the entities' contracts, and holding that:

> . . .it is clear that a party to a contract cannot be held liable for tortiously inducing himself to breach the contract. *See Worrick v. Flora,* 133 Ill.App.2d 755, 759, 272 N.E.2d 708, 711 (1971); *see generally* 3 J. Dooley, *Modern Tort Law* 218 (1977). Only a third party separate from the contracting parties can be liable for such a tort. *See B.R. Paulsen & Co. v. Lee,* 95 Ill.App.2d 146, 152, 237 N.E.2d 793, 796 (1968); *see also Olson v. Scholes,* 17 Wash.App. 383, 563 P.2d 1275, 1280 (1977). Mohan Corporation acts only through Mohan; the corporation could not form or breach contracts without Mohan's involvement and, in a very real sense, Mohan is a party to the employment agreement in this case. *See West v. Troelstrup,* 367 So.2d 253, 255 (Fla.App.1979). Because Mohan is Mohan Corporation's sole shareholder, officer, and director, therefore, we are convinced that Mohan would be considered by an Illinois court not to be a separate entity capable of inducing Mohan Corporation to breach its contracts.

Rao, at 224.

C. *Richmond v. Advanced Pain Consultants, S.C.*, 2015 WL 4971040 (N.D. Ill. Aug. 18, 2015)—dismissing tortious interference claim against the sole shareholder of a corporation who allegedly interfered with plaintiff's employment contract, finding that:

> In his Amended Complaint, Plaintiff alleges on information and belief that Dr. Kondelis: (i) is the sole shareholder of APC; (ii) is the principal member of CIPM; (iii) exercises final managerial control over his companies; (iv) has the authority to hire and fire APC and CIPM employees; (v) has the authority to direct and supervise the work of APC and CIPM employees; (vi) has the authority to sign on APC's and CIPM's checking accounts, including payroll accounts; and (vii) has the authority to make decisions regarding employee compensation and capital expenditures. Based on these allegations, APC or CIPM would not exist but for Dr. Kondelis. There is no mention of other corporate partners, trusts with interest, or additional stakeholders other than Dr. Kondelis. Furthermore, Plaintiff fails to allege any role Dr. Kondelis may have had as a corporate manager or

officer and instead, relies on conclusory allegations that Dr. Kondelis acted with malice when tortiously interfering with Plaintiff's contract. *See, e.g., George A. Fuller Co. v. Chicago College of Osteopathic Medicine,* 719 F.2d 1326 (7th Cir. 1983) (whether corporate managers/officers can be held liable for inducing the corporation to breach a contract is another issue); *see also Stafford,* 63 F.3d at 1442 (7th Cir. 1995) ("Malice, 'in the context of interference with contractual relations cases, simply means that the interference must have been intentional and unjustified.' ") (internal citation omitted). For these reasons, the Court agrees that the facts of the instant matter align with *Rao* and hold that Dr. Kondelis, as the alleged single operator and stakeholder of APC and CIPM, cannot tortiously induce a breach of his own alleged contract with Plaintiff. Plaintiff's conclusory allegations about Dr. Kondelis acting with malice do not alter this conclusion. As such, Plaintiff has not stated a claim for tortious interference with a contract under Illinois law and the Court grants Defendants' motion to dismiss Count IV.

D. *Rawlings v. Breit*, 2003-CA-002785-MR, 2005 WL 1415356 (Ky. Ct. App. June 17, 2005)—reversing verdict for tortious interference against sole owner of company and holding:

> We agree that the tortious interference claim against Rawlings was invalid. Rawlings was the sole owner of the firm. Therefore, Rawlings could not interfere with his own contract. *See Rao v. Rao,* 718 F.2d 219, 225 (7th Cir. 1983). Thus, the portion of the judgment granting Walker $250,000 against Rawlings for punitive damages for tortious interference of employment relationship is reversed.

E. *Schoellkopf v. Pledger*, 778 S.W.2d 897 (Tex. App. 1989)—reversing a judgment for tortious interference against two individuals who controlled company, holding:

> Here, Pumpkin Air is a corporation "owned, controlled, and dominated" by two individuals . . . The Schoellkopfs and Pumpkin Air had a unity of interest, and can be described, as the court did in *Baker,* as being "so closely aligned as to be one entity." *Baker* 735 S.W.2d at 550. We hold that the Schoellkopfs, as a matter of law, cannot have tortiously interfered with the contract between Pumpkin Air and Midway. Point twenty-nine, insofar as it relates to the contract between Pumpkin and Midway, is sustained.

Schoellkopf, at 903. *See also Baker v. Welch*, 735 S.W.2d 548, 550 (Tex. App. 1987) ("[w]e hold, as a matter of law, that Baker did not tortiously interfere with Welch's prospective business relations with HHI because Baker and HHI were so closely aligned as to be one entity, guided by one consciousness").

F. *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd.*, 475 F.3d 783 (6th Cir. 2007)—applying Michigan law and affirming dismissal of tortious interference claim against sole shareholder, and rejecting claimed "personal interest exception" to rule requiring the defendant be a stranger to the contract, holding:

> Where a corporate agent interferes with the contracts of the corporation solely for his or her own personal benefit, he or she is wearing the hat of an outsider to the contractual parties. More importantly, the economic interests of an agent acting in his or her personal capacity and the economic interests of the corporation—an entity that operates for the benefit of its shareholders—are not aligned. The same is not true for a controlling shareholder, whose interests are unified with the interests of the controlled corporation. *Boulevard Assocs. v. Sovereign Hotels, Inc.,* 72 F.3d 1029, 1036 (2d Cir. 1995) ("Because there is a significant unity of interest between a corporation and its sole shareholder—indeed, an even greater unity than that which exists between a corporation and its agents or officers—we do not believe that such a shareholder can be considered a third party capable of 'interfering' with its own company's contracts."); *see also Canderm Pharmacal Ltd. v. Elder Pharms. Inc.,* 862 F.2d 597, 601 (6th Cir. 1988) (corporate parent could not interfere with subsidiary because it "was, in effect, the same entity" as the subsidiary). Because Moog owns 98% of TSS shares, Moog and TSS are, for purposes of a tortious interference with contract action, the same party. Because Moog cannot as a matter of law commit the tort at issue, we affirm the grant of summary judgment in favor of Moog.

Servo Kinetics, at 801.

G. *Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029 (2d Cir. 1995)—reversing verdict for tortious interference because "there can be no tortious interference of contract by someone who is directly or indirectly a party to the contract," and concluding that:

> Because there is a significant unity of interest between a corporation and its sole shareholder—indeed, an even greater unity than that which exists between a corporation and its agents or officers—we do not believe that such a shareholder can be considered a third party capable of "interfering" with its own company's contracts.

Id. at 1036.

H. *Laird v. Clearfield & Mahoning R. Co.*, 59 Pa. D. & C.4th 556 (Com. Pl. 2001)—dismissing tortious interference claim against sole owner of company because defendant could not, as a matter of law, "be said to be a third party" to contract at issue.

I. *Nelson v. Martin*, 02A01-9403-CV-00043, 1996 WL 47137 (Tenn. Ct. App. Feb. 1, 1996)—affirming dismissal of tortious interference claim because defendants "Nelson, Martin and Gammon were the sole shareholders, sole directors and sole officers. As such, Nelson, Martin and Gammon *were* B & M Printing Company".

J. *Ansley v. Cooke*, 2017 WL 3872481 (S.D. Ohio Sept. 5, 2017)—". . . Defendants, the majority shareholders in Diversified, cannot be considered outsiders or strangers to Diversified's relationships for purposes of the tortious interference claim. Therefore, Defendants are entitled to judgment on the tortious interference claim."

K. *Dzierwa v. Michigan Oil Co.*, 393 N.W.2d 610, 613 (Mich. Ct. App. 1986)—". . . as the trial court concluded, Smith was not a third party to plaintiff's employment relationship with MOC. Plaintiff, in his complaint, states that his employment agreement was made by Smith on behalf of MOC. Smith is a director of MOC, its president, a controlling shareholder, and director and chief executive officer of its parent corporation. He had express authority and responsibility for hiring, evaluating, supervising, and terminating plaintiff on behalf of MOC. In short, Smith *is* the company on these facts. Summary disposition was therefore proper".

Though Plaintiff acknowledges the hornbook rule that one cannot interfere with his own contract/business relationship, she says an exception exists when a party to a contract/relationship (or sole shareholder like Bittel) terminates a contract/relationship using "improper means" or the termination is adverse to the interests of the party terminating the contract/relationship. Pl.'s Supp. Mem. p. 5. In the Plaintiff's view, the question is thus one of "privilege/justification," which she claims is an affirmative defense. Put simply, Molina says she can sue Bittel for interference and that he has liability unless he can prove that he terminated the contract using proper means and for a proper purpose. Molina is incorrect.

It is true that some courts in other jurisdictions have disposed of cases like this based upon a finding of "privilege/justification"; an analysis which puts the proverbial cart before the horse. These courts have skipped over the threshold inquiry of whether the defendant was a stranger to the contract/relationship and thus subject to the claim at all, and have instead framed the issue as one of a "privilege/justification" to interfere. *See Alpha Distrib. Co. of California, Inc. v. Jack Daniel Distillery*, 454 F.2d 442, 450 (9th Cir. 1972) (recognizing that "[a]n action will lie for the intentional interference [only] by a third person . . .," but disposing of case brought against sole shareholder by concluding that defendant "had a legitimate business interest in terminating the distributorship" of its subsidy); *Bendix Corp. v. Adams*, 610 P.2d 24, 31 (Alaska 1980) (dismissing

tortious interference claim brought against company that terminated contract between its subsidy and a third party based on the conclusion that its decision was "motivated by a legitimate concern for Bendix's investment"); *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (affirming decision in favor of defendant, noting that "[i]t would appear, then, that the trial court was correct in its conclusion that SPI, the parent company of Elder, was, in effect, the same entity as Elder, and, so, was privileged to become involved in the relations between Canderm and Elder"); *Felsen v. Sol Cafe Mfg. Corp.*, 249 N.E.2d 459 (1969) (reversing verdict for intentional interference because defendant, as "the sole stockholder of Sol Cafe, had an existing economic interest to protect and was, therefore, privileged to interfere with the contract . . ."). These courts reached the correct decision for the wrong reason. The claims were properly disposed of in the defendant's favor not because the defendant's conduct was "privileged/justified," but rather because there was no third party interference.

These out of state decisions relied upon by Molina improperly conflate two distinct issues; namely, whether, as a matter of law, one can interfere with his/her own contract, and the qualified privilege to interfere possessed by *third parties* who have a financial interest in the contract/business relationship, provided they do not use improper means and are protecting their own interests. The privilege issue only comes into play *if* the defendant is otherwise capable of interference because they are *not* a party to, or the source of, the contract/business relationship in the first place. As the Restatement itself makes clear, "one who has a financial interest in the business of another" is privileged to interfere if: (a) he does not employ "improper means"; and (b) he "acts to protect his interest from being prejudiced by the contract or relation." Restatement (Second) of Torts § 769 (1979). But unless the defendant is accused of interfering with the contract/business of ***another*** the privilege issue is academic.

The first question, then, is always whether a defendant is in fact a "stranger" to the contract/relationship and, as a result, subject to being sued for this tort. If that threshold question is answered in the affirmative, that defendant may then assert a qualified privilege based upon their financial interest in the business of "**another**," *see Restatement, supra*—a qualified privilege which will operate as a defense to the claim so long as the defendant did not employ "improper means and acted to protect his interest from being prejudiced by the contract or relationship." *Restatement, supra*. But these are two distinct issues, and if a defendant is a party to the contract/relationship allegedly interfered with there is no cause of action at all and, *a fortiori*, the affirmative defense of qualified privilege is irrelevant.

A careful review of Third District (and other Florida) precedent supports this Court's view that a defense of "privilege/justification" does not come into play until and unless the defendant is a party that can be sued for interference. For example, in *Ethyl Corp. v. Balter*, 386 So. 2d 1220 (Fla. 3d DCA 1980) the court first observed that the tortious interference claim failed because **"**Ethyl was essentially accused of interfering with its own undertaking to Balter," and that "[n]o such action lies under the law of Florida." *Id.* at 1224. The court then went on to point out that:

> There is, moreover, a completely *separate, additional*, and *overriding* reason which precludes Ethyl's liability for "interference" with any of the various contracts and relationships cited by Balter. Ethyl was, as a matter of law, privileged to act as it did throughout the entire course of Events involved in this case.

Id. at 1224. (Emphasis added). The court, therefore, as an *alternative* basis for its decision, found a privilege existed because Ethyl's actions "were reasonably directed to the recovery of the very substantial sums it was owed by Pac-Craft, to the protection of its status as the co-obligor with the corporation." *Id*.

In *Genet*, a case which relied on *Ethyl*, the Third District also analyzed these issues separately. After holding that "a cause of action for tortious interference does not exist against one who is himself a party to the business relationship allegedly interfered with," the court went on to observe that:

> Likewise, there can be no claim where the action complained of is undertaken to safeguard or promote one's financial or economic interest.

Id. at 685. The court then concluded that the defendant in that case, "A-B, acting in its own best interest, had the right not to approve the proposed transfer. Accordingly, its actions taken to safeguard its economic interests are non-actionable." *Id*.

Similarly, in *Babson Bros. Co. v. Allison*, 337 So. 2d 848 (Fla. 1st DCA 1976) the court also concluded that since the defendant had "authority to terminate or not renew the contract on behalf of the Georgia corporation [he was representing], his employer cannot be held liable for interference with the contract between the Georgia corporation and" plaintiff. *Id.* at 850. The court then reversed the verdict for yet "another reason"; namely, that the defendant was "privileged to interfere with the contract because it has a financial interest in the business of the Georgia corporation." *Id.* citing Restatement (Second) of Torts, § 769.

Ethyl, Genet and *Babson* employed alternative holdings. These decisions did not say—or suggest—that a party to the contract/relationship alleged to have been interfered with may be liable unless its actions were privileged. A privilege inquiry is again completely unnecessary unless the party being sued is in fact a "stranger" to the contract/relationship at issue and, as a result, subject to liability; a point illustrated by the decision in *Dzierwa v. Michigan Oil Co.*, 393 N.W.2d 610 (Mich. Ct. App. 1986).

In *Dzierwa* the trial court dismissed a claim brought by a former employee of Michigan Oil Company against the president and a director of MOC, alleging that [he] unjustifiably induced MOC "to breach its [employment] agreement with plaintiff." In affirming the dismissal of that claim, the court noted that:

> The trial court ruled that because Smith was essentially a party to the employment contract he was privileged to terminate the relationship and thus could not be sued for wrongful interference. We affirm the trial court's ruling on slightly different grounds.

Id. at 613. The court then went on to explain those "slightly different grounds," pointing out that:

> . . . as the trial court concluded, Smith was not a third party to plaintiff's employment relationship with MOC. Plaintiff, in his complaint, states that his employment agreement was made by Smith on behalf of MOC. Smith is a director of MOC, its president, a controlling shareholder, and director and chief executive officer of its parent corporation. He had express authority and responsibility for hiring, evaluating, supervising, and terminating plaintiff on behalf of MOC. In short, Smith *is* the company on these facts. Summary disposition was therefore proper.

Id. The *Dzierwa* court recognized that the issue presented was not one of privilege because no cause of action at all could be maintained against Smith—a party who had corporate authority to terminate plaintiff on behalf of MOC and was, therefore, "the company" for purposes of this tort. The *Dzierwa* court employed the proper analytical framework and correctly acknowledged that the privilege issue had no place in the analysis because the defendant could not, under any circumstance, be held liable for interference with a contract he was a party to.

Here, Plaintiff has attempted to affirmatively plead the non-existence of a privilege, alleging that Bittel, in terminating her employment, acted "with an ulterior purpose," and with "the ulterior

motive to cause Molina harm out of spite to avenge his wounded pride" and "to protect his interest in regaining his position as a powerful and respected person in political, social and charitable circles . . . ." SAC ¶ 61. This may be so, but it makes no difference if Bittel, as the sole shareholder, director, officer of Terranova, is deemed to be a party (*i.e.*, not a stranger) to Molina's employment contract, for if he is deemed to be a party to that agreement Plaintiff has no viable claim for interference. *Genet Co.,* 498 So. 2d 683.

Moreover, even if the issue here were one of "privilege/justification" (and it is not) there can be no doubt that Bittel, the owner of Terranova, had the requisite financial interest in the company's business to invoke the privilege, and whether he acted "with malice" in firing Molina is of "no moment." *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1322 (11th Cir. 1998). He also did not use improper means in terminating her, as she was called into a conference room and fired by human resources—a routine corporate protocol. But to be clear, a privilege inquiry is completely unnecessary here because Bittel, as the sole shareholder, officer, and director of Terranova was not a "stranger" to Molina's employment contract.[8]

As Plaintiff's counsel commendably acknowledged during oral argument, a finding that Bittel is a "stranger" to Molina's employment agreement, and thus subject to this tort, would make even actual signatories liable for interfering with their own agreements anytime a plaintiff could allege that they employed improper means or acted for improper purposes. Let's assume, for example, that Bittel himself were the other signatory to Molina's employment agreement, not Terranova. Plaintiff says he would still have liability for interfering with his own contract by terminating it (as he had a contractual right to do) if he employed improper means or was not motivated not by a legitimate business reason. Acceptance of this argument would thus expose parties to agreements to liability for tortuously interfering with their own contractual undertakings as long as a plaintiff alleged that improper means were used, or that the decision was contrary to the best interests of the party terminating the contract. Such a rule would decimate contractual expectations by allowing parties (or those who control a party) to be sued for tortious interference even when, in a case such as this, the termination was expressly permitted by the contract. It would also force courts and juries to decide whether a contractually permitted termination was motivated by legitimate reasons, thereby second-guessing corporate decisions and turning contract law on its head.

This Court concludes that Bittel, as the sole shareholder, officer and director of Terranova is, for purposes of the tort of intentional interference with a contractual/business relationship, a party to the employment contract between Molina and Terranova and, as a result, he may not, as a matter of law, be sued for having intentionally interfered with that contract. *Genet Co.,* 498 So. 2d 683; *Ethyl,* 386 So. 2d 1220.

IV. CONCLUSION

Assuming the allegations of Plaintiff's complaint are true, as the Court must for now, the Defendants may have significant exposure for sexual harassment/retaliation. But Plaintiff was an employee at-will pursuant to a written contract that expressly permitted termination at any time, for any reason, and further provided that it could not be orally modified. The parties bargained for these terms and that bargain may not be thwarted by allegations that Bittel, as the sole owner of Terranova, orally promised Molina that she would work with him "forever," and that she was "being groomed to run the company." Nor may Molina side-step her contract by suing Bittel for tortuously interfering with an employment agreement she entered into with his own wholly-owned entity; an agreement he alone had the authority to initially approve and later terminate. Put simply, Bittel, acting on behalf of Terranova, had the contractual right to fire Molina so long as he [it] did not violate any statutory law—a question that will be adjudicated through Counts IV and V of the SAC. But Molina's common law claims for fraudulent inducement and tortious interference fail to state a cause of action.

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

1. Counts I and III of Plaintiff's Second Amended Complaint are dismissed with prejudice.

2. Defendants shall file their Answer and Affirmative Defenses, if any, to Counts II, IV and V of Plaintiff's Second Amended Complaint within twenty (20) days.

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[1]FCRA is an acronym for the Florida Civil Rights Act, codified at § 760.01-§ 760.11.

[2]*Rolle v. Cold Stone Creamery, Inc.*, 212 So. 3d 1073, 1076 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D517c] ("Additionally, all allegations must be taken as true, and 'any reasonable inferences drawn from the complaint must be construed in favor of the non-moving party.' " (citing *Minor v. Brunetti*, 43 So.3d 178, 179 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2013a].

[3]Bittel was then the co-chair of finance for the Democratic National Committee. He had served on the site selection committee that chose Philadelphia to host the 2016 Democratic National Convention. SAC ¶ 20 m.

[4]The Court is cognizant of the fact that one may base a claim for fraud "upon representation of a future occurrence. . . made without any intention of performing it, or made with positive intention not to perform it . . . ." *Bernard Marko & Associates, Inc. v. Steele*, 230 So. 2d 42 (Fla. 3d DCA 1970), citing *Home Seekers' Realty Co. v. Menear*, 135 So. 402 (Fla. 1931); *Bongard v. Winter*, 516 So. 2d 27 (Fla. 3d DCA 1987) (". . . a present misrepresentation concerning a future intent may form the basis for actionable fraud where the party making the misrepresentation is aware at the time that it is in fact false"); *Hamlen v. Fairchild Indus., Inc.*, 413 So. 2d 800 (Fla. 1st DCA 1982). But the problem with Molina's fraud claim is not that it is premised upon representations "of a future occurrence" (*i.e.*, you will work with me "forever" or you are being groomed to rule over the company). The problem is that her claim is based upon statements that are: (a) not factual representations at all; and (b) to extent they may be considered "representations" of fact, they pertain to a subject matter (duration) expressly covered by her employment agreement.

[5]While the Agreement is not attached to the SAC, the pleading expressly refers to, and incorporates, several of its provisions. *See* SAC ¶¶ 13, 15(a)-(d). The court may therefore consider the contract in adjudicating this motion. *See, e.g., Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a]; *One Call Prop. Services Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a].

[6]In *Okeechobee*, this Court—sitting as an Associate Judge—did point out that a party may avoid a no oral modification clause if they allege—and eventually prove—that the oral amendment was "accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it." *Id.* at 993, citing *Professional Insurance Corp. v. Cahill,* 90 So.2d 916, 918 (Fla.1956). "This requires that a plaintiff plead (and again eventually prove): (a) that the parties agreed upon and accepted the oral modification (*i.e.*, mutual assent); *and* (b) that both parties (or at least the party seeking to enforce the amendment) performed consistent with the terms of the alleged oral modification (not merely consistent with their obligations under the original contract); *and* (c) that due to plaintiff's performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (*i.e.*, independent consideration"). *Id.* No such allegations have been made by Molina.

[7]Given the allegations of sexual harassment/retaliation pled, the Court—during oral argument—commented that this tort claim seemed like "water in the whisky" and questioned what it added to the case. In commendable candor, Plaintiff's counsel advised the Court that this fraud claim (and presumably the tortious interference claim as well) provided an avenue to seek punitive damages against Bittel, an "extremely wealthy individual." Exemplary damages are capped at "$100,000.00" for claims brought under the FRCA. *See* § 760.011 (5), Fla. Stat. (2019). While the Court appreciates counsel's creativity and zealous advocacy, it is clear that this case, at its core, is about alleged sexual harassment/retaliation, not "fraud" or "tortious interference"; tort claims that were pled in an understandable (but unsuccessful) attempt to increase the value of the case.

[8]While the Court recognizes that Terranova is a distinct juridical party, context matters, and in this particular context Bittel was "so closely aligned" with Terranova as to be "one entity." *Baker* 735 S.W.2d at 550. And this is not the only context in which a sole owner of a closely held corporation and the corporation itself are deemed to be a single unified entity. *See, e.g., Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2003a] (party, for purposes of § 57.105, includes "all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of the proceedings").

* * *

Criminal law—Cruel and unusual punishment—Prison/jail conditions—COVID-19—Defendant held in county jail pending competency determination—Motion for release from county jail alleging that defendant's detention violates cruel and unusual punishment provisions of both the federal and state constitutions due to COVID-19 jail conditions—Court rejects argument that subjective prong of cruel and unusual punishment analysis, which requires showing that jail officials acted with deliberate indifference to defendant's medical needs, is inapplicable in this case because defendant has not sued jailkeepers, but rather seeks release from the court—Defendant has failed to provide any authority adopting or applying suggested approach, and supreme court framework mandates inquiry into jail official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment—Motion is denied because subjective prong of cruel and unusual punishment analysis applies to defendant's claim and defendant has not satisfied it

STATE OF FLORIDA, v. JAHMAL PARKER, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F18 6813, Division 14. May 22, 2020. Robert T. Watson, Judge. Counsel: Ian Muir, Jennie Conklin and Alexander Lopez, Miami-Dade State Attorney's Office, for State. Erica Gerstin, John Morrison and Elsa Van Gorp, Miami-Dade County Public Defender's Office, for Defendant.

ORDER DENYING MOTION FOR RELEASE

THIS CAUSE is before the Court following a hearing on Tuesday, May 19, 2020, on Defendant's Motion for Release. At the conclusion of the hearing, for the reasons set forth on the record in open court, the Court denied the Motion and indicated that a brief written Order setting forth citations of authority would follow.

Background

The Defendant argued that his detention in the Metro West Detention Center pending a court-ordered competency evaluation violates the Cruel & Unusual Punishment provisions of both the United States Constitution and the Florida Constitution due to the COVID-19 jail conditions. The Defendant also argued that the Court would and should find cruel and unusual punishment based solely on the jail conditions.

The Court assumed without deciding that Defendant, either through testimony, other evidence, or a stipulation by Miami-Dade County, the jails operator (through its Corrections and Rehabilitations Department), would be able to show an objectively intolerable risk of harm in the jail. The Court noted, and counsel for the County confirmed, that in ongoing federal litigation related to Metro West conditions, the County so stipulated for purposes of its motion to stay pending appeal a preliminary injunction entered against the County by United States District Judge Kathleen M. Williams.

Defendant's Position

The defense position is that this showing is sufficient for a finding of cruel and unusual punishment. The defense acknowledges that the subjective intent of jail officials is also generally required for a finding of cruel and unusual punishment based on jail conditions, but contends that it need not satisfy the subjective prong in this case because Defendant has not sued the jailkeepers, but rather seeks his release from the Court. "Here the decisionmaker is not part of the executive branch, but this Court. Subjective intent tests are the courts judging the intentions of others." Def.'s Suppl. Br. 5-6. The defense stated that, even if the subjective prong applied, it was not prepared to present any witnesses or other evidence to satisfy it.

Analysis

The Court is not persuaded by the defense argument.

First, the defense was unable to provide any authority adopting or applying this approach.

Second, the United States Supreme Court has established a two-pronged legal framework for analyzing cruel and unusual punishment claims based on jail or prison conditions.

The Eighth Amendment[1], ratified in 1791, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239 (1972); *Robinson v. California*, 370 U.S. 660, 666-667 (1962).[2]

A cruel punishment involves "the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The unnecessary and wanton infliction of pain, in turn, includes "deliberate indifference to serious medical needs of prisoners" by prison doctors or prison guards. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The protection against cruel and unusual punishment thus extends beyond the terms of sentence and reaches deprivations suffered during imprisonment. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

But only "deliberate indifference to [a prisoner's] serious medical needs . . . can violate the Eight Amendment." *Id.* Only "unnecessary and wanton infliction of pain" violates the Eighth Amendment. *Id.* at 298 (citing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

The Supreme Court framework "mandate[s] inquiry into a [jail] official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Id.* at 299. "The source of the intent requirement is . . . the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300. *See also Helling v. McKinney*, 509 U.S. 25, 29-30 (1993) ("while the Eighth Amendment applies to conditions of confinement that are not formally imposed as a sentence for a crime, such claims require proof of a subjective component, and that where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard for that state of mind is the deliberate indifference standard.").

The framework the Supreme Court has established for cruel and unusual punishment claims in other contexts, such as sentencing, is different. *See generally, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) [18 Fla. L. Weekly Fed. S131a] (describing the standard applied in death penalty cases). But that is irrelevant to the issue before the Court, which is governed by the clearly established legal framework set forth above.

Third, a recent, published decision of the United States Court of Appeals for the Eleventh Circuit, considering a cruel and unusual punishment argument about the very jail at issue here, applied the two-pronged, objective and subjective framework. *Swain v. Junior*, No. 20-11622-C, 2020 WL 2161317 (11th Cir. May 5, 2020) [28 Fla. L. Weekly Fed. C1117a]. The court explained that a "challenge to the conditions of confinement has two components: one objective and the other subjective. . . . Deliberate indifference requires [jail operators] to have a subjective state of mind more blameworthy than negligence, closer to criminal recklessness." *Id.* at *4 (citing *Farmer v. Brennan*, 511 U.S. 825, 835, 839-40, 846 (1994)). Like here, the relief in-custody defendants sought was that a judge order their release. That that relief was sought in federal court or that it was sought in a lawsuit against the jailkeepers does not render the legal framework applied there inapplicable in this case. In both cases, a judge was being asked to find that jail conditions represent cruel and unusual punishment.[3]

Conclusion

Because the subjective prong of the cruel and unusual punishment analysis applies to Defendant's claim and Defendant has not satisfied it, his claim fails.

For these reasons and those set forth on the record in open court at the hearing on May 19, 2020, the Defendant's Motion for Release is

DENIED.

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[1]The protections of the Eighth Amendment relied on by Defendant do not attach until after a person has been convicted and sentenced. *Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (citing *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.")). Instead, a cruel and unusual punishment claim by a pretrial detainee such as the Defendant is governed by the Due Process Clause of the Fifth Amendment. *Archilla v. Witte*, No. 4:20-cv-596-RDP-JHE, 2020 WL 2513648, at *13 n.20 (N.D. Ala., May 15, 2020) (citing *Jordan v. Doe*, 38 F.3d 1559, 1564 (11th Cir. 1994)). The standard for providing adequate medical care to pretrial detainees under the Fifth Amendment is, however, the same as that for convicted persons under the Eighth Amendment. *Id.* (citing *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1573-74 (11th Cir. 1985)).

[2]The Florida Constitution provides that its "prohibition against cruel or unusual punishment . . . shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Fla. Const. art. 1, § 17.

[3]The appeals court observed that the in-custody defendants "offered little evidence to suggest that the [jail operators] were deliberately indifferent" and found that "the evidence supports that the [jail operators] are taking the risk of COVID-19 seriously." *Id.*

* * *

Liens—Construction—Contractor's motion for summary judgment is granted as to count of subcontractor's action against contractor invoking Florida Construction Lien Law—Law is not applicable to contractor who constructs systems through which it provides telecommunication services to condominium and homeowners associations at its own expense and retains ownership of systems at all times where contractor did not enter into construction contract with owners of real property and did not receive payment for constructing or altering permanent improvements to real property

BARTLETT FIBER, INC., Plaintiff, v. OPTICAL TELECOMMUNICATIONS, INC., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-006123-CA-01, Section CA15. March 24, 2020. Jose Rodriguez, Judge. Counsel: Joseph D. Kennett, Brick Business Law, P.A., Tampa, for Plaintiff. Nicholas D. Siegfried, and Zachary T. Smith, Siegfried Rivera, Coral Gables, for Defendant.

ORDER ON OPTICAL TELECOMMUNICATIONS, INC.'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF BARTLETT FIBER, LLC'S VERIFIED FOURTH AMENDED COMPLAINT

THIS CAUSE, having come before this Honorable Court on January 17, 2020 on Defendant's, Optical Telecommunications, Inc. ("Optical"), Motion for Summary Judgment ("Motion") as to Count I of Plaintiff's, Bartlett Fiber, LLC ("Bartlett") Verified Fourth Amended Complaint, and the Court having heard argument of counsel for Optical and Bartlett, having reviewed the Motion and Bartlett's Response thereto, Chapter 713, Florida Statutes, the authority cited by the parties, and being fully advised in the premises,

ORDERS AND ADJUDGES AS FOLLOWS:

1. Optical is in the business of providing various systems and/or services, including, but not limited to, multi-channel video, high speed data, security, information and voice services ("Services") to various condominium and homeowners associations throughout the state of Florida. *See* Motion, Ex. "B" at ¶ 3; *Accord* Complaint, at ¶ 33.

2. In its ordinary course of business, Optical enters into "Integrated Telecommunication Services and Access Agreements" with condominium and homeowners associations.[1] In sum, the Contracts provide that (1) Optical, at its own cost an expense, will construct the systems necessary to provide the Services[2], (2) that, upon completion of the systems, the associations will pay Optical for the Services by way of a "Bulk Service Fee,"[3] and (3) that the system will, at all times, be owned by, and be the personal property of, Optical.[4]

3. The Contracts reflect that the associations play no role in the construction of the systems, e.g., the associations do not set forth a budget for the systems, do not receive and review construction invoices, do not make payments during the course of construction, and at no time make payments for the construction. Optical segregates its provision of Services from the construction of the systems, apparently purposefully, because Optical desires to at all time retain ownership of the systems. *See* Contracts, at Section 8.1. In essence, contractors hired by Optical to construct the systems are not improving the real property of the associations, but are instead, constructing a system for Optical's exclusive use and ownership.

4. It is alleged that Optical hired Bartlett to perform certain labor and services related to the construction of the systems. Bartlett alleges that it has not been paid, in full, for its labor and that certain outstanding amounts are "undisputed."

5. Count I of Bartlett's Verified Fourth Amended Complaint ("Complaint") attempts to invoke Chapter 713, Florida Statutes, i.e., "Construction Lien Law," and alleges that Bartlett is entitled to the remedies provided in § 713.346, Florida Statutes, titled "Prompt Payment on Construction Contracts."

6. § 713.346(1) provides:

> Any person who *receives a payment for constructing or altering permanent improvements to real property* shall pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided on account of such improvements. (e.a.).

7. In its Motion, Optical argues that Bartlett's cause of action under § 713.346 fails as a matter of law because: (1) Optical did not enter into a "construction contract" with the owner of real property; and (2) Optical does not, and did not, receive payment for constructing or altering permanent improvements to real property. Instead, Optical constructs the systems at its own cost and expense, and is subsequently paid by the associations to whom it contracts with for its provision of Services. There is no dispute that Optical's position is correct—the associations do not pay Optical for the systems, and this undisputed fact is made clear by the Contracts, as well as Bartlett's admission in its Complaint. *See* Complaint, at ¶ 34 & the Contracts at Sections 4.1 & 9.2.[5]

8. Despite the foregoing, Bartlett suggests § 713.346 remains a valid cause of action for Bartlett because subsequent to the construction of the systems, Optical began receiving monthly payments from the associations which are attributable to the Services provided by Optical. According to Bartlett, Optical's receipt of payment for the provision of Services to the communities means that Optical was paid "on account of" Bartlett's labor and services, and, according to Bartlett, this factual scenario is exactly why the legislature enacted § 713.346, Florida Statues.

9. Bartlett's strained interpretation of § 713.346 is not well taken. The plain language of § 713.346(1) denotes a prerequisite for the application of this Section, i.e., Optical must have received a payment *for constructing or altering permanent improvements to real property.* As set forth above, that is not the case here, and as Florida Lien Law is to be strictly construed,[6] this Court will not broadly interpret § 713.346 in the manner proposed by Bartlett.[7]

10. Bartlett's reliance on a purported distinction in § 713.346(3)(g) is misplaced. § 713.346(1) and § 713.346(3)(g) both contain the phrase "on account of" and for Bartlett to suggest that "on account of" is broader in Subsection (3)(g) than it is in Subsection (1) is unsupported. § 713.346(1) sets forth the factual circumstance in which prompt payment is applicable. That circumstance does not exist here and Bartlett's suggestion that § 713.346(3)(g) somehow provides Bartlett a greater right to pursue a cause of action than as set forth in § 713.346(1) must be rejected. Subsections (1) and (3)(g) can be read consistently. This occurs when "on account of" is interpreted in harmony with the factual circumstance in which prompt payment is applicable, i.e., payment is received "for constructing or altering

permanent improvements to real property. . .” Otherwise, this Court would be forced to ignore the plain meaning of § 713.346(1), and otherwise reach a result based upon an absurd construction. *E.g., Ceco Corp. v. Goldberg,* 219 So.2d 475 (Fla. 3d DCA 1969) (“[I]t is axiomatic that we construe the statute as a whole entity, and not by its separate parts, in order to arrive at a construction which avoids illogical results.”).

11. In further support of this Court’s finding that Bartlett is proposing a strained interpretation, this Court notes that Bartlett repeatedly interchanged the phrase “on account of” with much broader synonyms such as “as a result of” or “by reason of” or by otherwise adding language to the statute. This the Court cannot do. *See Braine v. State*, 255 So. 3d 470, 473 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2143a] (“[T]his court is not permitted to add words to a statute that were not placed there by the legislature.”) (quoting *Peace River/Manasota Reg’l Water Supply Auth. v. IMC Phosphates Co.*, 18 So.3d 1079, 1087 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D348b]).

12. The Court is persuaded that § 713.346 is applicable in limited circumstances where an “owner”[8] enters into a contract known as “direct contract”[9] with a contractor[10] for the purpose of the “owner” permanently improving its real property. If the contractor enters into “contracts”[11]] with “subcontractors,”[12] and the “owner” makes a payment to the contractor on account of work performed by its subcontractors, the contractor has an obligation to pay the undisputed amounts owed to its subcontractors. In cases such as the foregoing, § 713.346 is clear and its application simple.[13] Here, there is no contract within the meaning of Chapter 713 between Optical and the associations, as the association’s contracted with Optical for the *Services*, not for improving real property. In short, Optical may have a “contract” as defined by Chapter 713 with Bartlett, but that purported contract is for the construction of Optical’s personal property. It is axiomatic that if Optical is paying for a system that it desires to retain ownership of, Optical is not receiving payment from another person for its construction.[14]

13. At the hearing on this matter, Bartlett was unable to provide any case law or authority which supports its attempt to apply § 713.346 to a service provider, such as Optical, that enters into service contracts with its customers. Absent any authority, the Court is bound to strictly construe § 713.346 and interpret it in a manner consistent with Chapter 713 as a whole. Accordingly, the Court concludes that Count I of Bartlett’s Complaint must fail as a matter of law. Bartlett may be correct that it is owed certain sums. If that be the case, Bartlett’s remedy will falls within one of its other pled causes of actions—but it does not fall within § 713.346.

14. Accordingly, Optical’s Motion is **GRANTED**.

15. As a result of this Court’s ruling, Bartlett’s Motion for Evidentiary Hearing as to Count I is denied as moot.

16. The Court reserves jurisdiction to determine Optical’s entitlement to attorneys’ fees pursuant to § 713.346(7), and to thereafter determine the amount of fees to be awarded.

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[1]The Contracts at Issue are attached to Exhibit “A” of the Motion, hereinafter collectively referred to as the “Contracts”.

[2]*See* Contracts at Section 4.1.

[3]*See* Contracts at Section 9, et seq.

[4]*See* Contracts at Section 8.1.

[5]The Bella Terra Contract has a different payment structure. Nevertheless, Optical has not received any monies from the association managing Bella Terra. *See* Optical’s Amended Answers to Bartlett’s First Set of Interrogatories.

[6]*See* § 713.37, Florida Statutes. *See also CDC Builders, Inc. v. Riviera Almeria, LLC,* 51 So.3d 510, 513 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2713c]; *Hiller v. Phoenix Associates of South Florida, Inc.,* 189 So.3d 272 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D881d] (“The mechanics’ lien law is to be strictly construed in every particular . . .”).

[7]Bartlett repeatedly argued that Optical’s receipt of monthly service fees from the associations was only made possible because of Bartlett’s work at the properties, i.e., Optical received service fees “as a result” of Bartlett’s labor. The Court does not find this argument to be persuasive. The standard set forth in § 713.346(1) is the receipt of a payment for the construction or alteration of real property—not the receipt of monies at some future date as a result of the construction.

[8]As defined in § 713.01(23).

[9]As defined in § 713.01(9).

[10]As defined in § 713.01(8). There is no allegation or evidence that Optical is a “contractor”.

[11]As defined in § 713.01(6).

[12]As defined in § 713.01(28).

[13]§ 713.346, Florida Statutes relates to private construction contracts. It’s public counterpart, § 255.071, Florida Statutes, is virtually identical. *Fence Masters, Inc. v. Zurqui Construction Service, Inc.,* 836 So.2d 1088 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D397a] provides an example of the factual circumstances in which § 255.071 was intended to apply, and the Court finds that § 713.346 must apply in similar circumstances.

[14]Optical desires to own the systems it constructed, and was willing to pay a hefty price for said ownership. This Court agrees with Optical that if this Court were to find that the associations’ payment for the Services implicitly means that the associations are paying for the construction of the systems, Optical’s Contracts would be rewritten to Optical’s detriment.

* * *

Attorneys—Disqualification—Prior representation of opposing party—Estates and trusts—Wife of decedent/trust beneficiary seeks to disqualify law firm that represented her husband and now represents personal representative/trustee and to impute that disqualification to law firm serving as co-counsel—Although wife had little interaction with law firm that represented her husband, where law firm prepared pour-over will and trust for wife, she was client of firm—Where wife’s present suit against personal representative/trustee is for breach of fiduciary duty in administering husband’s trust, not wife’s trust, subject matter of suit is not same or substantially similar to matter in which law firm represented wife—Although there is no actual conflict of interest in law firm representing personal representative/trustee, motion to disqualify must be granted because there is appearance of impropriety—There is no basis for disqualification of co-counsel where there is no actual conflict of interest, only appearance of impropriety, and there can be no suggestion that co-counsel received any informational advantage as result of disqualified firm’s limited representation of wife

CRISTINA LARACH BABUN, individually and as settlor and trustee of the Cristina Larach Babun Revocable Trust, Plaintiff, v. SARA CRISTINA BABUN, personally, as personal representative, and as co-trustee and trustee, et. al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2019-3211-CP-02. February 10, 2020. Milton Hirsch, Judge.

ORDER ON CRISTINA LARACH BABUN’S MOTION FOR DISQUALIFICATION

I. Facts

A. Introduction

Jose Babun Selman was one of a number of brothers who came to this country and, by their resourcefulness and the sweat of their brows, built a vast business empire. Lacking formal education and familiarity with American mores, Jose[1] was in need of good legal counsel in connection with his business endeavors. Fortunately for him, he found that counsel. For more than half a century, the law firm of Fowler White Burnett has served as legal advisors for Jose and his companies. *See Sara Cristina Babun’s Memorandum Response in Opposition to Cristina Larach Babun’s Motion for Disqualification* (“Sara’s Response”) p. 3.

Jose died in November of 2018. He had been declining for some time, during which time his daughter Sara had taken over much of the management responsibility for the Babun companies. Sara petitioned for administration of her father’s estate; she became personal representative, as well as trustee of her father’s trust. In all these capacities she was and is represented by Fowler White. Sara’s Response p. 4; *Motion to Disqualify Fowler White Burnett, P.A. and*

Dunwody White & Landon, P.A. as Counsel for Defendants; and Mary Prados, CPA, as Accountant for Defendants, the Trust, and the Estate ("Mtn. To Disqualify") p. 3 ¶¶2-5. Sara is also represented in her individual capacity by co-counsel Dunwody White & Landon. Mtn. To Disqualify p. 5 ¶12.

Cristina Babun, Jose Babun Selman's widow and Sara's mother, is a beneficiary of the trust established by Jose. She brings the present lawsuit, asserting a variety of equitable claims. The nature and merits of those claims are not the subject of the motion at bar. Rather, the motion at bar seeks the disqualification of Sara's lawyers and accountant[2] on the grounds that Cristina was at times and for purposes material to the present lawsuit a client of Fowler White and Ms. Prados, and that Fowler White's disqualification must be imputed to Dunwody White & Landon as well.

B. The hearing of January 21

After protracted discovery, a hearing was had on Cristina's motion to disqualify on January 21 of this year. Transcript references are to that hearing.

The first witness for Plaintiff was Liz Messianu, well known to the court as a prominent member of the probate bar. From 2007 till 2013 she was a partner at Fowler White "and I was brought in for the purpose of taking over the probate practice, doing estate planning and probate administration and litigation." Tr. 14. The events about which she was asked, concerning the nature of the relationship between Fowler White and Cristina, took place about a dozen years ago—an eternity in the life of a busy lawyer. Mrs. Messianu was commendably candid in acknowledging that she did not have a complete and detailed recollection of some of those events. *See, e.g.,* Tr. 14 ("I don't recall the nature of what I did for" Jose and Cristina); Tr. 21 ("I don't recall the exact representation of Mr. and Mrs. Babun, if it was individually, if it was estate planning matters or corporate matters"); Tr. 22 ("I do not know the nature of the exact representation"); Tr. 24 ("I recall we discussed estate planning matters and corporate matters. I just don't remember the substantive nature of our discussions 13 years ago"). This lack of total recall is perfectly understandable. Apart from the passage of time—as a consequence of which "memory, the warder of the brain/Shall be a fume," William Shakespeare, The Tragedy of MacBeth, Act I sc. 7—it may be that Mrs. Messianu's role vis-a-vis the Babuns was chiefly that of "client management." The Babuns spoke little or no English, and certain Fowler White lawyers who had long been responsible for the Babuns' business representation may have spoken little or no Spanish. Mrs. Messianu is fluently bilingual and shares cultural antecedents with the Babuns. When she participated in meetings at which members of the Babun family were present, she served not only as lawyer but also as interpreter and confidante. *See, e.g.,* Tr. 35 (she was present "to keep the calm and not so much arguing between the family members"). Beyond that, Mrs. Messianu herself did little or no work on Babun-related matters. Tr. 14; Tr. 19; Tr. 27.

That said, Mrs. Messianu was emphatic that Cristina, not just her husband and his business entities, was a client of the firm. Tr. 14 ("The Babuns"—NB the plural, in response to a question about "Jose and Cristina Babun"—"were clients of the firm" in 2008); Tr. 20. Mrs. Messianu's testimony concluded with the following exchange:

> Q: Is there any question in your mind while you worked at Fowler White you[3] represented Mr. Babun and Mrs. Babun?
>
> A: No.
>
> Q: . . . [I]t is your firm belief that while you were at Fowler White you represented Mr. Babun and Mrs. Babun; is that correct?
>
> A: That is correct.

Tr. 46.

Mrs. Messianu "recall[ed] . . . discussions" that she had with Cristina in which Cristina expressed "concern[ ] about the joint assets that the couple had and what would occur if either of them passed away." Tr. 15. As a result of those discussions, Mrs Messianu felt it inappropriate for her, or the firm, to represent Sara in connection with her own estate planning.

> Q: Now, did you agree to represent Sara Babun in her estate planning?
>
> A: No, I did not.
>
> Q: And why didn't you agree to represent Sara Babun in her estate planning?
>
> A: Because I believed we had a conflict.
>
> Q: What was the nature of that conflict?
>
> A: We already represented Mr. and Mrs. Babun in other general estate planning matters.
>
> Q: And did you perceive there to be an adversary situation between Mr. and Mrs. Babun and Sara Babun in that connection?
>
> A: Yes, absolutely.

Tr. 19. *See also* Tr. 22.

Plaintiff's next witness was John Strickroot. Mr. Strickroot "worked [at Fowler White] for 57 years starting way back when until two weeks ago," Tr. 53, and apparently had supervisory responsibility for some Babun-related matters. Mr. Strickroot was on the witness stand for some time, but the pith of his testimony was what his colleague Mr. Zorrilla had already acknowledged in opening statement:

> The only attorney/client relationship that was created [with Cristina], and we admit that, was in 2000 with Cristina . . ., and that was a limited representation of a former partner of the firm, Stuart Altman, that prepared a pour-over will and a trust at the request of Mr. Babun. And that preparation of that trust and that pour-over will has nothing to do, neither Ms. Cristina's testamentary disposition, Mr. Altman's work product, no one is challenging that. That is not an issue in any of this litigation.

Tr. 10. To the same effect, *see* Tr. 59-60 (testimony of Mr. Strickroot).

Additional witnesses were called, but they added little to the factual record for purposes of the issues now before me.[4] The transcript of Cristina's deposition was received in evidence as well. Tr. 129.[5]

II. Analysis

All agree that Rule 4-1.9 of the Rules Regulating the Florida Bar, captioned, "Conflict of Interest; Former Client,"[6] must be the beginning of our analysis. Explaining and interpreting that Rule, Florida courts have held that:

> To disqualify counsel from representing a party whose interests are adverse to the former client, the movant must show: (1) there was an attorney-client relationship, thereby giving rise to the irrefutable presumption[7] that confidences were disclosed to the attorney during the course of the relationship; and (2) the current subject matter is the same or substantially related to the matter in which the lawyer represented the former client.

Zarco Supply Co. v. Bonnell, 658 So. 2d 151 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1645a] (citing *University of Miami v. Dansky,* 622 So. 2d 613, 614 (Fla. 1st DCA 1993) (in turn citing *Unger Util. & Paving Co., Inc. v. Myers,* 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989)).

A. Was there an attorney/client relationship?

The resolution of this question is made more difficult than might otherwise be the case because of the very traditional nature of the marriage between Cristina and her husband. Cristina is an 82-year-old immigrant woman who does not speak or understand English. Depo 11. Throughout her married life her husband's role was that of breadwinner; hers was that of wife, mother, and housekeeper. In her own words, "Look, I'm always in my home locked between four walls, and my husband was the one that did everything. I did my chores." Depo 41-42. She recalls attending at least one meeting,

perhaps in 2008, Depo 28, with Fowler White lawyers whom she identified as Liz and John—presumably Liz Messianu and John Strickroot. Depo 25, 26. At that meeting she was called upon to sign certain documents. But she neither had nor has any idea what those documents were.

> A: . . . [T]hey made me sign and everything. The documents are there.
>
> Q: What documents were you made to sign? A: Everything was in English.
>
> Q: Does that mean you—
>
> A: My husband would tell me. I trusted completely my husband. He would tell me. . . . I signed because I trust him.

Depo 30. *See also* Depo 37 ("I signed just to keep happy my husband"); 39 ("My husband is the one that handled all of that"). Beyond that, she has no idea what was discussed at the meeting.

> Q: Do you recall the subject matter of anything that was discussed at that meeting?
>
> A: I cannot because they didn't tell me. The only thing they told me, come and sign.
>
> Q: Your husband asked you to sign?
>
> A: Well yes.

Depo 38. Because of the language barrier, Cristina had little or no interaction with John Strickroot. Depo 27 ("he speaks English and I speak Spanish. He doesn't understand me and I don't understand him either"); 36. She does remember speaking with Liz Messianu, although not since 2008. Depo 27-28; 39.

On questioning from her own attorney, Cristina was clear that she was at one point a client of Fowler White, but less than clear whether she continued to be a client:

> Q: In the year 2000, were you a client of attorneys John and Liz?
>
> A: Yes, through my husband.
>
> Q: Okay. And did that relationship last through the year 2008?
>
> A: With me, yes. . . .
>
> Q: Okay. And during that eight-year period of time, did you have discussions with Liz and John regarding legal matters?
>
> A: As I already told you, my husband is the one that communicated with them.
>
> Q: Okay. Did you also communicate with them?
>
> A: During all my life, I was a housewife.

Depo 45-46. Cristina recalled with some difficulty that Fowler White may have prepared a will for her; but when asked about the terms or provisions of that will, she could offer only that, "My husband, everything. He knows." Depo 47.

Although the question is a close one, I conclude that Cristina was a client of Fowler White. Fowler White acknowledges that it prepared a pour-over will and a trust for Cristina in 2000. The lawyer who was head of the probate department at Fowler White at all times material asserted her "firm belief" that both Jose and Cristina were clients; and as to that assertion she was not impeached. And Cristina herself states, albeit tepidly, that at least in the year 2000, she was a client of the firm.

B. Is the subject matter of the present lawsuit the same or substantially related to the matter in which Fowler White represented Cristina?

The late Jose Babun Selman was very much a client of Fowler White. Over the course of many years he turned to Fowler White for legal advice and representation in connection with all his business and personal matters. Cristina was a client of Fowler White, in her words, "through my husband." She was called upon by her husband to sign documents in the presence of Fowler White lawyers and she signed those documents. She does not remember what those documents were. She may never have known. We can say with some certainty that on one occasion Fowler White prepared a will and trust for her. Whether she ever knew, or presently knows, the terms of that will and that trust is far from clear. In all likelihood the will and trust were prepared based on discussions to which Fowler White and Jose, but not Cristina, were parties. Given the old-world nature of their marriage, neither Jose nor Cristina would have thought it appropriate for her to concern herself with such things. Cristina's present lawyers acknowledge as much. "For most of their marriage . . . Cristina maintained the family household and was generally uninvolved and uninformed about [business matters], leaving to [Jose] the management of . . . their financial affairs." Amended complaint ¶29.

The lawsuit at bar, however, does not focus on Cristina's will or trust. The amended complaint is concerned principally with the administration of the Jose Babun Selman Third Amended and Restated Trust dated June 24, 2010. Cristina's present lawyers accuse Sara of breach of fiduciary duty and related wrongs in her capacity as trustee. The subject matter of the present lawsuit is Sara's conduct vis-a-vis trust assets, and vis-a-vis her mother, from the time that her father became too debilitated to manage his own affairs to the present. The present lawsuit does not deal with the drafting of Cristina's will and trust in 2000; indeed it does not deal with the drafting of Cristina's will and trust at all. It does not deal with any meetings that Cristina had at which John Strickroot was present, or any conversations that Cristina may have had with Liz Messianu. It does not deal with legal documents that Cristina signed but did not understand. Rule 4-1.9, *see* n. 6 *supra,* includes commentary that provides:

> Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center resisting eviction for nonpayment of rent.

Yes, Fowler White prepared a will and trust documents for Cristina. And yes, Fowler White prepared—among a great many other legal services that its lawyers rendered—a will and trust documents for Jose. But it would be a very shallow analysis to conclude from those facts that the subject matter of the present lawsuit is the same as, or bound up with, Fowler White's long-ago representation of Cristina. The case at bar consists of very grave accusations made on Cristina's behalf against her daughter with respect to that daughter's administration of Jose's trust. It concerns itself with events that took place principally if not exclusively in the last three years—at least a decade since the time when Cristina last remembers chatting with Liz Messianu. True, the mere passage of time is insufficient, by itself, to sunder the subject matter of one lawsuit from another (although "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time," Commentary to Rule 4-1.9, Rules Regulating the Florida Bar). But here we deal with two different subject matters entirely. In the circumstances I cannot conclude that the subject matter of the present lawsuit is the same or substantially related to the matter in which Fowler White represented Cristina.

C. Does the appearance of impropriety necessitate disqualification?

The absence of actual conflict does not end the inquiry. The purpose of the rule barring representation adverse to that of a former client is not merely to protect the property interests of the former client, or to assure a playing field not rendered less than level by the use of confidences against that client. At the heart of the rule is a desire to assure both the integrity of the justice system and the ethical

standards of the legal profession. It is therefore emphatically the case that "an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests." *Cardinale v. Golinello,* 43 N.Y. 2d 288, 296 (N. Y. 1977). *See gen'ly Bochese v. Town of Ponce Inlet,* 267 F.Supp. 2d 1240 (M.D. Fla. 2003); *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach,* 303 S.W. 3d 591 (Mo. App. 2010); *Rotante v. Lawrence Hospital,361* N.Y. S. 2d 372, 373 (N.Y. App. 1974) ("[W]e cannot escape the conclusion that this is a situation rife with the possibility of discredit to the bar and the administration of justice."). Merely a "reasonable possibility" of the appearance of impropriety is sufficient to necessitate disqualification. *Norton v. Tallahassee Memorial Hospital,* 689 F. 2d 938, 941 (11th Cir. 1982).

The law in Florida is decidedly to the same effect. *State Farm Mutual Auto Ins. Co. v. K.A.W.,* 575 So. 2d 630, 631 (Fla. 1991) (referring to "representation [that] would interfere with the fair and impartial administration of justice" and "circumstances calling into question the fair and efficient administration of justice"); *Rombola v. Botchey,* 149 So. 3d 1138 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D263a]; *Zarco Supply Co. v. Bonnell,* 658 So. 2d 151 (Fla. 1st DCA 1995); *Kenn Air Corp. v. Gainesville-Alachua County Regional Airport Authority,* 593 So. 2d 1219, 1223 (Fla. 1st DCA 1992) (referring to "consideration of the public's perception of the integrity of the bar, and the appearance of impropriety") (citing *Campbell v. American Pioneer Sav. Bank,* 565 So. 2d 417 (Fla. 4th DCA 1990)); *Morrison Assurance Co. v. United States Fire Insurance Co.,* 515 So. 2d 995 (Fla. 1st DCA 1987). *But cf. Alters v. Villoldo,* 230 So. 3d 115, 118 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1989a] (citing *Brent v. Smathers,* 529 So. 2d 1267, 1269 (Fla. 3d DCA 1988)), discussed *infra* at 14-15.

This nice concern with things as abstract as the appearance of impropriety, the prospect of discredit to the bar, or the fair administration of justice, is not mere pedantry. In other contexts—contexts, admittedly, far removed from the present one—courts have held that the appearance of impropriety can constitute a failure of due process of law. In *Steinhorst v. State,* 636 So.2d 498, 501 (Fla. 1994), Florida's Supreme Court held that, "[C]onsistent with one of the most important dictates of due process . . . proceedings involving criminal charges . . . must both be and appear to be fundamentally fair." *See also Steinhorst* at 501 (Kogan, J., concurring) ("The appearance of impropriety here was so grave that I believe due process has been seriously violated, creating fundamental error under the due process clause of the Florida Constitution"). *And see also Levine v. United States,* 362 U.S. 610, 616 (1960) (trial proceedings must reflect "the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice") (internal quotations and citations omitted); *North Carolina v. Jeune,* 409 S.E. 2d 919, 921 (N. Car. 1991) (the "appearance of impropriety . . . standing alone so affronts the traditional notions of due process and a fair trial that the defendant should be entitled to a new trial"). Of course different considerations are at work in criminal than in civil cases; but surely no one would suggest that civil litigants—here, litigants locked in a tragic internecine struggle over the family fortune and legacy—are entitled to less process of law than is due to criminal defendants.

Cristina Babun devoted her life to her home and family. If and when her husband determined that she had need of legal representation, she relied upon her husband to arrange for that representation. She relied upon him blindly and unquestioningly, precisely because he was her husband. She did not ask him what legal and financial arrangements he made for the two of them. That was his business; hers was the house and the children. She was, although she scarcely knew it, a Fowler White client for a period of some years. During that time, the head of the Fowler White probate department declined to undertake estate-planning work for Sara because of a perceived or potential conflict of interest. *See supra* at 4-5 (citing testimony of Liz Messianu at Tr. 19, 22).

Now Cristina is 82 and widowed. A fair reading of the transcript of her deposition suggests that she suffers loss of memory and mentation. She is deprived of the husband on whom she depended, legally adverse to the daughter who has taken over that husband's responsibilities, and bereft of the legal services of the firm that always counseled that husband. She is, in short, terribly vulnerable. And now she faces the heartbreaking prospect of being engaged in bitter litigation for what may turn out to be the rest of her life against Sara, her own daughter. Her former lawyers—the lawyers who attended to all of her husband's business and personal legal needs; and her legal needs, to the extent that her husband determined that she had any—have decided to represent Sara against her in that bitter litigation. From a law-practice management perspective, that decision makes eminent good sense. Sara is the future of the Babun business empire. Sara will choose the legal counsel that will represent that empire in the years to come. Cristina will have little if any need for legal services in the few years of life that remain to her. The former head of Fowler White's probate department testified that she apprehended conflict in the representation of both Cristina and Sara. At the time about which she was testifying, Jose was still alive; and because Jose was alive, Cristina was a very valuable client. Now Jose is dead; and it is Sara, not Cristina, who is the very valuable client. From a law-practice management perspective, Fowler White's decision does indeed make eminent good sense.

It is not my purpose to seem dismissive of the importance of law-practice management. Great law firms, such as Fowler White Burnett, must be managed in an efficient and businesslike fashion if they are to be managed at all. But there is more to a great law firm than efficient and businesslike management. There is the principle that in our noble profession, "an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests." *Cardinale v. Golinello,* cited *supra* at 11. Viewed objectively—and the test for appearance of impropriety is an objective test—it could be said that at the very moment when it was most in Cristina's interest to have her legal champions at her side, her legal champions decided it was most in their interest to change sides. That is, to be sure, not the only gloss that could be put on these events. But it is one such gloss. And it is not an unfair one.

I refer *supra* at 12 to the case of *Alters v. Villoldo,* 230 So. 3d at 118, which features *dictum* that seems to brush away the notion of appearance of impropriety. In *Alters,* the trial court denied a motion to disqualify counsel, *id.* at 117, and the movant sought review by the difficult and exacting means of petition for writ of *certiorari. Id.* at 116. That petition was denied. *Id.*

Given the intensely fact-bound nature of claims based upon the appearance of impropriety and the fair administration of justice, it would be remarkable if one case were to be so like another as to constitute a controlling precedent. *Alters,* for example, was principally concerned with a conflict between attorneys. No one in *Alters* was circumstanced as Cristina is here. To apply the facts of *Alters* to the facts at bar would be a fit challenge for a contortionist.

Nor does a line or two of *dictum* require that *Alters* be read to create a fixed rule of law that no appearance of impropriety, however offensive, can give rise to disqualification of counsel. Such a rule would make *Alters,* and the Third District, an outlier not only in Florida, but also in national, jurisprudence. It is the duty of courts, trial and appellate, to protect the justice system from conduct which, even if well-intentioned, is likely to bring that system into disrepute or to foster the notion that the justice system is concerned with anything less than justice. *Alters* is not to be read as hobbling courts in the performance of that duty.

Here, I do not find an actual conflict of interest. But on these facts it is my duty to find an impermissible appearance of impropriety. It "is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case."[8] As a consequence, the motion to disqualify Fowler White must be granted.

The motion to disqualify Dunwody White & Landon, however, is denied. Imputation of conflict from one co-counsel to another applies only where the first co-counsel has an actual conflict; appearance of impropriety is not imputed. *See* Rule 4-1.10, Rules Regulating the Florida Bar, captioned, "Imputation of Conflicts of Interest."[9] Nor can there be any suggestion on these facts that Dunwody White & Landon will enjoy an "informational advantage" over Cristina as a consequence of Fowler White's appearance of impropriety. *See, e.g., Scott v. Higginbotham,* 834 So. 2d 221 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2221d]. As the chronology set forth above makes clear, Fowler White rendered limited legal services for Cristina, and had very limited interaction with her. She was, in her own words, a client of the firm "through my husband." No confidences or information were obtained from her that could be shared with co-counsel. She had no specific confidences or information to offer. *See, e.g., 5500 N. Corp. v. Willis,* 729 So. 2d 508 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D901b]. And the mere "fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." Commentary to Rule 4-1.9, Rules Regulating the Florida Bar. There is, accordingly, no basis whatever for disqualification of Dunwody White & Landon.

III. Conclusion

I am aware, keenly aware, that disqualification of counsel is "a harsh and drastic remedy" that "should be resorted to sparingly." *Kusch v. Ballard,* 645 So. 2d 1035, 1040 (Fla. 4th DCA 1994) (Stevenson, J., concurring in part and dissenting in part). *See also Balaban v. Philip Morris USA Inc.,* 240 So. 3d 896, 899 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D838a]; *Vick v. Bailey*, 777 So. 2d 1005, 1007 (Fla. 2d DCA 2000) [26 Fla. L. Weekly D30a]. But I am aware, too, that, "It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices,* [1924] 1 K.B. 256, 259.

Plaintiff's Motion to Disqualify Fowler White Burnett is respectfully GRANTED. Plaintiff's Motion to Disqualify Dunwody White & Landon is respectfully DENIED. Plaintiff's Motion to Disqualify Mary Prados will be addressed by separate order.

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

[2]The present order addresses disqualification of counsel. A separate order will issue concerning Ms. Prados, the accountant.

[3]It is unclear whether the "you" in this question and the next was intended as the singular (referring to Mrs. Messianu individually) or the plural (referring to the firm as an institution). But it matters not. If Mrs. Messianu, then head of the probate department at Fowler White, represented Mrs. Babun, then the firm represented Mrs. Babun.

[4]The testimony of Jose Jesus Babun, Cristina's son and Sara's brother, was not particularly instructive on the issues raised herein. The testimony of Mary Prados will be considered elsewhere, *see* n. 2 *supra.* And the testimony of Tamara Pallas, called by the defense to detail her efforts to comb Fowler White's records and databases to establish that Cristina was not formally a client, served principally to illustrate the Sisyphean nature of any attempt to comb the records and databases of a big law firm.

[5]References to Cristina's deposition transcript appear below as "Depo __."

[6]A lawyer who has formerly represented a client in a matter must not afterwards:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

[7]Surely the locution "irrefutable presumption" is one of the most Orwellian examples of LawyerSpeak. A presumption, to be a presumption, must be susceptible of being rebutted. A presumption that may not be rebutted is not a presumption but a substantive rule of law—and we ought to be honest and call it that.

[8]"It cannot be denied that to issue a subpoena" to the president of the United States, wrote the great Chief Justice John Marshall, "is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case." John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2371 (1st ed. 1904). The matter at bar, fortunately for this court, does not involve a decision so consequential as whether to issue a subpoena to Thomas Jefferson in order to effectuate the fair-trial rights of Aaron Burr. But it does involve a decision "which would be dispensed with more cheerfully than it would be performed:" the decision whether or not to disqualify one of Miami's oldest and best-regarded law firms from the continued representation of a client. And that difficult decision is made all the more difficult because the members of that law firm who have appeared before the court throughout this litigation, Mr. Juan C. Zorrilla and Ms. Tamara R. Pallas, have conducted themselves in a manner entirely consistent with the highest and best traditions of the bar.

[9]The Rule addresses, at subsection (a), imputed disqualification of lawyers within a single law firm; at subsection (b), imputed disqualification when a new lawyer joins a law firm; and at subsection (c), imputed disqualification when a lawyer leaves a law firm. It has nothing to say about disqualification of a law firm simply because of a co-counsel relationship with another law firm, as is the case here; nor about disqualification of a law firm as to which there is no appearance of impropriety simply because co-counsel may have an appearance of impropriety.

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Defendant's detention was not unlawfully extended where ranger who arrested him at national seashore took him to city police department for breath test before transporting him to county jail rather than transporting defendant directly to jail and having breath test performed there—Breath test—No merit to argument that city police officer lacked jurisdiction to request breath sample and administer test where breath sample was requested by ranger who arrested defendant within his jurisdiction—Breath test operator is not limited to operating Intoxilyzer on cases solely occurring within his jurisdiction

STATE OF FLORIDA, Plaintiff, v. JOHN CLIFFORD SHORT, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2019 MM 005668, Division 1. February 28, 2020. Charles Young, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court upon the Defendant's Motion to Suppress and the Court, having considered the Defendant's Motion, conducted a hearing on February 26, 2020 accepting evidence and considering argument of counsel, and otherwise being fully advised in the premises states:

Undisputed Facts

1. Defendant was arrested by National Park Services Ranger John Hunter for DUI on October 5, 2019 inside the Gulf Islands National Seashore. The Defendant's Motion does not challenge the probable cause for the arrest.

2. Gulf Island National Seashore is within the jurisdiction of Escambia County, Florida.

3. Defendant was taken, after arrest, from Gulf Islands National Seashore to Gulf Breeze Police Department for the performance of a post-arrest breath test.

4. Officer Jonathan Churchill of the Gulf Breeze Police Department was the operator of the breath test instrument on October 6, 2019 and was certified to perform as an operator at the time at issue herein.

5. After the breath test was performed, the Defendant was taken to the Escambia County Jail.

Issues

1. **THE DETENTION WAS UNLAWFULLY EXTENDED WHEN RANGER HUNTER TOOK THE DEFENDANT TO THE GULF BREEZE POLICE DEPARTMENT.**

The Court finds that no evidence was presented to shows or tends to show that the detention of the Defendant was unlawfully extended by the actions of Ranger Hunter taking the Defendant to the Gulf Breeze Police Department for a breath test and then to the Escambia County jail as opposed to taking the Defendant to the Escambia County jail and then having the Defendant perform the breath test at the Escambia County jail.

2. **OFFICER CHURCHILL OF THE GULF BREEZE POLICE DEPARTMENT LACKED JURISDICTION TO REQUEST A BREATH SAMPLE AND TO ADMINISTER BREATH TEST.**

It is clear from the facts of this case that Officer Churchill did not request a breath sample from the Defendant. It is also clear the Officer Churchill was only acting upon the request of Ranger Hunter to operate the Intoxilyzer instrument as part of Ranger Hunters continuing investigation of the arrest of the Defendant for driving under the influence.

The Defendant's Fourth Amendment rights apply in this matter, as was argued by the Defendant's counsel, but it is a "long-established rule that a warrantless search may be conducted incident to a lawful arrest. *Birchfield v. North Dakota,* 136 S.Ct. 2160, 2174 (2016) [26 Fla. L. Weekly Fed. S300a]. Additionally, "Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Id.* 136 S.Ct. at 2184. In Florida the Defendant has impliedly consented to lawful tests for sobriety. In this case the Defendant agreed to, among other tests, to submit to a test of his breath.

Ranger Hunter's investigation and arrest occurred within Ranger Hunter's jurisdiction. Ranger Hunter requested that Officer Churchill conduct the breath test examination in Santa Rosa County at the Gulf Breeze Police Station. The Gulf Breeze Police Station is not within Ranger Hunter's jurisdiction. It is well established "that police may legally carry investigation of a crime in their jurisdiction to other areas outside their jurisdiction." *State v. Cahill,* 388 So.2d 354 (Fla. 2nd DCA 1980) Ranger Hunter was within his authority to seek the assistance of Officer Churchill as part of the investigation and arrest of the Defendant. F.S. § 901.18.

Officer Churchill was authorized to operate the Intoxilyzer as a Certified Breath Test Operator. There is no requirement or limitation, presented to the Court, that limited Officer Churchill as to when the Intoxilyzer could be operated or that the operation of the Intoxilyzer was limited to either Officer Churchill's own cases or cases solely occurring within Officer Churchill's jurisdiction.

Two positions were argued by the defense:

(1) That since Officer Churchill was either acting under "color of law" and in that were the case his actions were improper, since the alleged crime did not take place in Officer Churchill's jurisdiction. The Court finds that Officer Churchill was not acting under "color of law". Officer Churchill gave no commands of a legal nature to the Defendant nor did Officer Churchill conduct an investigation into the alleged crimes. Officer Churchill simply operated the Intoxilyzer at the request of Ranger Hunter.

(2) That Officer Churchill was acting as a citizen assisting Ranger Hunter and as a citizen could not operate the Intoxilyzer since an ordinary citizen could not operate the intoxilyzer.

There is no requirement in the Florida Administrative Code that requires a Certified Breath Test Operator to be a law enforcement office. The requirement is that the Operator, to be certified, must work for an agency. The definition of "agency" includes a "law enforcement agency", ". . .an entity which conducts breath tests. . ." or a "civilian entity performing such duties on behalf of a law enforcement agency." FDLE Rule 11-8.002(4). Clearly the certification is not limited to officers, deputies or policeman.

Finally, the Court sees no rule, statute or caselaw that would require the suppression of the results of a consensual breath test, conducted subsequent to a lawful arrest for driving under the influence, that is conducted by a certified breath test operator' simply because the breath test was conducted outside the jurisdiction of the where the arrest took place. Especially considering that the breath test was conducted with the stated purpose of preserving evidence as soon as possible and without any detriment or delay to the Defendant.

IT IS ORDERED AND ADJUDGED that, the Defendant's Motion to Suppress is hereby DENIED.

* * *

Insurance—Personal injury protection—Notice of loss—Claim form that contains correct name of medical provider but omits provider's professional license number is substantially complete and accurate and provided insurer notice of covered loss—No merit to argument that change in PIP statute from stating that providers "shall" include professional license number to stating that providers "must" provide professional license number changes standard for notice of loss from substantial compliance to strict liability

HYDE PARK MEDICAL CENTER a/a/o Kimberly Coleman ("HYDE PARK"), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("STATE FARM"), Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-SC-012313-MA, Division L. March 30, 2020. Michelle Kalil, Judge. Counsel: Adam Saben, Shuster & Saben, LLC, Jacksonville, for Plaintiff. James C. Rinaman III, Dutton Law Group, Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before this Court for hearing on March 5, 2020 on Defendant's Motion for Summary Judgment. This Court, having reviewed the Court file and having heard argument of counsel and being otherwise advised in the premises DENIES the Defendant's Motion and finds as follows:

The facts are not in dispute. Plaintiff, HYDE PARK, treated assignor, Kimberly Coleman, for injuries sustained in a motor vehicle accident on June 26, 2016. Plaintiff submitted its bills to Defendant, STATE FARM, for payment and all bills were paid, including the one date of service at issue in the motion, July 6, 2016. State Farm now seeks recoupment for payment issued for said date because Hyde Park failed to place the treating physician's license number in Box 31 of the submitted CMS-1500 form, arguing that such omission fails to place the insurer on written notice of a covered loss, pursuant to Florida Statute 627.736(5)(d)(2016).

Florida courts have now addressed this exact issue, at least, three times, providing this Court with guidance on the proper standard for determining whether an insurance company has been placed on written notice of a covered loss, pursuant to section 627.736(5)(d), Florida Statutes (2016). In *United Automobile Ins. Co. v. Professional Medical Group, Inc.,* 26 So.3d 21 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a]("*Professional Medical*"), the insurer argued that it was not placed on written notice of a covered loss because, *inter alia,* the medical provider did not place the physician's license number in Box 31 of the CMS-1500 forms. The relevant section of the PIP statute states:

> For purposes of paragraph (4)(b), an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are properly completed in their entirety as to all material provisions, with all relevant information being provided therein. Fla.Stat. 627.736(5)(d)(2009).

The Third District focused on the words "properly completed", referencing the pip statute's definition of same in section 627.732(13), Florida Statutes (2004):

> "Properly completed" means providing truthful, *substantially complete,* and *substantially accurate* responses as to all *material elements* to each applicable request for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties. *Id.* at 24. (emphasis in original).

The Third District concluded that "based on the statute's plain language, a bill or statement need only be 'substantially complete' and 'substantially accurate' as to relevant information and material provisions in order to provide notice to an insurer." *Id.* The Court found that the bills submitted to United Auto were "substantially complete" as to all relevant and material information as required by section 627.736(5)(d). Important to the Court's decision were the additional facts that, at no time did United Auto object to the missing physician's license number. In the case at bar, State Farm never took issue with the missing number in Box 31. Therefore, State Farm cannot argue that the missing number was a material provision since it in no way prevented the Defendant in its ability to adjust the claim.

In *USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc.,* 31 So.3d 234 (Fla 4th DCA 2010) [35 Fla. L. Weekly D613b] ("*Pembroke Pines MRI*"), USAA argued that it was not placed on written notice of a covered loss because the MRI center did not place a professional license number in Box 31 of its CMS-1500 form. The Fourth DCA affirmed the trial court in finding that Pembroke Pines MRI substantially complied with section 627.736(5)(d) because it "provided substantially accurate responses to all relevant information and material elements." *Id.* at 238.

In *Geico General Ins. Co. v. Tarpon Total Health Care,* 86 So.3d 585 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1027a] ("*Tarpon Total*"), the Second DCA adopted the reasoning from the above two cases in finding that the medical provider's failure to include the professional license number in Box 31 was not fatal and that an insurer is placed on written notice of a covered loss by a substantially completed CMS-1500 claim form. Therefore, three Florida District courts concluded that the proper standard to apply is "substantial compliance" in determining whether a submitted CMS-1500 form places an insurer on written notice of a covered loss. More specifically, all three concluded that the failure to include a professional license number in Box 31 is not fatal to an otherwise properly submitted claim form. Following the guidance of the discussed, binding case law, this Court concludes that the claim form submitted by Plaintiff, HYDE PARK, for date of service July 6, 2016 substantially complied with section 627.736(5)(d) and State Farm was placed on proper notice of a covered loss for said date.

State Farm argues that *Professional Medical, Pembroke Pines MRI* and *Tarpon Total* do not apply to the analysis of this case because all three cases involved a version of section 627.736(5)(d) that predate 2012. State Farm notes that, in 2012, the legislature amended Florida Statute 627.736(5)(d) to state that "All providers, other than hospitals, must include on the applicable claim form the professional license number of the provider in the line or space provided for 'Signature of Physician or Supplier, Including Degree or Credentials.' Prior to 2012, this provision stated that providers "shall" include the professional license number." State Farm argues that changing the word "shall" to "must" changes the standard from "substantial compliance" to "strict liability", wherein the mere omission of the license number in Box 31 constitutes failure to provide the insurer of written notice of a covered loss. This Court rejects the Defendant's argument for the following reasons. One, none of the three opinions from the District Courts of Appeal (*Professional Medical, Pembroke Pines MRI* or *Tarpon Total*) focus on the word "shall" in their analysis. All three focus on the application of the definition of "properly completed" from section 627.732(13); a definition that remains the same before *and* after 2012. "Properly completed" is found to mean "substantially complete" and "substantially accurate", which aligns with a standard of substantial compliance. Therefore, to focus on the distinction between "shall" and "must" (words that are close in meaning anyway) is to divert from the analysis of three appellate decisions on the same issue as the before this Court. Two, although the three noted opinions analyze the pre-2012 version of the stature, sister courts faced with the same or similar legal issue after 2012 applied these same Opinions in support of the theory of substantial compliance. In *Spinal Health & Rehab of Punta Gorda, Inc. v. Star Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 120a (Broward Cty. Ct., February 12, 2017), Judge Fry relied on *Pembroke Pines MRI* to discredit the opinions of the defense

medical expert as to Box 31, calling them "contrary to established law". In *North Broward Health & Rehab, Inc. v. State Farm Fire & Cas. Company,* 21 Fla. L. Weekly Supp. 838b (Broward Cty. Ct., March 25, 2014) ("*North Broward Health*"), Judge Levy relies on *Professional Medical* to discount attacks on alleged errors in Box 31 from the insurance company, finding that the "Defendant's interpretation...does not comport with *substantial compliance precedent* including other examinations of Box 31 defects." (emphasis added), also see, *Healing Hands Pain Relief Center, Inc. v. Star Casualty Ins. Co.,* 20 Fla. L. Weekly Supp. 182a (Polk Cty. Ct., December 7, 2012)(applying the "substantial compliance" standard to alleged defects in the CMS-1500 form, relying on *Professional Medical*). Therefore, the analysis of *Professional Medical, Pembroke Pines MRI* and *Tarpon Total* with respect to the "substantial compliance" standard applies after 2012. Three, written notice of a covered loss only applies to the proper completion of "material provisions" of the CMS-1500 form. In this case, State Farm paid the submitted claim without the need to have the physician's license number in Box 31. The form contained the physician's name and all other relevant information needed to adjust the claim. An adjuster can quickly look up the license number of any physician on the Florida Department of Regulation website, if needed. Therefore, it is hard for this Court to accept that the omission of the license number from Box 31 is a "material" provision that prevented State Farm from being able to adjust the claim at issue. Four, while State Farm argues that the change in terms from "shall" to "must" shows a legislative intent to denote a mandatory provision regarding the license number in Box 31, it is difficult to reconcile the suggested intent with the established legislative intent of the no-fault statute to provide "swift and virtually automatic" payment of medical claims. See, *North Broward Health,* citing, *Gov't Employees Ins. Co. v. Gonzalez,* 512 So.2d 269 (Fla. 3rd DCA 1987). Such a strict liability standard as suggested by State Farm would result in the "wholesale denials of otherwise valid bills for services that were rendered." See *North Broward Health* at 3. Furthermore, if the intent of the legislature were truly to replace the substantial compliance standard with a strict liability standard, it is difficult to understand how that would be achieved by replacing "shall" with "must". The two terms, are, essentially, synonyms. Accepting State Farm's argument, as true, it would be reasonable to assume that the legislature would replace "shall" with some term other than "must" to differentiate the stark change in the notice standard suggested by State Farm.[1]

Therefore, the Defendant's Motion for Partial Summary Judgment is DENIED.

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[1]Plaintiff also argued that State Farm waived its ability to challenge Box 31 based on the insurer's failure to raise the issue in its Explanation of Benefits or in its response to Plaintiff's pre-suit Demand Letter. Based on the Court's finding of substantial compliance, the Court need not reach this legal issue.

* * *

Insurance—Personal injury protection—Attorney's fees—Prevailing insured—Award of fees and costs—Contingency fee multiplier is appropriate in case involving benefits-exhausted defense in Tampa Bay area—Contingency risk multiplier of 2.0 applied—Discussion of *Quanstrom* factors

MEDICAL SPECIALISTS OF TAMPA BAY, LLC d/b/a GULF COAST INJURY CENTER, a/a/o Alonzo Guzman-Giron and Antonia Gomez, Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant, County Court, 6th Judicial Circuit in and for Pasco County. Case No. 51-10-CC-001145-WS-O. March 27, 2014. Paul E. Firmani, Judge. Counsel: Lawrence H. Liebling, Liebling & Liebling, Safety Harbor, for Plaintiff. Steven T. Sock, Dutton Law Group, P.A., Tampa, for Defendant.]

[AFFIRMED. 28 Fla. L. Weekly Supp. 96a]

ORDER AND FINAL JUDGMENT AWARDING ATTORNEY'S FEES AND COSTS

THIS CAUSE came before the Court for an evidentiary hearing on January 23, 2014 upon the motions of Plaintiff, Medical Specialists of Tampa Bay, LLC d/b/a Gulf Coast Injury Center a/a/o Alonzo Guzman-Giron and Antonia Gomez (GCIC), for an award of trial and appellate attorney's fees and costs against Defendant, Ocean Harbor Casualty Insurance Company (Ocean Harbor).

Appearances

Lawrence H. Liebling and Arthur Liebling, of Liebling & Liebling, on behalf of GCIC.

Steven S. Sock, Esq., of the Dutton Law Group, on behalf of Ocean Harbor.

History of the Case

GCIC is a provider of medical services. Ocean Harbor issues automobile insurance policies. The subject policy in this case provided Personal Injury Protection (PIP) coverage as required by § 627.736, Fla. Stat. (2008) (Florida Motor Vehicle No-Fault Law). Ocean Harbor's insured, Alonzo Guzman-Giron (Guzman), was injured in an automobile accident and sought treatment at GCIC's facilities. GCIC submitted claims to Ocean Harbor for care provided to its insured. Ocean Harbor made partial payment and notified GCIC that benefits were exhausted. GCIC engaged Arthur Liebling, Esq., to pursue payment of its denied bills on a contingent statutory fee basis. Arthur Liebling associated Lawrence H. Liebling, Esq.[1], of Liebling & Liebling, to handle the litigation.

Ultimately, this Court denied Ocean Harbor's motion for summary judgment on its benefits exhausted defense and granted GCIC's motion for final summary judgment. Ocean Harbor appealed to the Appellate Division of the Sixth Judicial Circuit in and for Pasco County. The Appellate Division affirmed this Court's denial of Ocean Harbor's motion for summary judgment on its benefits exhausted defense, affirmed the summary judgment for GCIC, and remanded solely for entry of individual rulings on each of Ocean Harbor's remaining affirmative defenses [26 Fla. L. Weekly Supp. 534a]. Upon remand, Ocean Harbor filed a confession of judgment in the trial court and acknowledged GCIC's entitlement to attorney's fees and costs. The Appellate Division granted GCIC's entitlement to appellate attorney's fees as well and remanded to this Court for determination of the amount.

An evidentiary hearing on GCIC's motions for trial and appellate attorney's fees and costs was held before this Court on January 23, 2014.

Witnesses

Witnesses for GCIC included its office manager, David Auslander; its attorneys-of-record, Lawrence H. Liebling and Arthur Liebling, and its expert witness, Donald A. Smith, Jr., Esq.

Ocean Harbor called David B. Kampf, Esq., as its expert witness.

Mr. Smith was admitted to The Florida Bar in 1978 and practices primarily in representing attorneys in grievance and disciplinary proceedings regarding professional conduct and fee disputes. Mr. Smith is not engaged in PIP litigation.

Mr. Kampf was admitted to The Florida Bar in 1992 and practices primarily in the areas of personal injury and insurance defense, including PIP cases. Mr. Kampf testified that in the PIP arena, he exclusively represents and defends insurance companies and that his firm has defended approximately 10,000 cases.

The Court has considered the extensive testimony of the fee experts in this case. Mr. Smith testified that Mr. Liebling reasonably billed 87.5 hours at the trial level and 45.6 hours for the appeal, and that a rate of $450.00 to $500.00 per hour is reasonable. Mr. Smith

also testified that a contingency fee multiplier of 2.0 to 2.5 would be appropriate. Mr. Kampf testified that reasonable time expended by Mr. Liebling in this case would have been approximately 42 hours for the trial level and 16 hours for the appeal, and that his hours should accordingly be reduced by nearly 60%. Mr. Kampf opined that a reasonable rate to be awarded would be $300.00 to $325.00 per hour, and that no contingency fee multiplier is warranted.

Findings of Fact and Conclusions of Law

Having reviewed the trial and appellate record herein, heard the arguments of counsel, and considered each of the lodestar factors in *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985) and *Standard Guaranty Ins. Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990), as codified in Rule 4-1.5, Rules Regulating The Florida Bar, the Court makes the following findings of fact and conclusions of law:

Lawrence H. Liebling was admitted to The Florida Bar in 1983 and has been a solo practitioner in the Tampa Bay area for nearly thirty years. Mr. Liebling has practiced civil trial and appellate law throughout his career in the areas of insurance, personal injury, business, real estate and family law litigation. Since 2008, while continuing to maintain his own practice, Mr. Liebling has also represented health care providers in PIP actions and appeals in association with Arthur Liebling, Esq., under the name, Liebling & Liebling. All of the legal services rendered to GCIC in the instant action, including the defense of Ocean Harbor's appeal of the final judgment in GCIC's favor, were performed by Mr. Liebling.

Throughout the trial and appellate proceedings in this case, Ocean Harbor was represented by the Dutton Law Group, a well established and experienced PIP defense firm in the state of Florida. Although Mr. Kampf described this case as not a "slam dunk" for the Plaintiff but "not one to defend" involving facts not in dispute, Ocean Harbor and its counsel clearly had a different view and staunchly opposed GCIC's suit at every stage. Ocean Harbor denied liability and asserted various affirmative defenses including exhaustion of benefits. In correspondence and motions, defense counsel on at least two occasions warned Plaintiff's Counsel they would seek attorney fee sanctions against GCIC and its counsel for maintaining a frivolous action in the face of Ocean Harbor's benefits exhausted defense. An attorney with lesser experience and ability could certainly have thrown in the towel at this point. Nevertheless, Mr. Liebling worked diligently to establish the facts and bring an evolving area of the 2008 PIP law into focus as applied to Ocean Harbor's unique policy provisions. When final summary judgment was ultimately entered in GCIC's favor, Ocean Harbor filed a motion for rehearing which was denied. Ocean Harbor appealed the final judgment, arguing reversible error and reasserting all of its affirmative defenses. As a result of Mr. Liebling's arguments on appeal, Ocean Harbor's benefits exhausted defense was resolved in GCIC's favor in a unanimous opinion of the Appellate Division of the Circuit Court, which remanded solely for entry of individual rulings on Ocean Harbor's remaining defenses.

Following remand, Ocean Harbor filed a confession of judgment in the trial court and acknowledged GCIC's entitlement to reasonable attorney's fees and costs. The Appellate Division subsequently granted GCIC's entitlement to appellate attorney's fees as well and remanded for determination of the amount. While the Court finds that a large number of hours were expended in countering the Defendant's aggressive defense of the claim, the Court also finds that a certain number of hours claimed for research at the trial and appellate stage were unsupported or repetitive or excessive.

Based on credible and convincing evidence, the Court finds that Counsel's expenditure of 70.5 hours at the trial level and 30.1 hours for the appeal, for a total of 100.6 hours was reasonable and necessary in this action.

The Court finds that $350.00 per hour is a reasonable rate of compensation to award the Plaintiff in this case, producing a lodestar of $35,210.00.

In determining whether to apply a contingency fee multiplier in this case, this Court has considered the following factors:

> (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.

Quanstrom, 555 So.2d at 834.

The Court is mindful that the product of the reasonable hours expended times the hourly rate provides a suitable foundation for an objective structure. *See Rowe Supra* at 1150. The Federal lodestar approach establishes a strong presumption that the lodestar represents the reasonable fee. *See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air* 483 US 711, 107 S. Ct 3078, 997 L.Ed 2d 585(1987). Ultimately the rules regulating the Florida Bar require that all fees awarded by the Court be reasonable. *See Progressive Express Insurance Co. v. Donald Schultz* 948 So.2d 1027 (5th DCA 2007) [32 Fla. L. Weekly D548b]

The Court notes that recently a County Court decision within the 2nd District Court of Appeal, specifically *MRI Assoc. of St. Pete d/b/a St. Pete MRI a/a/o Fikreta Jakupai v. Geico Indem. Co.* 20 Fla. L. Weekly Supp. 814a (13th Jud. Cir. in and for Hillsborough County May 30th, 2013) has held that cases similar to the current case are more properly to be included in the public policy enforcement cases category as opposed to the tort and contract cases category as delineated in *Quanstrom*. As such the Plaintiff would not need to establish the additional elements that would be required by the tort and contract cases. While the Court finds that this is a compelling argument, the Court is basing its decision on the fact that the Plaintiff has satisfied the various elements necessary under the second category for the purposes of *Quanstrom*.

This Court finds that the relevant market of competent PIP attorneys in the Tampa Bay area require a contingency fee multiplier in order to accept a benefits exhausted case on a contingent statutory fee basis, and that it is unlikely Arthur Liebling or Lawrence H. Liebling or any other lawyers would have accepted the instant benefits exhausted case from GCIC on a contingent statutory fee basis without the potential for a contingency fee multiplier. The Court is persuaded that GCIC, as a matter of sound business practice and economic necessity, are unable to pay competent attorneys on an hourly basis to pursue collection of hundreds of relatively small dollar amount PIP claims and that it would have been extremely difficult, if not impossible, for GCIC to locate any competent attorney who would accept this benefits exhausted case on a contingent statutory fee basis without the possibility of a multiplier.

The Court further finds that GCIC's counsel was unable to mitigate the risk of nonpayment in any way. Given the relatively small amounts involved in individual PIP claims and the high cost of litigation against insurers, the contingent fee agreement is the only feasible arrangement between providers and attorneys in PIP collection actions. Mr. Smith testified he had contracted at least nine lawyers who specialized in PIP cases and none would have taken the case on a contingency fee basis without a multiplier in a benefits exhausted case. Mr. Kampf was unable to name a single case in his experience where a provider paid its PIP counsel on an hourly basis, prevailed against the carrier, and then sought reimbursement of fees already paid. The Court discounts as non-realistic the argument that GCIC could have contributed $100.00 to $500.00 toward the prosecution of the suit, which would merely have only covered the

cost of filing and serving the complaint. Nevertheless, GCIC's counsel did seek to mitigate the risk of nonpayment by serving the statutory presuit demand for the amounts due. As Mr. Kampf conceded, once suit was filed, GCIC's counsel had no way to mitigate the risk of nonpayment.

As to the remaining factors delineated in Rule 4-1.5 the (B) the Court finds the following factors not to be applicable:

(2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(5) The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) The nature and length of the professional relationship with the client.

As to the remaining factors provided for in Rule 4-1.5, the Defendant's expert, Mr. Smith's stated that there was nothing novel or complex about the present case as a result of the Coral Imaging decision in 2006. *See Coral Imaging Services v. Geico Indemnity Insurance Company* 955 So.2d 11 (3rd DCA 2006) [31 Fla. L. Weekly D2478a]

However while the *Coral Imaging* decision settled cases where the insurance carrier chose to pay claims on an untimely basis therefore depriving the provider of a claim that was filed on a timely basis, the issues involved in the present case deal with the methodology of payment when there is a conflict between the statutory provision and the policy itself. In fact Defendant's memorandum of law at the trial stage does not once mention the *Coral Imaging* decision.

The issues regarding the methodology of payment continued to be in flux on this issue until after the present lawsuit was filed. The present lawsuit was filed on March 19th, 2010 prior to the *Kingsway Amigo* decision which was decided May 18th, 2011. *See Kingsway Amigo Ins. Co. v. Ocean Health, Inc.* 63 So.3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] and *Geico Indem. Co. v. Virtual Imaging Services, Inc.* 79 So.3d 55 (Fla. 3rd DCA 2011) [36 Fla. L. Weekly D2597a]. This was followed by *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.* 90 So.3d 321 (Fla. 3rd DCA 2012) [37 Fla. L. Weekly D985b] which was ultimately affirmed by the Supreme Court at . . .So.3d. . .2013 WL 3332385 (Fla. 2013), 38 Fla. L. Weekly S517a.

The Court finds that this case was novel if not complex. In *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So.3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a], the Fourth District was the first to address an insurer's practice of limiting all bills to 200% of Medicare Part B under § 627.736(5)(a)2.f. (2008) when the sole payment methodology in the policy required payment of "all reasonable expenses" as provided in § 627.736(1)(a). The Court stated, "[w]e agree with the trial court that these statutes are unambiguous and that their plain language allows an insurer to choose between two different payment calculation methodology options. . . . The applicable policy made no reference to the permissive methodology of subsection 627.736(5)(a)2. . . . . We reject Kingsway's argument that, because the PIP statute is incorporated into the policy, it had the unilateral right to ignore the only payment methodology referenced in the policy." 63 So.3d at 67.

In this case, Ocean Harbor did not choose between the two payment methodologies authorized under the 2008 statute as in *Kingsway,* it utilized *both* methodologies. The policy provided that MRI bills "shall not exceed the applicable limitations for such expenses as prescribed by the Florida Motor Vehicle Law," while all other reasonable medical expenses would be allowed as billed. Ocean Harbor's dual payment methodologies presented this Court with an issue of first impression since such language had not previously been construed in any published decision addressing the permissive fee limitations in § 627.736(5)(a)21 (2008). Plaintiff Counsel's arguments at the trial and appellate level helped establish new precedent that the mandatory and permissive payment methodologies in the 2008 PIP statute could be applied in *pari materia* to different enumerated medical expenses where the policy expressly so provides.

Florida law is clear that once a carrier pays out all contracted-for benefits, it owes nothing more. Thus, the benefits exhausted defense is often insurmountable. Plaintiff's Counsel after obtaining Ocean Harbor's policy in discovery ultimately established that Ocean Harbor breached its policy when it failed to limit its insured's total MRI bills of $7,200.00 to 200% of Medicare Part B, gratuitously overpaid $3,201.68 to the imaging provider, combined the overpayment with proper payments to reach the $10,000.00 policy limit, then denied payment of $1,636.32 to GCIC, claiming that benefits were exhausted. As to the "results obtained" criteria of Rule 4-1.5(4) not only did Counsel secure the $1,636.32 wrongfully withheld from his client, the remaining benefits of $1,565.36 were restored to the insured's account and made available for additional treatment.

Counsel represented GCIC on a contingent statutory fee basis as required by the needs of his client. He not only bore the risk of not being paid for his labor and recouping his costs for two years of trial and appellate litigation, he was confronted with multiple warnings of sanctions. Many attorneys might have dismissed this action as demanded by defense counsel or not filed suit at all, rather than risk such liabilities.

Based on the above findings, this Court determines that a multiplier is necessary and justified in this case.

The appropriate time frame for determining entitlement to a multiplier is when the client is seeking to employ counsel. *See Michnal v. Palm Coast Development, Inc.* 842 So.2d 927 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D688b]. The Court notes that at the time that Plaintiff retained counsel the case appeared to be a plain "benefits exhausted" case and was prior to the *Kingsway* decision which was issued on May 18th, 2011.

Quanstrom permits the Court to apply a maximum lodestar multiplier of 2.0 or 2.5 in a contract action where success was unlikely at the outset. The Court however believes a multiplier of 2 is appropriate. Such an award serves the public policy underlying § 627.428. *See Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a] ("the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts").

Based upon the foregoing findings, this Court determines that the reasonable fee to be awarded Lawrence H. Liebling in this case is $70,420.00 (100.6 hours x $350.00 per hour x 2.0 multiplier).

Mr. Liebling reasonably and appropriately advanced taxable trial costs of $575.00 and taxable appellate costs of $51.30, for a total of $626.30. Mr. Liebling also reasonably and appropriately incurred taxable court reporter fees of $345.56 for a copy of Mr. Smith's deposition.

The evidence was unrebutted that GCIC's expert witness, Donald A. Smith, Jr., Esq., contracted with Arthur Liebling, Esq. for his expert services at the rate of $450.00 per hour, that Mr. Liebling paid Mr. Smith an initial retainer of $2,500.00, and that Mr. Smith billed a total of $15,627.00 up to the fee hearing. Mr. Smith expended an additional four hours attending the morning session of the hearing during which Mr. Auslander, Messers. Liebling, and Mr. Smith himself testified, for a total of $17,427.00. Based on the uncontraverted evidence, the Court finds that Mr. Smith's fees are reasonable and taxable against Ocean Harbor in these proceedings.

Liebling & Liebling is entitled to interest on the total trial level award at the statutory rate of 4.75% per annum from the filing of the

final judgment in GCIC's favor on October 13, 2011 through the entry of the instant order and final judgment. The Appellate Division's opinion affirmed judgment against Ocean Harbor on its core defense of benefits exhausted and remanded solely for entry of individual rulings on each of its other defenses. Before this Court could do so, Ocean Harbor filed a confession of judgment. Since nothing remained for the Court to do but comply with the Appellate Division's mandate, interest runs from the date of the original final judgment. *See Gorman v. Largo Hosp. Owners, Ltd.,* 435 So.2d 872, 873-74 (Fla. 2d DCA 1983) (where the "only action necessary in the trial court is compliance with the mandate of the appellate court, interest on the judgment as modified runs from the date of the original judgment").

Liebling & Liebling is entitled to interest on the total appellate level award at the statutory rate of 4.75% per annum from the filing of the Appellate Division's order granting attorney's fees on March 22, 2013 through the entry of the instant order and final judgment.

Final Judgment

Based upon the foregoing, it is

ORDERED AND ADJUDGED as follows:

Lawrence H. Liebling of Liebling & Liebling, shall recover against Ocean Harbor taxable costs of $626.30 and reasonable attorney's fees of $70,420.00 (100.6 hours x.$350.00 per hour x 2 multiplier), for a total award of $71,046.30, pursuant to §§ 627.428, 627.736(8) and 57.041, Fla. Stat. (2010).

Prejudgment interest of $5,821.39.00 is hereby awarded on the total trial level award of $49,925.00 ($350.00 per hour x 70.5 hours x 2 multiplier + costs of $575.00) at the statutory rate of 4.75% per annum from the filing of the summary final judgment in GCIC's favor on October 13, 2011 through the entry of the instant order and final judgment.

Prejudgment interest of $1,017.00 is hereby awarded on the total appellate award of $21,121.30 ($350.00 per hour x 30.1 hours x 2 multiplier + costs of $51.30) at the statutory rate of 4.75% per annum from the filing of the Appellate Division order granting attorney's fees on March 22, 2013 through the entry of the instant order and final judgment.

Lawrence H. Liebling of Liebling & Liebling shall recover taxable costs of $345.56 against Ocean Harbor for the court reporter's charge for a copy of Mr. Smith's deposition.

Arthur Liebling of Liebling & Liebling shall recover taxable expert's fees of $17,427.00 against Ocean Harbor for the expert witness services of Donald A. Smith, Jr., Esq.

Combining the awards in paragraphs "2" through "5" above, Liebling & Liebling shall recover the grand total of $95,657.25 against Ocean Harbor Casualty Insurance Company, which shall bear interest at the statutory rate of 4.75% per annum from the date of entry of this judgment until paid in full, FOR WHICH SUMS LET EXECUTION ISSUE.

[1]Hereafter, references to "Mr. Liebling" are to Lawrence H. Liebling, unless otherwise noted.

* * *

Criminal law—Driving under influence—Discovery—Investigative subpoena—Medical records—Where defendant, who was involved in accident, had unsteady gait and balance, could not produce requested documents, performed poorly on field sobriety exercises, and made inappropriate statements in response to implied consent warning, nexus between records of hospital to which she was transported and DUI investigation is established—No merit to argument that state is required to get search warrant for medical blood records—Subpoena is limited to results of blood draw and observations of treatment personnel

STATE OF FLORIDA v. SARAH B. MILLER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019-310862MMDB. September 30, 2019. Belle B. Schumann, Judge. Counsel: Laura Rojas-Glad, Assistant State Attorney, for State. Flem Whited, for Defendant.

ORDER OVERRULING OBJECTION TO STATE'S REQUEST TO ISSUE SUBPOENA FOR MEDICAL BLOOD

This case comes before the Court on the State's Notice of Intent to Subpoena medical records of the Defendant the night of the arrest, the Defense's Objection, and the hearing held September 19, 2019. Based on the totality of the officers' observations as alleged in the police report, the State has sustained its extremely low burden of demonstrating that the Defendant's medical records are relevant to an ongoing criminal investigation.

At the hearing, the State relied exclusively on the arrest report, which can provide a sufficient evidentiary basis. *McAlevy v. State*, 947 So. 2d 525 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c]. However, when the officer does not testify, he or she cannot add to or otherwise embellish the bare statements in the report.

The facts as alleged in this charging affidavit are that the Defendant was in a traffic crash on August 16, 2019, at 5:13 PM on A1A in Daytona Beach Shores. The accident report was not admitted in evidence and is not part of the court file, so it is not possible to determine the Defendant's responsibility for the crash. The arresting officer stated that the Defendant "appeared to have an unsteady gait and was unable to maintain her balance. The defendant went through her belongings and handed me a medical insurance card and failed to provide me with the information requested." This is the sole factual allegation to justify the administration of field sobriety exercises contained in the police report.[1]

Another officer arrived at the scene, Sgt. Long, who informed the Defendant that the traffic investigation was ending and a criminal investigation was beginning. The Defendant agreed to perform field sobriety exercises. The HGN test was not completed because the Defendant "had a hard time keeping her eyes open." During the walk and turn, the defendant was unable to maintain her balance, used her arms to balance, and miscounted the steps. Her performance on the field sobriety exercises led Sgt. Long to conclude that she was under the influence of "alcohol and/or drugs." She did not seem to comprehend the implied consent instruction. She "mumbled out a sentence about old people and rainbows" which was unresponsive. The police report concludes with the statement that she "was taken to Halifax Health for evaluation prior to being transported to the Volusia County Branch" Jail. It is unclear whether the reason for the hospital visit was for injuries sustained in the crash, or some other reason.

The State seeks to subpoena the medical records from that visit pursuant to section 395.3025, Florida Statutes (2019). Patient medical records are protected under Florida's constitutional right to privacy as well as by statute. Art. I, Sec. 23, Fla. Const.; *Hunter v. State*, 639 So. 2d 72 (Fla. 5th DCA), *rev. denied*, 649 So. 2d 233 (Fla. 1994); *State v. Johnson*, 814 So. 2d 390 (Fla. 2002) [27 Fla. L. Weekly S250a]. Where a privacy right attaches, the State may justify encroachment of that right if it demonstrates a compelling state interest and that the state has used the least intrusive means to accomplish it goal. *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989). A compelling state interest exists upon a showing that the materials contain information relevant to an ongoing criminal investigation. "Where a right to privacy attaches, the State may vindicate an encroachment on that right. . .(when it) is established by a showing that the police have a reasonable founded suspicion that the protected materials contain information relevant to an ongoing criminal investigation." *State v. Rutherford*, 707 So. 2d 1129, 1131(Fla. 4th DCA 1997) [22 Fla. L. Weekly D2387b] (*disapproved on other grounds in State v. Johnson,* 814 So. 2d 390 (Fla. 2002) [27 Fla. L. Weekly S250a]. Under the statute, once the patient objects to the issuance of an investigative

subpoena for medical records, the State must demonstrate a nexus between the records sought and a pending criminal investigation. *Cerroni v. State*, 823 So. 2d 150 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1392b].

The defense objects to the issuance of the subpoena for her medical records on several grounds. First, she argues that there were no facts related that provide a specific connection to either alcohol or a controlled substance. No indicia of impairment was alleged to indicate the consumption of alcohol and no facts were alleged to support the conclusion that the Defendant had consumed any specific drug. Without those factual allegations, the defense contends that there is no nexus between the medical records and a criminal investigation to overcome her right to privacy in her medical records.

This asks too much: there is no legal authority the undersigned could locate that requires a police officer to identify what specific drug the person may be under the influence of to sustain the State's burden on this issue. It is true that there is no familiar testimony regarding bloodshot, watery eyes or an odor of alcohol emanating from the person's breath to indicate impairment by alcohol. But where the sole basis for alleged intoxication is controlled substances, that proof is elusive. Lack of motor skills, inappropriate or bizarre statements, and lethargy to the point of being unable to stand are all that there may be to indicate impairment by drugs. The Court is reluctant to hold that is not enough for this purpose. At trial, however, the level of proof is very different.

Secondly, she contends without contradiction that she did not want medical treatment and that she was transported to and treated at the hospital against her wishes. The medical blood was obtained solely by the actions of the police, according to the Defendant. Relying on *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D892a] and other cases, she contends that Florida Courts now acknowledge that a warrant is required to take a person's blood. Since the requested records were created entirely by State action, she contends a warrant should be required for their production. To the extent that sections 395.3025 and 456.057, Florida Statutes (2019) permit a search without a warrant, in light of intervening United States Supreme Court decisions, she claims these statutes are now unconstitutional. *Missouri v. McNeely*, 569 U.S. 141 (2013) [24 Fla. L. Weekly Fed. S150a].

As the defense points out, relevancy is an extremely low standard. Medical records from the night of a DUI arrest will always be relevant, tending either to prove or disprove the material fact of impairment. Although the arrest report upon which the State relies as its sole proof is deficient in some respects, the combination of the observations of both officers, the Defendant's performance of field sobriety exercises, and inappropriate statements would tend to establish the bare facts of the crime alleged.[2] The "medical" blood would tend to prove or disprove a material fact and there is a nexus between the criminal investigation and the records sought.

As to the constitutional claims raised, the landscape of blood draws in DUI cases has certainly changed dramatically in the last several years. *See, e.g. State v. Quintanilla*, 276 So.3d 941, 44 Fla. L. Weekly D1764a (Fla. 3d DCA July 31, 2019) [275 So.3d 941 (Fla. 3DCA 2019). However, legal blood drawn pursuant to the implied consent law and medical blood drawn for purposes of treatment have always been separate with different requirements and analysis. *Limbaugh v. State*, 887 So. 2d 387 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2603a]. In a case well known to counsel and the court, our supreme court held that medical blood may be admissible in a DUI case independent of the implied consent law. *Robertson v. State*, 604 So. 2d 783, 787 n. 1 (Fla. 1992). The Defense argument combines these independent legal sources. The State correctly points out *Hunter* and the "medical blood" line of cases have not been overruled to date. This issue is certainly dispositive in this case and so perhaps the defense will have the opportunity to seek a higher authority.

Significant to the Court's rejection of the invitation to blend these two lines of thought is the fact that currently it is not possible to get a search warrant for a misdemeanor DUI. *State v. Geiss*, 70 So. 3d 642 (Fla. 5th DCA) [36 Fla. L. Weekly D1575b], *rev. dism.* 88 So. 3d 111 (Fla. 2011). To rule as the defense suggests would make it impossible for the State to obtain medical or legal blood, thereby negating several statutory provisions.

The requested subpoena is limited to the results of the blood drawn on August 16, 2019, specifically, whether the Defendant's blood contained alcohol or controlled substances, and any observations from treatment personnel relating to impairment. Whether the State can translate the result from that test to proof of impairment beyond and to the exclusion of a reasonable doubt remains to be seen.

WHEREFORE, for the reasons advanced above, the Court hereby overrules the Defense objection to the State's Notice of Intent to Subpoena Medical records.

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[1]Moreover, the officer alleged as a conclusion that the Defendant was driving, but did not directly state this as fact. He approached her "on the *passenger side* and made contact with her. . . .The defendant stepped out of her car and began searching in the area of the front *passenger seat* for the paperwork." There is no allegation that she was the only person in the car, and no allegation that she was observed in the driver's seat by this officer or anyone else.

[2]No suppression issues were alleged.

* * *

Criminal law—Driving under influence—Leaving scene of accident—Search and seizure—Officer acting outside jurisdiction—Where municipal police officer responded immediately to BOLO regarding vehicle leaving scene of accident, officer used constant stream of information from tipster who was following vehicle, and officer caught up with defendant's vehicle within 15 minutes at location outside of city limits at which sheriff's department sergeant had made stop, officer was in fresh pursuit of defendant at time of extra-jurisdictional arrest—Sergeant made valid traffic stop based on BOLO from identified informant—Officer had probable cause for arrest for leaving scene of accident based on BOLO information, his own observations and investigation of defendant's vehicle, and information received from fellow officer at crash scene—Officer's observations that defendant had strong odor of alcohol, poor balance, bloodshot eyes, and thick-tongued speech, wore a wristband from a bar, and was aware of poor judgment regarding his ability to drive justified request that defendant perform field sobriety exercises and eventual DUI arrest

STATE OF FLORIDA, Plaintiff, v. DAVIN RAY BUTIKOFER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019-308438-MMDB, Division 80. April 9, 2020. Bryan A. Feigenbaum, Judge. Counsel: Angel M. Drolet, and Shannon Shontz-Phillips, Assistant State Attorneys, for State. G. Kipling Miller, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court on March 4, 2020 for a hearing on Defendant's Motion to Suppress filed pursuant to Rule 3.190 Fla. R. Crim. P.; the Fourth Amendment of the United States Constitution; and Article 1, Section 12 of the Florida Constitution. The Court having taken notice of the court file, having listened to testimony of the witnesses and having considered the arguments from counsel, makes the following findings upon which it enters this Order:

On May 19, 2019, an incident happened in New Smyrna Beach involving two cars. At approximately 5:48 p.m., a call came in about a traffic accident at the intersection of A1A and Third Avenue. According to the initial report, the responsible vehicle had left the scene, heading westbound on S.R. 44. The reporting party, whose name and contact information was provided, witnessed the event and

kept constant visual contact and provided running updates as he followed behind the fleeing vehicle.

A BOLO [be on the lookout] was issued which included the tag information and the vehicle description. Initially the vehicle was described as a white pick-up truck but that was quickly corrected as to it being a white Chevrolet Tahoe.

Officer Page of the NSBPD [New Smyrna Beach Police Department] was walking into the police station, preparing to start a 6 p.m. shift, when he heard about the crash. The initial report from the accident scene, where the struck vehicle remained, was that there were two occupants of that vehicle, an adult male and infant, and possible injuries. Off. Page grabbed his BWC [body worn camera] and headed out, going southbound on U.S. 1, with his police car's lights and sirens activated. Upon hearing that the Tahoe was traveling rapidly westbound, he changed directions to try to catch up on S.R. 44. Another NSBPD officer was already arriving at the accident scene, with at least one more on the way.

The reporting party relayed information that the Tahoe was being driven extremely fast, about 90 m.p.h., and was swerving in and out of traffic. Meanwhile, Sgt. Bryan of the VCSO [Volusia County Sheriff's Office] was eastbound on S.R. 44, on his way home, having completed his 6 a.m. to 6 p.m. shift. He heard the BOLO about a white Tahoe which had just been involved in an accident resulting in injuries in New Smyrna Beach, now traveling westbound on S.R. 44 at 90 m.p.h. while a civilian witness was following.

Sgt. Bryan was in VCSO's jurisdiction near the intersection of Pioneer Trail and S.R. 44 when he spotted a matching Tahoe swerving as it quickly neared other traffic. Sgt. Bryan pulled his police car behind the Tahoe and followed, matching the tag number as the same that was part of the BOLO. Sgt. Bryan initiated a felony stop and the Tahoe pulled over. The Defendant was the driver. NSBPD Off. Page pulled up within seconds of the traffic stop and confirmed the Defendant was the driver of the Tahoe. The driver and the passenger were ordered out of the Tahoe at gunpoint and they cooperated. The time of the traffic stop was at 6:03 p.m., a gap of about 15 minutes from the first report of the accident. The location of the traffic stop was four or five miles outside New Smyrna Beach city limits and about 10 miles from the scene of the accident.

Sgt. Bryan turned over the investigation to Off. Page and the NSBPD. Sgt. Bryan had been on a different police radio channel than the NSBPD channel that Off. Page was on, so was not privy to the same information Off. Page was receiving from NSBPD officers at the accident scene. Off. Page was getting information that there were no visible injuries on the two occupants, the man and two year old infant, of the vehicle that had been struck. Off. Corrigan of the NSBPD, who was involved in the on-scene traffic crash investigation, was relaying information from another accident witness at the scene who had purportedly seen the Tahoe sideswipe the victim's car as it tried to drive between the witness' and the victim's vehicles. Off. Corrigan was also updating Off. Page that the adult driver of the struck vehicle was pretty confident that he had a broken rib and wanted to go to the hospital to have both he and the child checked out. Off. Corrigan observed white transfer paint on the red vehicle that had been struck and testified that he heard from Off. Page that there was red transfer paint on the white Tahoe. There was otherwise little damage to either vehicle, but Off. Page described fresh bumper damage on the Tahoe's front passenger side and some scratches.

Off. Page testified both that his travel path of 15 minutes, with lights and sirens on, was continuous, uninterrupted, and without delay, yet also that he was not in fresh pursuit.

The Defendant was described as having poor balance, bloodshot eyes, a strong odor of alcohol coming from his mouth that got stronger as he spoke, and having thick-tongued speech. He was only wearing a bathing suit and a pink wristband from Chases on the Beach, a well-known New Smyrna Beach restaurant/bar.

The Defendant was arrested for leaving the scene of an accident and taken back to the NSBPD. He agreed to takes FSEs [field sobriety exercises] at the station and was additionally arrested for DUI charges.

Legal Issues and Analysis

The defense raises two issues: (1) the legality of the stop, detention, investigation, and arrest outside the NSBPD's jurisdiction, and (2) the sufficiency of the evidence allowing for the DUI investigation and arrest.

The NSBPD had a valid interest in following up on the report of a traffic crash that happened within their city limits. At least two eyewitnesses, in addition to the alleged victim, were providing information that a white Tahoe had struck the alleged victim's vehicle and rapidly left the scene. There was probable cause that the Defendant had left the scene of a crash involving personal injury, a violation of Fla. Stat. § 316.027 (2), a third degree felony, and/or a crash involving damage to a vehicle, a violation of Fla. Stat. § 316.061, a second degree misdemeanor.

After the traffic stop by Sgt. Bryan of the VCSO, Officer Page made the arrest for this offense outside New Smyrna Beach city limits. Generally, a NSBPD officer would have no official power to make an arrest outside the officer's jurisdiction. *State v. Gelin,* 844 So. 2d 659, 661 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D746b]. "However, pursuant to Section 901.25, Florida Statutes, an arrest made outside the officer's jurisdiction can be validated" under the concept of fresh pursuit. *Gelin, id*. at 661.

Fla. Stat. § 901.25 (2004) provides, in part:

> (1) The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. It shall also include the pursuit of a person who has violated a county or municipal ordinance or chapter 316 or has committed a misdemeanor.
>
> (2) Any duly authorized state, county, or municipal arresting officer is authorized to arrest a person outside the officer's jurisdiction when in fresh pursuit. Such officer shall have the same authority to arrest and hold such person in custody outside his or her jurisdiction, subject to the limitations hereafter set forth, as has any authorized arresting state, county, or municipal officer of this state to arrest and hold in custody a person not arrested in fresh pursuit.

Fresh pursuit has been defined as requiring "1) that the police act without unnecessary delay; 2) that the pursuit be continuous and uninterrupted; and 3) that there be a close temporal relationship between the commission of the offense and the commencement of the pursuit and apprehension of the suspect." *Porter v. State,* 765 So. 2d 76, 80 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2001a]. *See also State v. Englehardt,* 465 So. 2d 1366, 1368 (Fla. 4th DCA 1985) (also involving the crime of leaving the scene of an automobile accident, which is defined as a "continuing offense"); *State v. Phoenix,* 428 So. 2d 262, 265 (Fla. 4th DCA 1982) ("[t]he power to arrest after fresh pursuit presupposes that the officers had legally sufficient grounds to detain or arrest before they left their jurisdiction."); *Department of Highway Safety and Motor Vehicles v. Leonard,* 718 So. 2d 314 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2107a]; and *State v. Dobson,* 2 Fla. L. Weekly Supp. 83a (Fla. 15th Jud. Cir., Palm Beach Cty Ct. Nov. 22, 1993). In addition, nothing in Fla. Stat. § 901.25 requires the "crime committed must be one which is continuing during the pursuit nor does it require the police officers to spot the vehicle within their jurisdiction" nor is it of any import if the "perpetrator and/or his

vehicle are located for the first time outside the officers' jurisdiction." *Porter, id*. at 79.

All of the fresh pursuit criteria are met in this case. Off. Page responded immediately to the information of the Tahoe leaving the scene of an accident and, following the constant stream of information from the uninterrupted surveillance of the reporting party, caught up, with his lights and siren on, to the location outside city limits where Sgt. Bryan of the VCSO made the traffic stop, within 15 minutes of the first call-out.

Off. Page's description of his actions, whether or not he was in fresh pursuit, are not controlling. As was stated in *Huebner v. State,* 731 So. 2d 40, 45 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D718a], ". . . an officer's characterization of his actions is not binding on the court." In *Huebner,* the trial judge determined that there was fresh pursuit even though the officer testified that he was not in fresh pursuit. *See also McNeil v. State,* 512 So. 2d 1062, 1063 (Fla. 4th DCA 1987) (". . . the language an officer uses or misuses is not determinative. . . . there is no shortage of cases overturning a policeman's belief that he did have probable cause to arrest and deciding that he did not.") and *State v. Shattuck,* 25 Fla. L. Weekly Supp. 465a (Fla. 7th Jud. Cir., Volusia Cty Ct. June 29, 2017) ("[the officer's] actions have more legal consequences that [the officer's] subjective opinion of what [the officer] was doing at the scene.").

Sgt. Bryan made a valid traffic stop based on the BOLO and the ongoing information from the reporting party that included the description of the vehicle, the tag information, and the ongoing dangerous driving pattern regarding the Tahoe's speed and swerving. With regards to a BOLO dispatch, the Florida Supreme Court has stated: "Several factors are relevant in assessing the legitimacy of a vehicle stop pursuant to a BOLO: (1) the length of time and distance from the offense; (2) route of flight; (3) specificity of the description of the vehicle and its occupants; and (4) the source of the BOLO information [citations omitted]." *Hunter v. State,* 660 So. 2d 244, 249 (Fla. 1995) [20 Fla. L. Weekly S251a]. *See also Sanchez v. State,* 199 So. 3d 472, 475 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2012a] ("Moreover, 'the time of day, the absence of other persons or vehicles in the vicinity of the sighting, any other suspicious conduct, and other activity consistent with guilt' may weigh into the analysis [citations omitted]."); and *State v. Reyes,* 680 So. 2d 1092 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2181b].

Whether or not Sgt. Bryan had probable cause to stop the Defendant for a crime, he had reasonable suspicion based on the totality of circumstances, the quantity and quality of the information he was receiving and what he himself observed, to allow for an investigatory stop. *Baptiste v. State,* 995 So. 2d 285, 290 (Fla. 2008) [33 Fla. L. Weekly S662a]. The source of a BOLO is a factor and there is a spectrum of reliability through which to view a source's information depending on whether the source is anonymous or ascertainable. As the Florida Supreme Court described in *Baptiste, id*. at 291:

> "[s]tate and federal case law establishes that the reliability of a tip which alleges illegal activity varies based upon whether the tip is truly anonymous, such as an anonymous telephone call, or whether it is offered by a "citizen-informant" who approaches the police in person to report criminal activity. A tip from a citizen informant falls at a higher end of the reliability scale. . . . This hierarchy has been described as based on various factors. First, a citizen informant may be motivated not by pecuniary gain, but by the desire to further justice. . . . Second, unlike an anonymous tipster, a witness who directly approaches a police officer may be held accountable for false statements. . . . Third, a face-to-face tip may be viewed as more reliable because the officers who receive the tip have the opportunity to observe the demeanor and evaluate the credibility of the person offering the information. . . . Fourth, a witness who approaches the police in person may subject himself or herself to possible reprisal from the defendant, thereby rendering the tip more reliable than an anonymous tip. [citations omitted]".

These factors apply regardless if there is a face-to-face tip or if the source is providing real-time information to law enforcement as long as the source is identifiable. *See also State v. DeLuca,* 40 So. 3d 120 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1581c]; *State v. Evans,* 692 So. 2d 216 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D912a]; and *Department of Highway Safety and Motor Vehicles v. Ivey,* 73 So. 3d 877 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D2455b].

As far as the source of the BOLO information in this case, there were several citizen informants: the victim, the eyewitness at the scene, and especially the reporting party who was following the Tahoe and reporting the Defendant's driving behavior and path in a play-by-play fashion to law enforcement. The pursuing reporting party had provided his name and contact information to law enforcement, distinguishing him from being an anonymous tipster, and the fact that he did not stop at the location where the traffic stop occurred is of no significance.

Once Sgt. Bryan made the traffic stop, Off. Page took over the detention of the Defendant and based on the information he had received from the BOLO, his own observations and investigation, and the details from Off. Corrigan, he had probable cause to arrest the Defendant for leaving the scene of a crash involving injury and/or property damage to another vehicle. "The combined observations of two or more officers may be united to establish the probable cause to arrest. . . . [and] [t]he fellow officer rule applies to misdemeanors as well as felony offenses. [citations omitted]". *Leonard, id*. at 316. "The 'fellow-officer' rule or doctrine operates to impute the knowledge of one officer in the chain of an investigation to another." *Evans, id*. at 218.

Finally, Off. Page made multiple observations that allowed for the subsequent request to perform FSEs and eventually arrest the Defendant for DUI. Off. Page detected a strong odor of alcohol from the Defendant's mouth, observed very poor balance, bloodshot eyes, thick-tongued speech, a wristband indicating the Defendant had been at a bar, and was aware of poor judgement insofar as his ability to drive. *See State v. Taylor,* 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]; *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]; *State v. Ameqrane,* 39 So. 3d 339 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D1148b]; and *State v. Castaneda,* 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]. As shown in the *Englehardt* case, *id*., a police officer's investigation and arrest of a person for leaving the scene of an accident can lead to a valid arrest for DUI.

Based on the circumstances and the case law,

IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is **DENIED**.

* * *

Criminal law—Driving under influence causing injury or property damage—Discovery—Investigatory subpoena—Medical records—Motion for issuance of subpoena duces tecum is granted for hospital records and toxicology reports of defendant who rear-ended motorcycle, was observed to have multiple indicia of impairment, and was transported to hospital after breath test recorded his blood alcohol level to be within legal limit—Records are directly relevant to elements of DUI offense being investigated

STATE OF FLORIDA, Plaintiff, v. JOSHUA LEE MATZ, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2019-CT-001310-A, Division II. September 26, 2019. Susan Miller-Jones, Judge. Counsel: Andrew McCain, Assistant State Attorney, for Plaintiff. Barbara Blount-Powell, for Defendant.

ORDER GRANTING STATE'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

The trend in the law, from *Hunter v. State,* 639 So. 2d 72 (Fla. 5th DCA 1994), all the way to *Gomillion v. State,* 267 So. 3d 502 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D758a], shows that the State must show a compelling state interest in order for this Court to allow the issuance of a subpoena duces tecum for medical records over a patient's objection. The State may show such a compelling State interest by showing that the contents of the medical records are relevant to a criminal investigation. The State may do this through a sworn-to affidavit. *McAlevy v. State,* 947 So. 2d 525 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c]; *Hunter,* 639 So. 2d at 73.

In *Gomillion,* 267 So. 3d 502, the most recent opinion from a Florida District Court of Appeal that this Court has been presented with, the State did not meet this burden. There, the State showed evidence of a criminal investigation into Leaving the Scene of an Accident and Carelessly or Negligently Causing Serious Bodily Injury While Driving on a Canceled, Suspended, or Revoked License. However, as the Second District Court of Appeal put it,

> the State did not argue or prove that there was some issue in an ongoing investigation into the crash that led to the offenses with which Mr. Gomillion was charged to which the toxicology records were material. Nor did it argue or prove that Mr. Gomillion's toxicology records were relevant to any element of any offense with which Mr. Gomillion was charged or to any defense Mr. Gomillion might present to those charges. The absence of any such assertion distinguishes this case from our decision in *Rivers* and the Fourth District's decision in *McAlevy,* upon which the State primarily relies. In each of those cases, the State sought to subpoena toxicology records in the course of a prosecution for driving under the influence. *Rivers,* 787 So.2d at 953; *McAlevy,* 947 So.2d at 528. To the extent the toxicology records in those cases revealed drugs or alcohol in the defendant's blood, the records would have been directly relevant to a substantive issue in the case. In contrast here, the State advanced no theory that made the medical records relevant to any substantive issue in the case.

Gomillion, 267 So. 3d at 507-08.

In this case, there is a compelling state interest in the criminal investigation into the crime of Driving Under the Influence Causing Injury or Property Damage as demonstrated by the sworn-to affidavit attached to the State's motion. The State has shown that a traffic crash occurred on August 11, 2019, late in the evening. The sworn-to police report indicates that the Defendant rear-ended a motorcycle. The officer reports observing an odor of alcohol coming from the defendant as the defendant spoke to him. The officer observed the defendant lean against something to hold himself steady, failed to maintain balance, swayed back and forth, and have glassy eyes. The officer observed the damage to property caused by the crash. The officer transported the defendant to the Gainesville Police Department for a breath test, which yielded 0.175/0.174 grams of alcohol per 210 liters of breath. The officer writes, "Due to the crash, I then transported the DEF to NFRMC at Millhopper where he was medically cleared."

This case is akin to *Rivers* and *McAlevy* in that the medical records sought are directly relevant to the elements of the offense being investigated. The subpoena duces tecum proposed for issuance by the State initially sought records from August 11, 2019 through August 12, 2019. The State has narrowed that timeframe to only August 12, 2019. Thus, unlike in *Faber v. State*, 157 So. 3d 429 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D348a], there is a nexus between date and time of the records that are sought and the date the crime occurred.

The defendant argued through counsel that the Supreme Court's opinion in *Carpenter v. U.S.,* 138 S.Ct. 2206 (2018) [27 Fla. L. Weekly Fed. S415a], disrupted or should disrupt the scheme laid out in cases like *Hunter, Rivers, McAlevy,* and most recently in *Gomillion.* The Court finds *Carpenter* distinguishable. *Carpenter* involved a court ordering the release of cell records that allowed the government to catalogue Carpenter's movements over a large amount of time. Although the Supreme Court did state that "[w]e hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party," the Court preceded that statement by saying "[t]his is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations." In light of this explicit attempt to confine the scope of its holding in *Carpenter,* in light of the factual dissimilarity to our own case, and in light of more recent *Gomillion* opinion by the Second District Court of Appeals reaffirming the above-described law, this Court declines to depart from the scheme described by *Gomillion* and similar cases.

The Court authorizes the State to issue a subpoena duces tecum to gather the following:

> All notes and all discharge paperwork from North Florida Regional Medical Center for **JOSHUA LEE MATZ, DOB: 05/06/1991**, from August 12, 2019, which is to include the names and contact information for all doctors, nurses, medical technicians, the blood drawer, blood analyst, and all toxicology reports.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Deputy who observed defendant make wide U-turn, swerve within lane, and cross center yellow line with tires for 3 - 4 seconds was justified in conducting stop to determine reason for unusual operation of vehicle—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. RYAN GEIGER, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2019-CT-001847-A000-BA. November 11, 2019. David E. Stamey, Jr., Judge. Counsel: Aaron Fortier, Assistant State Attorney, for Plaintiff. Lee Adam Cohen, for Defendant.

ORDER DENYING DEFENDANTS MOTION TO SUPPRESS EVIDENCE

THIS MATTER having come before this Court on the 11th day of October 2019, on Defendant's *Motion to Suppress Evidence.* The court took sworn testimony from Deputy Robert Hamilton of the Polk County Sheriff's Office and Ryan Geiger, the "defendant." The Court having reviewed the Motion, and after observing and evaluating the testimony and evidence presented, the arguments of the parties, and the applicable law, and being otherwise fully informed in the premises does hereby find as follows:

FINDINGS OF FACT

On March 12, 2019, just after midnight, Deputy Robert Hamilton was travelling northbound on South Florida Avenue, when he observed a vehicle (that had been traveling southbound of South Florida Avenue) make an extremely wide U-turn in front of him. While making this wide U-turn, the vehicle turned abruptly to avoid crossing over the outside fog line of the northbound lanes. This action caught Deputy Hamilton's attention, so he began to monitor the vehicle. While traveling behind the vehicle, Deputy Hamilton observed the vehicle to drift within its lane of travel. The vehicle would drift towards the right line before the operator would correct and swerve back to the middle of the lane. Following the swerving, the

vehicle's driver side tires crossed over the solid yellow inside line for three to four seconds. Being concerned for the well-being of the driver, and not knowing the cause of the unusual driving, Deputy Hamilton activated his emergency lights and initiated a traffic stop. Once the vehicle came to a stop in the Outback parking lot, Deputy Hamilton made contact with the driver (defendant). During this initial contact, Deputy Hamilton observed defendant to have bloodshot and watery eyes and detected the odor of alcohol. Defendant was requested to exit the vehicle where a roadside investigation for impairment was completed. Defendant was subsequently arrested for Driving Under the Influence (DUI) and transported to the Polk County Jail. While at the jail, defendant provided samples of his breath (0.116\0.111). Defendant is charged with the criminal offense of Driving Under the Influence, in violation of Florida Statute 319.193.

CONCLUSIONS OF LAW

Defendant, by and through his attorney, filed a *Motion to Suppress Evidence,* pursuant to Rule 3.190(g), Fla. R. Crim. P. Consistent with Florida Rule of Criminal Procedure 3.190(g)(3) and *State of Florida v. Mobley,* 98 So. 3d 124 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1726a], the Court determined defendant's *Motion* to be legally sufficient, and the State assumed the burden of moving forward with the evidence at hearing.

In support of his *Motion,* Defendant argues he was illegally and unconstitutionally stopped. However, from the evidence presented at the hearing, it is clear to this Court that Deputy Hamilton was justified in stopping the vehicle being driven by the Defendant based on observations he had that indicated that there was a problem with the driver of the vehicle or the vehicle itself.

Courts around the State have held that an officer is justified in stopping a vehicle to determine the reason for its unusual operation. The leading case on that point is *Bailey v. State,* 319 So.2d 22 (Fla. 1975). In its ruling, the Florida Supreme Court stated:

> Because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation. In this instance, although no vehicular regulation was being violated, it seemed strange to the officer that the vehicle was proceeding at only 45 miles per hour and was weaving, although not so much as to move out of its lane on one side or the other. Perhaps some of the possibilities occurring to the officer were defective steering mechanism or that the operator was driving under the influence of alcohol or some other drug.

The ruling in *Bailey* was used as the foundation for later decisions, such as *Department of Highway Safety & Motor Vehicles v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992) wherein the Second District Court of Appeal found:

> [e]rratic driving similar to that involved in this case has been held sufficient to establish a founded suspicion and to validate a DUI stop. . . . Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. . . . The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior.

In another case ruled on by the Second District Court of Appeal, *Duke v. State,* 82 So.3d 1155 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D589a] the Court stated, "Case law is clear that a person's continual drifting across the line and erratic driving can establish reasonable suspicion for an investigatory stop based on an officer's legitimate concern for the safety of the motoring public, such as where the officer believes the person may be impaired, sick, or tired." See also, *State v. Davidson,* 744 So.2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a]; *Esteen v. State,* 503 So.2d 356 (Fla. 5th DCA 1987); *Brown v. State*, 595 So.2d 270 (Fla 2d DCA 1992); *State v. Carrillo,* 506 So.2d 495 (Fla. 5th DCA 1987); *Roberts v. State,* 732 So.2d 1127 (Fla 4th DCA 1999) [24 Fla. L. Weekly D533a].

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress Evidence is **DENIED.**

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—No merit to argument that breath test results should be suppressed because breath test was not administered immediately after twenty-minute observation period where there is no evidence that breath test commenced six minutes after observation period ended, and even if it did, there was substantial compliance with administrative rules—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. GOUSETT GRAJALES, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2018-CT-007259-A000-BA. October 21, 2019. David E. Stamey, Jr., Judge. Counsel: Aaron Fortier, Assistant State Attorney, for Plaintiff. Thomas C. Grajek, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE—BREATH TEST

THIS MATTER having come before this Court on the 23rd day of August 2019, on Defendant's *Motion to Suppress Evidence—Breath Test.* The court took sworn testimony from Trooper Ezra Jackson of the Florida Highway Patrol and Gousett Grajales, the defendant. The court received without objection two (2) exhibits in evidence consisting of separate copies of the dash-camera video from Trooper Jackson's patrol vehicle. The Court having reviewed the Motion, and after observing and evaluating the testimony and evidence presented, the arguments of the parties, and the applicable law, and being otherwise fully informed in the premises does hereby find as follows:

FINDINGS OF FACT

On September 15, 2018, at approximately 2:48 a.m., Trooper Ezra Jackson of the Florida Highway Patrol responded to mile marker 17 of the Polk Parkway (State Road 570) to investigate the report of a possible impaired driver. Upon arrival, Trooper Jackson observed a vehicle parked on the left shoulder of the westbound lanes next to the guard railing. Trooper Jackson observed the driver's (and sole occupant's) upper torso to be hanging out of the driver's door and leaning on the open driver's door. Trooper Jackson made contact with the female driver (defendant) and asked, "Are you okay?" The defendant acknowledged that she was **drunk** and replied, **"I'm over the limit. Just take me to jail."** Trooper Jackson had the defendant exit her automobile. During this close contact with defendant, Trooper Jackson observed defendant to be unsteady on her feet. Defendant had to brace herself against the vehicle to maintain her balance. Trooper Jackson smelled an odor of an alcoholic beverage coming from the defendant. Defendant exhibited slurred speech, messy hair, wrinkled clothing, and red bloodshot eyes. Trooper Jackson also observed that defendant had thrown up on herself. Believing that defendant was impaired, Trooper Jackson had the defendant perform field sobriety exercises. Trooper Jackson, at roadside, conducted the "Pen-light" exercise on defendant. During the administration of this exercise,

Trooper Jackson detected the odor of alcohol coming from the defendant. He also noticed that defendant was swaying and was unable to follow his directions. Trooper Jackson next attempted to have defendant perform the "Walk and Turn" exercise. Defendant was unsteady on her feet in the starting position and was unable to maintain her balance. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Trooper Jackson next attempted to have defendant perform the "One Legged Stand" exercise. Defendant was unsteady on her feet. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Defendant was then arrested for Driving Under the Influence (DUI). EMS was called to the scene and cleared defendant for transport to the Polk County Jail. Defendant was transported to the Polk County Jail where Trooper Jackson conducted a 20-minute observation of her. This period of observation took place between 4:22am and 4:42am. Subsequent to the observation period defendant provided two samples of her breath. Following the breath testing, Trooper Jackson conducted a post arrest interview of the defendant. Defendant is charged with the criminal offense of Driving Under the Influence, in violation of Florida Statute 319.193(1).

CONCLUSIONS OF LAW

Defendant, by and through her attorney, filed a *Motion to Suppress Evidence—Breath Test,* pursuant to Rule 3.190, Fla. R. Crim. P., the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United State Constitution, and Article One, Sections Two, Nine, Twelve, Sixteen, and Twenty-three of the Florida Constitution. Consistent with Florida Rule of Criminal Procedure 3.190(g)(3) and *State of Florida v. Mobley,* 98 So. 3d 124 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1726a], the Court determined defendant's *Motion* to be legally sufficient, and the State agreed to assume the burden of moving forward with the evidence at hearing.

Defendant argues in her *Motion* that the results of her breath testing should be suppressed, claiming that she was not observed by law enforcement for the required twenty (20) minute observation period. However, Trooper Jackson's **uncontroverted** testimony established that he observed defendant for the requisite twenty minutes to **reasonably ensure** that defendant did not take anything by mouth or regurgitate during that time prior to the administration of the breath test.

At the hearing, **although it was not alleged in her motion,** defendant through her attorney argued that the breath test results should be suppressed because the testing did not take place immediately after the 20-minute observation period. Defendant further argued that the breath testing commenced at 4:48am. six (6) minutes after the observation period ended.

Despite this argument, **there was no evidence presented at the hearing** that the breath testing commenced at 4:48am. However, this Court finds that even if there had been evidence presented to that effect, the breath test results should not be suppressed as there was **substantial compliance** of the administrative rules. Rule 11D-8.007(3), Florida Administrative Code, requires the breath test operator to "reasonably insure that the subject has not taken anything by mouth or has not regurgitated for at least twenty minutes before administering the test." See *Carle v. Department of Highway Safety & Motor Vehicles,* 24 Fla. L. Weekly Supp. 925b (Fla. 12th Cir. Ct., June 8, 2016) wherein that Court stated, "**There is no requirement in the law that the breath test be administered immediately at the expiration of the observation period,** so it is not inconsistent to conclude that the breath test was administered more than twenty minutes after the observation period began."

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress Evidence- Breath Test is **DENIED.**

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Defendant was not in custody for purposes of *Miranda* during roadside investigation prior to being placed under formal arrest—Motion to suppress statements made to investigating officer denied—Accident report privilege is not applicable to defendant's statements where statements were not made for purpose of completing accident report, inasmuch as neither defendant nor officer knew at that time that defendant had been involved in accident

STATE OF FLORIDA, Plaintiff, v. GOUSETT GRAJALES, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2018-CT-007259-A000-BA. October 21, 2019. David E. Stamey, Jr., Judge. Counsel: Aaron Fortier, Assistant State Attorney, for Plaintiff. Thomas C. Grajek, for Defendant.

ORDER DENYING DEFENDANTS MOTION TO SUPPRESS STATEMENTS

THIS MATTER having come before this Court on the 23rd day of August, 2019, on Defendant's *Motion to Suppress Statements.* The court took sworn testimony from Trooper Ezra Jackson of the Florida Highway Patrol and Gousett Grajales, the defendant. The court received without objection two (2) exhibits in evidence consisting of separate copies of the dash-camera video from Trooper Jackson's patrol vehicle. The Court having reviewed the Motion, and after observing and evaluating the testimony and evidence presented, the arguments of the parties, and the applicable law, and being otherwise fully informed in the premises does hereby find as follows:

FINDINGS OF FACT

On September 15, 2018, at approximately 2:48 a.m., Trooper Ezra Jackson of the Florida Highway Patrol responded to mile marker 17 of the Polk Parkway (State Road 570) to investigate the report of a possible impaired driver. Upon arrival, Trooper Jackson observed a vehicle parked on the left shoulder of the westbound lanes next to the guard railing. Trooper Jackson observed the driver's (and sole occupant's) upper torso to be hanging out of the driver's door and leaning on the open driver's door. Trooper Jackson made contact with the female driver (defendant) and asked, "Are you okay?" The defendant acknowledged that she was **drunk** and replied, **"I'm over the limit. Just take me to jail."** Trooper Jackson had the defendant exit her automobile. During this close contact with defendant, Trooper Jackson observed defendant to be unsteady on her feet. Defendant had to brace herself against the vehicle to maintain her balance. Trooper Jackson smelled an odor of an alcoholic beverage coming from the defendant. Defendant exhibited slurred speech, messy hair, wrinkled clothing, and red bloodshot eyes. Trooper Jackson also observed that defendant had thrown up on herself. Believing that defendant was impaired, Trooper Jackson had the defendant perform field sobriety exercises. Trooper Jackson, at roadside, conducted the "Pen-light" exercise on defendant. During the administration of this exercise, Trooper Jackson detected the odor of alcohol coming from the defendant. He also noticed that defendant was swaying and was unable to follow his directions. Trooper Jackson next attempted to have defendant perform the "Walk and Turn" exercise. Defendant

was unsteady on her feet in the starting position and was unable to maintain her balance. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Trooper Jackson next attempted to have defendant perform the "One Legged Stand" exercise. Defendant was unsteady on her feet. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Defendant was then arrested for Driving Under the Influence (DUI). EMS was called to the scene and cleared defendant for transport to the Polk County Jail. Defendant was transported to the Polk County Jail where Trooper Jackson conducted a 20 minute observation of her. Subsequent to the observation period defendant provided two samples of her breath. Following the breath testing, Trooper Jackson conducted a post arrest interview of the defendant. Defendant is charged with the criminal offense of Driving Under the Influence, in violation of Florida Statute 319.193(1).

CONCLUSIONS OF LAW

Defendant, by and through her attorney, filed a *Motion to Suppress Statements,* pursuant to Rule 3.190, Fla. R. Crim. P., the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United State Constitution, and Article One, Sections Two, Nine, Twelve, Sixteen, and Twenty-three of the Florida Constitution. Consistent with Florida Rule of Criminal Procedure 3.190(g)(3) and *State of Florida v. Mobley,* 98 So. 3d 124 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1726a], the Court determined defendant's *Motion* to be legally sufficient, and the State agreed to assume the burden of moving forward with the evidence at hearing.

Defendant argues that her pre-Mirandized statements to law enforcement should be suppressed, claiming that at the roadside, she was in custody and interrogated. However, it is well established that routine roadside investigation is not custody for purposes of **Miranda.** In *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L.Ed.2d 317 (1984) the United States Supreme Court determined that generally the roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation. See also *Pennsylvania v. Bruder,* 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988) (holding that where defendant was subjected to an ordinary traffic stop, asked a "modest" number of questions, and requested to perform a simple balancing test, defendant was not in custody for purposes of Miranda).

Based upon the evidence presented at the hearing, this Court finds that while at the roadside, prior to being placed under formal arrest for DUI, defendant was not in custody for purposes of Miranda. As such, these roadside statements made to Trooper Jackson will not be suppressed.

Defendant next argues that her statements made during roadside investigation should be suppressed because they were compelled and privileged pursuant to the "Accident Report Privilege", contained in Florida Statute 316.066(4). This statute states:

> Except as provided in this subsection, each accident report made by a person involved in an accident and any statement made by such person to a law enforcement officer for the purpose of completing an accident report required by this section shall be without prejudice to the individual so reporting. No such report shall be used as evidence in any trial, civil or criminal.

Under the facts of this case, as testified to at the hearing, the statements made by defendant to law enforcement were not made "for the purpose of completing an accident report." In fact, defendant testified that at the time of making the statements, she did not know that she had been involved in an accident. Moreover, Trooper Jackson testified that he did not see any indications that defendant had been involved in an accident. Consequently, Trooper Jackson never investigated a crash. Nor did he receive from defendant an accident report. As such, the statements made by defendant at roadside are not privileged and will not be suppressed.

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress Statements is **DENIED.**

* * *

Criminal law—Driving under influence—Search and seizure—Field sobriety exercises—Where trooper encountered defendant hanging out of driver's seat of vehicle parked on side of road and noted that she had odor of alcohol and bloodshot eyes, had vomited on herself, and was unsteady on her feet, trooper had reasonable suspicion and probable cause to compel defendant to perform field sobriety exercises—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. GOUSETT GRAJALES, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2018-CT-007259-A000-BA. October 21, 2019. David E. Stamey, Jr., Judge. Counsel: Aaron Fortier, Assistant State Attorney, for Plaintiff. Thomas C. Grajek, for Defendant.

ORDER DENYING DEFENDANTS MOTION TO SUPPRESS EVIDENCE

THIS MATTER having come before this Court on the 23rd day of August, 2019, on Defendant's *Motion to Suppress Evidence.* The court took sworn testimony from Trooper Ezra Jackson of the Florida Highway Patrol and Gousett Grajales, the defendant. The court received without objection two (2) exhibits in evidence consisting of separate copies of the dash-camera video from Trooper Jackson's patrol vehicle. The Court having reviewed the Motion, and after observing and evaluating the testimony and evidence presented, the arguments of the parties, and the applicable law, and being otherwise fully informed in the premises does hereby find as follows:

FINDINGS OF FACT

On September 15, 2018, at approximately 2:48 a.m., Trooper Ezra Jackson of the Florida Highway Patrol responded to mile marker 17 of the Polk Parkway (State Road 570) to investigate the report of a possible impaired driver. Upon arrival, Trooper Jackson observed a vehicle parked on the left shoulder of the westbound lanes next to the guard railing. Trooper Jackson observed the driver's (and sole occupant's) upper torso to be hanging out and leaning on the open driver's door. Trooper Jackson made contact with the female driver (defendant) and asked, "Are you okay?" The defendant acknowledged that she was **drunk** and replied, **"I'm over the limit. Just take me to jail."** Trooper Jackson had the defendant exit her automobile. During this close contact with defendant, Trooper Jackson observed defendant to be unsteady on her feet. Defendant had to brace herself against the vehicle to maintain her balance. Trooper Jackson smelled an odor of an alcoholic beverage coming from the defendant. Defendant exhibited slurred speech, messy hair, wrinkled clothing, and red bloodshot eyes. Trooper Jackson also observed that defendant had thrown up on herself. Believing that defendant was impaired, Trooper Jackson had the defendant perform field sobriety exercises. Trooper Jackson, at roadside, conducted the "Pen-light" exercise on defendant. During the administration of this exercise, Trooper Jackson detected the odor of alcohol coming from the defendant. He

also noticed that defendant was swaying and was unable to follow his directions. Trooper Jackson next attempted to have defendant perform the "Walk and Turn" exercise. Defendant was unsteady on her feet in the starting position and was unable to maintain her balance. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Trooper Jackson next attempted to have defendant perform the "One Legged Stand" exercise. Defendant was unsteady on her feet. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Defendant was then arrested for Driving Under the Influence (DUI). EMS was called to the scene and cleared defendant for transport to the Polk County Jail. Defendant was transported to the Polk County Jail where Trooper Jackson conducted a 20-minute observation of her. Subsequent to the observation period defendant provided samples of her breath. Following the breath testing, Trooper Jackson conducted a post arrest interview of the defendant. Defendant is charged with the criminal offense of Driving Under the Influence, in violation of Florida Statute 319.193(1).

CONCLUSIONS OF LAW

Defendant, by and through her attorney, filed a *Motion to Suppress Evidence,* pursuant to Rule 3.190, Fla. R. Crim. P., the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United State Constitution, and Article One, Sections Two, Nine, Twelve, Sixteen, and Twenty-three of the Florida Constitution. Consistent with Florida Rule of Criminal Procedure 3.190(g)(3) and *State of Florida v. Mobley,* 98 So. 3d 124 (Fla. 5thDCA 2012) [37 Fla. L. Weekly D1726a], the Court determined defendant's *Motion* to be legally sufficient, and the State agreed to assume the burden of moving forward with the evidence at hearing.

Defendant argues she was unlawfully ordered to submit to roadside field sobriety exercises which amounted to an illegal search. However, from the evidence presented at the hearing, it is clear to this Court that Trooper Jackson had not only **reasonable suspicion,** but also **probable cause** to believe that defendant committed the crime of Driving Under the Influence.

Many courts around the State have held that if an officer has **reasonable suspicion** for a DUI, the defendant can be required to submit to field sobriety exercises. In *State v. Liefert,* 247 So. 2d 18 (Fla. 2d DCA 1971) the Second District Court of Appeal ruled that if an officer had sufficient cause to believe the defendant committed a crime in the operation of a motor vehicle, the officer could require the defendant to submit to field sobriety tests.

In *State v. Canuet,* 22 Fla. L. Weekly Supp. 900a (Fla. 17th Cir. Ct. March 2, 2015) the court held that because the officer had reasonable suspicion, he could demand FSEs without consent. Many other courts have reached this same conclusion. See, *State v. Gonzalez,* 13 Fla. L. Weekly Supp. 685b (Fla. 11th Cir. Ct. May 1, 2006); *State v. Higgins,* 13 Fla. L. Weekly Supp. 548a (Fla. 11th Cir. Ct. April 11, 2006); *State v. Phillips,* 22 Fla. L. Weekly Supp. 193b (Fla. 17th Cir. Ct. August 4, 2014); *State v. Balanchette,* 20 Fla. L. Weekly Supp. 1042a (Fla. 12th Cir. Ct. October 13, 2008); *State v. Burke,* 16 Fla. L. Weekly Supp. 378a (Fla. 9th Cir. Ct. October 14, 2008); *State v. Gilbert,* 14 Fla. L. Weekly Supp. 14a (Fla. 11th Cir. Ct. Nov. 17, 2006); *State v. Bussey,* 17 Fla. L. Weekly Supp. 230a (Fla. Brevard Cty. Ct. Nov. 11, 2009); *State v. McCoy,* 16 Fla. L. Weekly Supp. 450b (Fla. Hillsborough Cty Ct. March 13, 2009).

Some other courts around the State have ruled that the officer needed **probable cause** to believe the driver had committed the offense of Driving Under the Influence. When **probable cause** existed, the officer could require the driver to perform field sobriety exercises. In *Morris v. State,* 988 So. 2d 120 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1851a], the court stated "[W]hen a law enforcement officer has probable cause to believe that an accused has committed a DUI offense, the officer can lawfully compel the person to perform field sobriety exercises and a breath test. . ." Several other Florida opinions have reached this same conclusion. See *Jones v. State,* 459 So.2d 1068, 1080 (Fla. 2d DCA 1984); *State v. Rogers,* 36 Fla. Supp. 2d 81 (Fla. 13th Cir. 1988) ("field sobriety tests can be compelled under the law of Florida"); *State v. Guccione,* 2 Fla. L. Weekly Supp. 104a (Fla. 18th Cir. 1994) ("if probable cause exists, field sobriety tests may be compelled"); *State v. Carney,* 14 Fla. L. Weekly Supp. 287a (Fla. Hillsborough Cty. Ct. Dec. 7, 2006) ("Based on *Liefert* and *Rogers,* this court holds that where a law enforcement officer has probable cause to believe an individual has committed a violation of 316.193, F.S., the officer can require that individual to submit to field sobriety tests.") see also *State v. Macias,* 515 So.2d 206 (Fla. 1987) (defendant can be required to perform FSE's and to give voice exemplar in front of jury during a trial), and *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (Where there is probable cause to believe a crime was committed, law enforcement may compel a defendant to provide non-testimonial evidence).

Defendant was in actual physical control of her vehicle while displaying obvious signs of alcohol induced impairment. As a result of this evidence, it is clear to this Court that Trooper Jackson had the requisite **reasonable suspicion** to conduct a DUI investigation and to compel defendant to perform Field Sobriety Exercises. Moreover, it is equally clear that Trooper Jackson had **probable cause** to arrest defendant for the offense of Driving Under the Influence and, as some courts have found necessary, to compel defendant to perform Field Sobriety Exercises.

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress Evidence is **DENIED.**

* * *

Criminal law—Driving under influence—Scientific evidence—Horizontal Gaze Nystagmus test—State may not refer to HGN test at trial unless it lays predicate establishing scientific validity of HGN test and proper predicate for its admissibility—Absent this predicate, state may refer to HGN test as "pen-light exercise" and refer to portions of test within jury's understanding such as ability to follow instructions, balance, attention, appearance, and odor

STATE OF FLORIDA, Plaintiff, v. GOUSETT GRAJALES, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2018-CT-007259-A000-BA. October 21, 2019. David E. Stamey, Jr., Judge. Counsel: Aaron Fortier, Assistant State Attorney, for Plaintiff. Thomas C. Grajek, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE TO EXCLUDE HORIZONTAL GAZE NYSTAGMUS

THIS MATTER having come before this Court on the 23rd day of August 2019, on Defendant's *Motion In Limine To Exclude Horizontal Gaze Nystagmus.* The court took sworn testimony from Trooper Ezra Jackson of the Florida Highway Patrol and Gousett Grajales, the defendant. The court received without objection two (2) exhibits in evidence consisting of separate copies of the dash-camera video from

Trooper Jackson's patrol vehicle. The Court having reviewed the *Motion,* and after observing and evaluating the testimony and evidence presented, the arguments of the parties, and the applicable law, and being otherwise fully informed in the premises does hereby find as follows:

FINDINGS OF FACT

On September 15, 2018, at approximately 2:48 a.m., Trooper Ezra Jackson of the Florida Highway Patrol responded to mile marker 17 of the Polk Parkway (State Road 570) to investigate the report of a possible impaired driver. Upon arrival, Trooper Jackson observed a vehicle parked on the left shoulder of the westbound lanes next to the guard railing. Trooper Jackson observed the driver's (and sole occupant's) upper torso to be hanging out and leaning on the open driver's door. Trooper Jackson made contact with the female driver (defendant) and asked, Are you okay?" The defendant acknowledged that she was **drunk** and replied, **"I'm over the limit. Just take me to jail."** Trooper Jackson had the defendant exit her automobile. During this close contact with defendant, Trooper Jackson observed defendant to be unsteady on her feet. Defendant had to brace herself against the vehicle to maintain her balance. Trooper Jackson smelled an odor of an alcoholic beverage coming from the defendant. Defendant exhibited slurred speech, messy hair, wrinkled clothing, and red bloodshot eyes. Trooper Jackson also observed that defendant had thrown up on herself. Believing that defendant was impaired, Trooper Jackson had the defendant perform field sobriety exercises. Trooper Jackson, at roadside, conducted the "Horizontal Gaze Nystagmus" (HGN) test on defendant. During the administration of this test, Trooper Jackson detected the odor of alcohol coming from the defendant. He also noticed that defendant was swaying and was unable to follow his directions. Trooper Jackson next attempted to have defendant perform the "Walk and Turn" exercise. Defendant was unsteady on her feet in the starting position and was unable to maintain her balance. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Trooper Jackson next attempted to have defendant perform the "One Legged Stand" exercise. Defendant was unsteady on her feet. Believing that it was unsafe for defendant to further attempt to perform this exercise, Trooper Jackson discontinued its administration. Defendant was then arrested for Driving Under the Influence (DUI). EMS was called to the scene and cleared defendant for transport to the Polk County Jail. Defendant was transported to the Polk County Jail where Trooper Jackson conducted a 20-minute observation of her. Subsequent to the observation period defendant provided samples of her breath. Following the breath testing, Trooper Jackson conducted a post arrest interview of the defendant. Defendant is charged with the criminal offense of Driving Under the Influence, in violation of Florida Statute 319.193(1).

CONCLUSIONS OF LAW

Defendant, by and through her attorney, filed a *Motion In Limine To Exclude Horizontal Gaze Nystagmus,* claiming that the State has failed to provide any witnesses that possess the scientific expertise required.

At trial the State is prohibited from referring to the Horizontal Gaze Nystagmus (HGN) Test unless and until it has established a proper predicate establishing the scientific validity of HGN and further laying a proper predicate for its admissibility. *State v. Meador,* 674 So.2d 826, 836 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a]. However, the State may refer to any portions of that exercise which relates to issues within a jury's understanding. These issues include, but are not limited to, ability to follow instructions, balance, attention, appearance, and odor. Accordingly, in the absence of the requisite scientific predicate, the exercise will be referred to as the "Pen-Light Exercise".

Accordingly, for the foregoing reasons, it **is ORDERED AND ADJUDGED** that Defendant's Motion to Exclude Horizontal Gaze Nystagmus **is GRANTED IN PART** and **DENIED IN PART** as set forth herein. At trial, the State shall not elicit nor produce any evidence of HGN except as set forth in this Order.

* * *

Insurance—Venue—Forum non conveniens—Venue transferred from Miami-Dade County to Pinellas County where accident occurred, insured resides, insurer's office is located, and policy was issued—Further, insurer's adjusters and representatives are located in county adjoining Pinellas County, and witnesses would be significantly inconvenienced by having to travel to Miami-Dade County

BRETT M. HERRINGTON, D.C., P.A., FIRST CHOICE CHIROPRACTIC, a/a/o Jennifer Bogart Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-023563-SP-25, Section CG02. April 9, 2020. Elijah A. Levitt, Judge. Counsel: T. Roger White, Jr., White & Twombly, P.A., Miami Shores, for Plaintiff. Stephen B. Farkas and Michael Fogarty, Dutton Law Group, P.A., Tampa, for Defendant.

ORDER OF VENUE TRANSFER AND ORDER CLOSING CASE

THIS CAUSE came before the Court on a motion to transfer venue and/or to dismiss case. The Court being advised in the premises, it is:

ORDERED AND ADJUDGED that the Clerk of the Court is hereby directed to transfer this cause to the County Court of *Pinellas* County. The filing fee shall be paid by *DEFENDANT* as soon as practicable or within *30* days of the lifting of the court's emergency provisions caused by the COVID-19 virus. Accordingly, this action is closed in Miami-Dade County, Florida reserving jurisdiction to address any issues regarding the transfer and this Order.

In support of this Order, the Court provides the following:

As an initial matter, under the circumstances of this case, dismissal is inappropriate. *See Foy v. State Rd. Dep't*, 166 So.2d 688, 689-690 (Fla. 3d DCA 1964) (holding that courts should transfer cases for improper venue rather than enter orders of dismissal). Wherefore, Defendant's Motion to Dismiss is DENIED.

Defendant brings its Motion to Transfer under Florida Rule of Civil Procedure 1.060 and section 47.122, Florida Statutes (2020). Section 47.122 provides, "For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." The Court finds that a transfer of this matter is warranted under section 47.122, so the Court will not address the Rule 1.060 argument. To render its decision, the Court interprets the plain language of section 47.122.

The interests of justice require transfer of this matter to Pinellas County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 673 So. 2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a]; *E.I. DuPont De Nemours & Co. v. Fuzzell*, 681 So. 2d 1195 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a]. According to the affidavit of Defendant's adjuster Judy Bailey, (1) the accident occurred in Pinellas County, (2) claimant Jennifer Bogart, Defendant's insured, resides in Pinellas County, (3) Defendant issued the policy to Ms. Bogart in Pinellas County, (4) Plaintiff's office is located in Pinellas County,

and (5) Defendant's adjusters and corporate representatives are located in Polk County, a neighboring county of Pinellas County. Plaintiff argues that the case involves only legal issues, but these legal issues should be addressed by the correct jurisdiction. Accordingly, in the interests of justice, this matter should be governed by the legal precedent of the Sixth Judicial Circuit of Florida and Florida Second District Court of Appeal, both authorities having jurisdiction over Pinellas County.

The Court also finds that the Miami-Dade County jury and court system would be unjustly burdened by determining a case that has no connection to Miami-Dade County other than having a defendant that has representatives in Miami-Dade County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 673 So. 2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a]. Indeed, Defendant very well likely has a representative in every county in the United States of America. The matter is more appropriately resolved in the county in which all parties reside and the action accrued.

The Court further finds that the witnesses would be significantly inconvenienced by having to travel to Miami-Dade County from Pinellas County for trial or other hearings. *See R.J. Reynolds Tobacco Co. v. Mooney*, 147 So. 3d 42 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1386a].[1] Approximately 280 of roadways lie between the Dade County Courthouse and Pinellas County. *See* https://www.google.com/maps. The distance alone is a significant inconvenience. Defendant's counsel indicated that he expected to depose Plaintiff's corporate representative and Ms. Bogart. The attorneys would need to travel to Pinellas County for depositions anyway. *See* Fla. R. Civ. P 1.410(e)(2) (Unless otherwise agreed to by the parties and witnesses or allowed by order of the Court, a witness shall be deposed in the location where the witness resides, is employed or transacts business in person.) Plaintiff's counsel prospectively also will be able to resolve the case's legal issues via telephonic or video appearance from Miami-Dade County.

Based on the foregoing, Defendant's Motion to Transfer the Case is granted as provided herein.

[1]The Court disagrees with the Third District Court of Appeal's addition of the qualifier "significantly" before the word "inconvenient." The Court is rewriting the statute, which is the province of Florida legislature. Either a course of action is convenient or it is not. The antonym of "convenient" is "inconvenient" and not "significantly inconvenient" as proposed by the Third District Court. https://www.merriam-webster.com/thesaurus/convenient. This Court, nevertheless, finds a significant inconvenience exists in this case.

* * *

Contracts—Complaint—Dismissal—Failure to attach to complaint a legible copy of contract on which complaint is based

CASCADE CAPITAL LLC, Plaintiff, v. ANTWON WARD, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-030044-CC-05, Section CC06. April 17, 2020. Luis Perez-Medina, Judge. Counsel: Rausch Sturm LLP, for Plaintiff. Shera Erskine Anderson and Ofer Shmucher, Weston, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court at a hearing on the Defendant's Motion to Dismiss, and the Court having considered same, having reviewed the file and being otherwise fully advised in the premises, the Court finds as follows:

Findings of Fact

1. The Plaintiff initiated the above captioned cause of action by filing a Complaint based upon a breach of contract theory.

2. The Plaintiff attached to its complaint a purported copy of the contract upon which its Complaint was based; however, the first page of the attachment to the Complaint is completely illegible.

Applicable Legal Authority

3. *Fla. R. Civ. P.* 1.130(a) requires that "all . . . contracts . . . on which action may be brought or defense made, or a copy thereof . . . must be incorporated in or attached to the pleading."

4. "In the case of a complaint based on a written instrument it does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the pleading in question." *Safeco Ins. Co. of Am. v. Ware,* 401 So. 2d 1129, 1130 (Fla. 4th DCA 1981).

5. Where a party fails to attach to its complaint a legible copy of a contract upon which its claims are based, the party has failed to comply with *Fla. R. Civ. P.* 1.130(a). *Contractors Unlimited, Inc. v. Nortrax Equipment Co. Southeast,* 833 So. 2d 286, 288 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D141a].

6. "When a party brings an action based upon a contract and fails to attach a necessary exhibit under Rule 1.130(a), the opposing party may attack the failure to attach a necessary exhibit through a motion to dismiss." *Samuels v. King Motor Co. of Ft. Lauderdale,* 782 So. 2d 489, 500 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D849a].

It is therefore ORDERED AND ADJUDGED:

7. The Defendant's Motion to Dismiss is hereby GRANTED insofar as the Plaintiff failed to attach to its complaint a legible copy of the contract upon which its complaint was based and therefore the Plaintiff's complaint failed to state a cause of action.

8. The Plaintiff is granted leave to amend its complaint to attach a legible copy of the contract upon which its complaint is based in order to comply with *Fla. R. Civ. P.* 1.130.

9. The Plaintiff must amend its Complaint within thirty days from the date of this Order.

10. As decided in open court, the Defendant is the prevailing party due to the granting of the Defendant's Motion to Dismiss.

* * *

Insurance—Attorney's fees—Amount

PHYSICIANS GROUP, LLC a/a/o Heather Olechnowicz, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2017-SC-007830 NC. March 27, 2020. Phyllis Galen, Judge. Counsel: George Milev, Milev Law LLC, Key Biscayne, for Plaintiff. Stephanie Hoffman, 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 Settlement of the Underlying Claim with Stipulation for Entitlement to Fees/Costs on July 17, 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 40 hours.

4. The reasonable hourly rate for attorney George Milev is $ 475/hour.

5. Thus the reasonable reimbursement for attorney George Milev is 40 hours at $574.00/hour = $19,000.00.

6. Plaintiff is entitled to recover the expert witness fees of attorney Anthony Barak 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 Barak reasonably expended 10.5 hours. The Court finds that a rate of $500.00/hour is a reasonable hourly rate for the services of Mr. Barak. Thus, the total award for Mr. Barak is 10.5 hours at $500.00 = $5,250.00.

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 6.77% as applicable, set by the Florida Chief Financial Officer from the date of the Settlement of the Underlying Claim with Stipulation for Entitlement to Fees/Costs on July 17, 2019 until the entry of this Final Judgment pursuant to *Quality Engineered Installation, Inc. v. Higley South*, 670 So. 2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a]. The pre-judgment interest is calculated to be $ 892.56

8. Therefore, Plaintiff recover from the Defendant the following:

a. Reasonable attorney's fees in the amount of $ 19,000.00

b. Costs in the amount of $115.00

c. Interest from the Settlement of the Underlying Claim and Stipulation for Entitlement to Fees/Costs in the amount of $ 892.56

d. Expert witness fees for Anthony Barak in the amount of $5,250.00

e. For a total sum of $ 25,257.56 together with post-judgment interest at the rate of 6.83% per annum until payment in full of the judgment for which let execution issue forthwith.

* * *

Insurance—Personal injury protection— Application— Misrepresentations—Where PIP insurer breached policy by failing to timely pay or deny claim and waited 85 days after learning of alleged material misrepresentation to invoke rescission right, insurer's overt acts of continuing to send out letters pursuant to PIP statute after learning of rescission right waived that right

PHYSICIANS GROUP, L.L.C., a/a/o James Greene Sr., Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2018 SC 004549 NC. March 25, 2020. Maryann Boehm, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Cameron Ringo, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE having come before the Court for hearing on March 09, 2020 upon Plaintiff's Motion for Final Summary Disposition and Defendant's Motion for Summary Disposition and the Court, having reviewed the motions, the Court file, the case law presented, and having heard argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

1. The Court has been asked to determine whether Earl Worthy ("Mr. Worthy"), made a material misrepresentation on his insurance policy application by failing to disclose James Greene, Sr. ("Mr. Greene") as driver of the insured vehicle, and if so, whether the Defendant's unilateral rescission of the policy was proper.

2. On or about July 03, 2017, Mr. Worthy executed an application for insurance with the Defendant ("Application"). In response, the Defendant, Century-National Insurance company ("C-N") issued an automobile insurance policy under policy number: PGA06949300 for his 2014 Nissan Sentra, for policy period July 03, 2017 through January 03, 2018 (the "Policy"). The Policy period premium was $1,034.00.

3. Mr. Greene did not live with, nor was he a household member of Mr. Worthy's household. [D.E. 132, Worthy EUO].

4. Prior to the July 19, 2017, motor vehicle accident, Mr. Worthy sustained injuries to his leg, which required him to wear a brace. [D.E. 132, Worthy EUO]. As a result of this injury, Mr. Greene volunteered to run errands for, and drive Mr. Worthy to his doctor(s) appointments. [D.E. 132, Worthy EUO].

5. On or about July 19, 2017, while the insurance policy was in full force and effect, Mr. Greene was involved in an automobile accident in the State of Florida while operating Mr. Worthy's insured 2014 Nissan Sentra.

6. C-N first received written notice of Mr. Greene's claim on August 11, 2017. [D.E. 132, Mejia Tr. P. 14, In. 22-24]. Pursuant to section 627.736(4)(b), Florida Statutes, C-N was required to respond to the claim within thirty (30) days.

7. C-N did not invoke section 627.736(4)(i), Florida Statutes, which would have extended the deadline by sixty (60) days. Therefore, under section (4)(b), C-N was required to respond by September 11, 2017. This they did not do. C-N was in breach at this time.

8. On October 26, 2017, the C-N took the EUO of Mr. James Greene. [D.E. 113, JPTS, section II, ¶11]. At that time, C-N became aware of its rescission-right. [D.E. 132, Mejia Tr. P. 18, IN. 17-20, P. 22, In. 23-25, P. 23, In. 10-13; P. 32, In. 4-16].

9. C-N mailed out a rescission letter on or about January 17, 2018. [D.E. 132, Mejia Tr P. 24, In. 10-22]. The Defendant mailed the policy premium refund in the amount of $1,273.79 on or after January 19, 2018. [D.E. 132, Mejia Tr. P. 25, 14-17]. Interest was not included in the policy premium refund. [D.E. 113, JPTS, section II, ¶20]

10. From October 26, 2017, the date C-N first learned of its rescission-right to January 19, 2018, eighty-five (85) days past. That is, the Defendant with knowledge or notice of a basis for rescission, waited eighty-five (85) days to unilaterally rescind the Policy.

11. This Court heard arguments on March 09, 2020.

12. The Plaintiff argued that C-N's failure to deny the claim within thirty (30) days violated the PIP Statute—and as a result of the violation, the insurer waived its ability to investigate or deny the claim for material misrepresentation.

13. In contrast, C-N argued that it was entitled to rescind the Policy under section 627.409, Florida Statutes and that *Cont'l Assur. Co. v. Carroll,* 485 So. 2d 406, 407 (Fla. 1986) was controlling case law. Additionally, C-N argued that the statutory thirty (30) day time requirement to process medical bills under section 627.736(4)(i) does not exist. Lastly, C-N argued that the penalty for an insurer who fails to comply with the statutory time frame set forth in section (4)(b) is interest. [See D.E. 129]

14. C-N's argument is belied by the fact that the cases C-N cited to were decided prior to the 2012/2013 PIP amendment. The 2012/2013 PIP amendments added portions to the statute which strengthened the statutory deadlines. *See Century National Ins. Co. v. Halifax*

Chiropractic & Injury Clinic a/a/o Rantanen Bloodworth, (Fla. 9th Jud. Cir. Ct., Orange Cty., [Appellate] Case No.: 2018-CV-000019-A-O, January 22, 2020, Patricia A. Doherty, Judge) [28 Fla. L. Weekly Supp. 30a].

15. The purpose of the No-Fault Act described in section 627.736, Florida Statutes, is to provide "swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption." *See Custer Med. Ctr. v. United Auto. Ins.* Co., 62 So. 3d 1086 (Fla. 2010) [35 Fla. L. Weekly S640a]. To effectuate the PIP Statute's purpose Florida courts have strictly construed the time limitations set forth in the PIP Statute. *See January v. State Farm Mut. Ins. Co.,* 838 So. 2d 604, 607 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a] ("It is clear that an insurer is not freed from the statutory time constraints of a PIP claim payment simply by raising a coverage issue."). Section 627.736(4)(b), Florida Statutes makes clear that payments which are not made within thirty (30) days after an insurer is furnished written notice of the claim are overdue. §627.736(4)(b), Fla. Stat. (2017). As such, the burden is on the insurer to timely authenticate the claim within the time constraints set forth in section (4)(b). *See Amador v. United Automobile Insurance Co.,* 748 So.2d 307 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a] (insurer's failure to adhere to statutorily mandated time frame constituted a breach of contract), review denied, 767 So.2d 464 (Fla.2000). The deadline to verify, and pay, a claim is not tolled. *Superior Ins. Co. v. Libert,* 776 So. 2d 360, 363 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D381a].

16. More recently, in *Central Fla. Chiropractic Care a/a/o David Cherry v. GEICO Indemnity Co.,* 24 Fla. L. Weekly Supp. 152a (Fla. 9th Cir. April 22, 2016) *affirmed on appeal,* 26 Fla. L. Weekly Supp. 613a (Fla. 9th Jud. Cir. May 11, 2017), the trial court addressing the PIP Statute time constraints in an EUO case, found that a prior breach prohibited an insurer from denying a claim for breach of contract. The appellate court, in affirming the trial court, stated "[a] party who first commits a material breach cannot enforce the contract." (quoting Williston on Contracts §63.34th Ed. & May 2016 update).

17. In *Halifax Chiropractic & Injury Clinic a/a/o Rantanen Bloodworth,* (Fla. 9th Jud. Cir. Ct., Orange Cty., [Appellate] Case No.: 2018-CV-000019-A-O), the appellate court was asked to determine whether Century-National's unilateral rescission of the policy was proper in light of its failure to comply with the time constraints set forth in the PIP Statute. Relying on *Amador, January,* and *David Cherry,* the appellate court stated that "the statute under which the rescission took place is irrelevant, the threshold question was whether invocation of the rescission-right was proper."(internal quotations omitted). The appellate court went on to state that "[i]t is indisputable that thirty days past. . .[since C-N had notice of the claim, and] had not rescinded the policy, paid or denied or asked for more time to investigate under 62.736(4)(i). Rather, C-N continued to send out EOBs and notice letters pursuant to the PIP statute, at the same time it was aware that a rescission-right existed. ***These overt acts, while in breach of the PIP statute, waived its right to rescission.***"[1] (emphasis added).

18. The Court's finds *Halifax Chiropractic & Injury Clinic a/a/o Rantanen Bloodworth,* (Fla. 9th Jud. Cir. Ct., Orange Cty., [Appellate] Case No.: 2018-CV-000019-A-O) persuasive.

19. The Court finds based on the evidence presented, that this case is factually similar the *Rantanen Bloodworth* case. C-N had not paid or denied the claim, nor had it requested more time to investigate under section (4)(i) or (6)(b) prior to September 11, 2017. As such, C-N was in breach of contract. C-N had notice or knowledge of a basis to invoke its rescission-right on October 26, 2017—the date of Mr. Green's EUO. C-N waited eighty-five (85) days to invoke its rescission-right and rescind the Policy. Furthermore, C-N mailed out multiple letters pursuant to the PIP statute from August 22, 2017 through February 06, 2018. But most importantly, C-N mailed multiple letters pursuant to the PIP statute, after October 26, 2017. Additionally, the Plaintiff submitted circumstantial evidence that leads to the inference that C-N may have accepted additional policy premiums after October 26, 2017.[2] ***These overt acts, while in breach of the PIP statute, waived its right to rescission***.

20. This Court also finds that C-N also failed to pay statutorily required interest.

21. A forfeiture of rights under an insurance policy is not favored in Florida, especially when the forfeiture is sought after the happening of the event giving rise to the insurer's liability. *Johnson v. Life Ins. Co. of Ga.,* 52 So. 2d 813, 815 (Fla. 1951). Furthermore, "when an insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any unequivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof." *Id.*

Accordingly, it is hereupon ORDERED and ADJUDGED, as follows:

1. The Plaintiff's Motion for Final Summary Disposition is **GRANTED**; and

2. The parties are directed to submit a proposed final judgment within thirty (30) days.

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[1]The appellate court determined that C-N had notice of its rescission-right for "[m]ore than sixty (60) days prior to its invocation of that right *Halifax Chiropractic & Injury Clinic a/a/o Rantanen Bloodworth,* (Fla. 9th Jud. Cir. Ct., Orange Cty., [Appellate] Case No.: 2018-CV-000019-A-O, P. 2).

[2]The policy period ended on January 03, 2018. C-N did not refund the policy premiums until January 19, 2018. C-N admitted that it had not included interest in the premium refund. C-N's overpayment in the policy premium refund leads to the logical conclusion that the extra $239.79 dollars refunded was paid for the January 03, 2018 renewal policy period before C-N's alleged rescission.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Deputy who observed defendant stop in middle of intersection on green light, swerve within his lane, and cross yellow center line three times had reasonable basis to conduct welfare check—Deputy's observations of defendant's erratic driving pattern coupled with his observations that defendant had watery bloodshot eyes, slurred speech, odor of alcohol, and sluggish movements provided reasonable suspicion justifying request that defendant perform field sobriety exercises—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. JHON FERNANDEZ, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 CT 7505 NC. October 18, 2019. Dana Moss, Judge.

ORDER DENYING MOTION TO SUPPRESS

This matter came before the Court on the Defendant's motion to suppress. The Defendant alleges that law enforcement illegally stopped his vehicle and subjected him to a DUI investigation, and all evidence obtained as a result of the illegal stop must be suppressed. The Defendant argues Deputy Ovchar, with the Sarasota Sheriff's Office, stopped his vehicle without probable cause or reasonable suspicion and requested field sobriety exercises without reasonable suspicion. The Court conducted an evidentiary hearing on October 4, 2019, and therefrom makes the following findings of fact and

conclusions of law.

FINDINGS OF FACT

At approximately 5:00 a.m. on June 2, 2019, Deputy Ovchar observed a car come to a stop in the middle of the intersection at Honore Avenue and 17th Street while the signal light was green and then it continued forward. This caught the deputy's attention. Once the car moved forward, the deputy began to follow it and saw it swerving within its lane. Deputy Ovchar confirmed that the car did not affect other traffic, strike the curb or run off the road. Deputy Ovchar said the car crossed over the center yellow line three times within 3/10 of a mile. Based on the driving patter, Deputy Ovchar stopped the car to conduct a welfare check. Deputy Ovchar approached the driver's side window and immediately smelled a strong odor of an alcoholic beverage coming from the car. The Defendant was behind the wheel. Deputy Ovchar testified that the Defendant was non-responsive to his questions, which could have been attributable to impairment or a language barrier. Based on the totality of his observations, Deputy Ovchar summonsed Deputy Peterson to conduct a DUI investigation.

Deputy Peterson testified that she arrived, was briefed about the situation and made contact with the Defendant, who had bloodshot watery eyes, slurred speech, odor of an alcoholic beverage on his breath and slow sluggish movements. The Defendant admitted, both pre-*Miranda* and post-*Miranda,*[1] to Deputy Peterson that he had been drinking beer that night. Based upon the totality of circumstances, Deputy Peterson requested the Defendant to submit to field sobriety exercises. Deputy Peterson subsequently arrested the Defendant for DUI.

ANALYSIS

This case presents two issues for the Court's consideration. First, whether Deputy Ovchar lawfully stopped the Defendant's car based on the totality of his observations; and, second, whether Deputy Peterson had a reasonable suspicion based on the totality of the circumstnaces to request field sobriety exercises.

I. Unlawful Stop

There are three levels of citizen-police encounters recognized by our state and federal constitutions and case law. Level one is the consensual encounter during which a citizen is free to leave and police contact is minimal. *United States v. Mendahall,* 446 U.S. 544, 100 S.C. 1870 (1980); *Popple v. State,* 626 So. 2d 185 (Fla. 1993). Level two is an investigatory stop that is permissible if the officer has a well-founded articulable suspicion that the detained individual has committed, is committing or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 188 S.Ct. 1868 (1968); *Carter v. State,* 454 So. 2d 739 (Fla. 2d DCA 1984). Level three is an arrest supported by probable cause that an offense has been committed and the defendant is the one who committed the offense. *McMaster v. State,* 780 So. 2d 1026, 1028 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D881b].

The level two encounter has been codified under Florida's Stop and Frisk Law. § 901.151(2), Fla. Stat., which authorizes officers to temporarily detain an individual when the circumstances reasonably indicate the person committed, is committing or is about to commit a criminal offense. Probable cause for an arrest is not needed for the investigatory stop to be legal. *See e.g Baggett v. State,* 849 So. 2d 1154 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1659d]. Officers may conduct a brief, temporary stop to investigate a person's identity and the circumstances surrounding the detained person's behavior if the officer has reasonable, articulable suspicion based on the totality of the circumstances that "criminal activity is afoot." *Frazier v. State,* 789 So. 2d 486 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1666a].

It is not necessary that an officer observe a traffic offense in order to conduct a lawful level two traffic stop to check on the welfare of a driver. Notwithstanding the Stop and Frisk law, an officer may stop a motor vehicle based on observations indicating that there is a problem with the driver or the car. "[A] stop is permitted even without a traffic violation, so long as the stop is supported by a reasonable suspicion of impairment, unfitness or vehicle defects," *Hurd v. State,* 958 So. 2d 600, 603 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] (citing *Esteen v. State,* 503 So. 2d 356 (Fla. 5th DCA 1987); *State v. Davidson,* 744 So. 2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a]). This level two stop is also permissible when an officer observes a driving pattern that is indicative of a sleepy or alcohol-impaired driver. *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975) (holding because automobiles pose inherent dangers in modern life, an officer may be justified in stopping a vehicle to determine the reason for its unusual operation); *Brown v. State,* 595 So. 2d 270 (Fla. 2d DCA 1992) (finding valid stop based on officer's testimony that car had been continuously weaving within its lane and slowed to 45mph and then accelerated to 55mph several times).

In the instant case, Deputy Ovchar testified that he conducted a traffic stop to check on the welfare of the driver due to the driver swerving within the lane, crossing over the center line three times and coming to a stop in the middle of the intersection when the signal light was green. These are all signs indicating that the driver may have been sleepy or impaired. Based on the authority cited above, the Court concludes Deputy Ovchar had a reasonable objective for conducting a welfare check and it was a permissible level two stop. The motion to suppress is denied as to this issue.

II. Probable Cause for Field Sobriety Exercises

To request that a driver submit to field sobriety exercises, an officer must have reasonable suspicion that the driver was operating the motor vehicle while under the influence of drugs or alcohol. *State v. Ameqrane,* 39 So. 3d 339 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. Reasonable suspicion may arise with an officer observes factors such as an erratic driving pattern, odor of an alcoholic beverage emitting from the driver, slurred speech, blood-shot watery eyes, staggering and sluggish movements. *Origi* v. *State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]; *State v. Castaneda,* 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]. In *Ameqrane,* the police officer stopped a car for speeding and observed the driver had glassy, bloodshot eyes when he approached car. *Ameqrane,* 39 So. 3d at 341. The *Ameqrane* court held that the officer had reasonable suspicion of a DUI violation to justify field sobriety testing. *Id.*

In the case at hand, Deputy Peterson observed that the Defendant had bloodshot watery eyes, slurred speech, odor of an alcoholic beverage on his breath and slow sluggish movements. That, coupled with Deputy Ovchar's observation of an erratic driving pattern provided more than enough reasonable suspicion for Deputy Petersons to request field sobriety exercises. For these reasons, the Court denies the motion to suppress on this issue.

CONCLUSION

For the above stated reasons, the Court concludes that Deputy Ovchar's traffic stop of the Defendant's vehicle and Deputy Peterson's subsequent request for the Defendant to preform field sobriety exercises were lawful. It is hereby,

ORDERED and ADJUDGED that the Defendant's Motion to

Suppress is denied.

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

* * *

Criminal law—Driving under influence—Refusal to submit to breath test—Evidence—Implied consent warning—Where defendant, who was originally from Cuba, never communicated to deputy that he did not understand implied consent warning when it was read to him in English, suppression of evidence of defendant's refusal to submit to breath test is not warranted—Whether defendant's refusal was due to language barrier and whether refusal manifests consciousness of guilt are questions of fact for jury

STATE OF FLORIDA, Plaintiff, v. PEDRO DOMINGUEZCUELLAR, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 CT 208 NC. December 31, 2019. Dana Moss, Judge.

ORDER DENYING MOTION TO SUPPRESS

This matter came before the Court on the Defendant's motion to suppress. The Defendant argued his arrests for the charges of DUI and refusal to submit to a breath test were the result of an unlawful search and seizure. Prior to beginning the suppression hearing, the parties stipulated to narrowing the issues to one: whether the Defendant's refusal to submit to the breath test should be suppressed because the arresting officer read the implied consent in English, when a Spanish form was readily available, and the Defendant claimed not to understand the entirety of what was read because his primary language is Spanish. The Defendant reserved his right to challenge probable cause for the arrest and the adequacy of the field sobriety exercises at a later time.

The Court conducted an evidentiary hearing on September 19, 2019, and heard the Defendant's testimony and received into evidence the video of the traffic stop and reading of implied consent. The Court made the following findings of fact and determined suppression is not warranted because it is a question of fact for the jury to determine if the Defendant knowingly refused to submit to the breath test when asked to do so. The Defendant may raise the affirmative defense at trial that a language barrier existed. It is up to the jury to determine the weight to be given to that defense based upon the evidence put forth at trial.

FINDINGS OF FACT

Deputy Pufahl with the Sarasota County Sheriff's Office was summonsed to a traffic stop to conduct a DUI investigation of a detained motorist [Defendant]. The video began with the view of the Defendant's car pulled off to the side of the road late at night. Deputy Pufahl approached the car and conversed in English with the Defendant, who was seated behind the wheel. The entire transaction between the deputy and Defendant was in English. The Defendant responded to the deputy's basic commands without hesitation. Deputy Pufahl asked the Defendant to step out of the car and remove his hat, which he did without delay.

The Defendant spoke English with a thick accent and slurred speech. His answers to Deputy Pufahl's questions, for the most part, were appropriate. When Deputy Pufahl asked the Defendant if he saw a doctor for anything, the Defendant said he just went for a flu shot. A few of the Defendant's responses were awkwardly phrased or odd. For example, Deputy Pufahl asked the Defendant how far he could count to which he answered, "I can count from not too far away." And, when Deputy Pufahl told the Defendant he was under arrest for DUI, the Defendant responded, "you know my license is valid."

The Defendant testified at the hearing, through an interpreter, that he was born in Cuba and moved to the United States in 1980. He is 56 years old and his primary language is Spanish, which he speaks at home and work. He claimed to understand English if it is spoken slowly, but denied understanding "legal" concepts in English and emphasized that he was uncomfortable conducting "important business" in English. With regard to the Defendant's level of education, he testified he completed the 7th grade in Cuba; yet, the video recorded him telling Deputy Pufahl that he had a 5th grade education. The Defendant testified that he requested a Spanish interpreter at the traffic stop. Nothing on the video confirmed or dispelled this. Neither Deputy Pufahl nor the deputy who initiated the traffic stop were present at the hearing. The video does not show the events that took place prior to Deputy Pufahl's arrival, so it is entirely possible that the Defendant asked for an interpreter before Deputy Pufahl arrived on scene. Nonetheless, it is clear in the video that the Defendant never requested an interpreter while interacting with Deputy Pufahl or during the reading of the implied consent warning. When Deputy Pufahl asked the Defendant if he understood or had any questions after each set of instructions, the Defendant always indicated that he understood and had no questions. During the evidentiary hearing, the Court noted that the Defendant was able to begin responding to the questions asked in English even before the interpreter finished the translation.

Turning to the reading of implied consent, the video showed Deputy Pufahl asked the Defendant if he would submit to a breath test immediately after placing him under arrest. The breath machine was in the trunk of Deputy Pufahl's patrol car. Deputy Pufahl used hand gestures to demonstrate the breath machine when he asked the Defendant to take the test. The Defendant answered that he had a lawyer and cited the name of a local criminal defense attorney. The deputy told the Defendant that it was a decision he would have to make without his lawyer. The Defendant indicated he would not take the test and continued to say he had a lawyer. Deputy Pufahl read the implied consent warning in English to the Defendant and explained he would be charged with a misdemeanor for refusing since he had a prior refusal and offered the Defendant the option to change his mind about taking the test. The Defendant continued to converse in English with Deputy Pufahl, asking how much his bond would be and why was his car searched [prior to towing]. Thereafter, the deputy transported the Defendant to jail, where the Defendant completed the booking process in English without a translator.

The Defendant testified that he did not know what the implied consent warning was when it was read, and that he did not blow in the machine because he had asthma. The Defendant said he understood some things that night but not others and he would have preferred the encounter to have been in Spanish. The defense attorney supplemented the record after the hearing with the stipulated fact that Deputy Pufahl had an implied consent form readily available to him in Spanish at the time of the Defendant's arrest.

ANALYSIS

Underlying the Court's analysis are two basic principles. First, any person who accepts the privilege to drive or takes actual physical control of a motor vehicle in Florida is deemed to have given his or her consent to submit to an approved breath test and a refusal to do so is admissible in any criminal proceeding, so long as the arrest was lawful. § 316.1932 (1)(a)1.a., *Fla. Stat.* A person must be told that the failure to submit to any lawful test will result in the suspension of the person's privilege to operate a motor vehicle for 1 year for the first

refusal, or 18 months if the person had previously been suspended for a refusal, and it is a misdemeanor crime for a subsequent refusal. *Id.* This cautioning is known as the *implied consent warning.* Generally, officers read the warning from a standardized form and it is not uncommon for law enforcement agencies to have the form available in English and Spanish, as in this case.

The second principle important to this analysis is that common constitutional safeguards are not afforded to the accused when he or she is faced with the decision whether to submit to a lawful breath test. The United States Supreme Court ruled it is not necessary for officers to secure a search warrant to obtain a breath test from a DUI arrestee, because the intrusion is of minimum inconvenience and can only reveal limited information, i.e. the amount of alcohol in a subject's breath. *Birchfield v. North Dakota,* 136 S.Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a]. An arrestee does not have the right to consult with a lawyer before deciding whether to submit to the breath test. *Kurecka v. State,* 67 So. 3d 1052, 1056 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b]. Furthermore, admitting the refusal into evidence does not violate the accused's rights to due process and against self-incrimination. *State v. Pagach,* 442 So. 2d 331, 332 (Fla. 2d DCA 1983) (finding Florida's implied consent statute constitutional even though it allows the admissibility of the refusal to submit to a chemical test without having to advise the defendant that the refusal can be used against him citing *South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916 (1983)). Individual States may punish DUI defendants for refusing to submit to a lawful test and may allow evidence of the refusal at trial to show consciousness of guilt. Nevertheless, the arrest must be lawful, officers must inform defendants of the requirement to submit without giving misleading or confusing advice, and officers may only require defendants to submit to lawfully approved tests. *See Florida Dept. Hwy. Safety and Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a] (holding individuals do not violate the implied consent law when they refuse to take a test that is not incidental to a lawful arrest); *Grzelka v. State,* 881 So. 2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a] (failing to advise defendants of at least one adverse consequence of refusing to submit to an authorized test could result in suppression); *State v. Iaco,* 906 So. 2d 1151 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1556a] (holding suppression not required even when officers intentionally failed to advise drivers of administrative and criminal consequences of refusing to submit to testing); *but see State v. Jahada,* 18 Fla. L. Weekly Supp. 647a (Fla. 4th Cir. Ct. June 14, 2011) (suppression of refusal to submit to testing warranted where officer specifically told the defendant he had a right to remain silent and as a direct result, the defendant exercised his right to remain silent and the officer did nothing to clear up the confusion).

In this case, the Defendant argued the refusal to submit to the breath test should be suppressed because he did not knowingly and voluntarily refuse to test; rather, he did not understand the entirety of the implied consent warning that Deputy Pufahl read in English and this could have been corrected because a Spanish form was readily available. The defense cited *State v. Isaac Estrada-Bustos,* 20 Fla. L. Weekly Supp. 812a (12th Cir. May 15, 2013) for the proposition that suppression is warranted if a language barrier is alleged to have existed at the time the implied consent warning was read and the officer did not make use of a readily available translated form that could have overcome the barrier. In *Estrada-Bustos,* the defendant and arresting officer conversed in English and Spanish and it was evident that the defendant understood some English. The arresting officer testified at the motion suppress hearing that the defendant was uncooperative by insulting him in English, and the officer did not believe the defendant's assertion at the scene that he did not understand the implied consent warning that was read in English. The officer specifically chose not to use the Spanish form that was on hand. The *Estrada-Bustos* court suppressed the refusal because the Spanish form was available and could have been used. The court equated the officer's decision not to use the Spanish form as a failure to advise the defendant of the negative consequences of refusing to take the test. This Court declines to extend the holding in *Estrada-Bustos* to the instant case because the cases are factually different in one significant way: the Defendant never communicated to Deputy Pufahl that he did not understand what was read.

The Defendant's argument in the instant case is premised on the belief that the Defendant had the right to be advised of the implied consent warning in his native language to ensure a knowing and voluntary decision was made before it could be used against him. This Court finds no authority requiring law enforcement officers to translate the implied consent warning to another language if the arrestee requests it or even if it is apparent to the requesting officer that a language barrier may exist. Like in the *Kurecka* case, the implied consent warning read to the Defendant did not violate any statutory or constitutional provisions and the warning was not otherwise deficient so as to justify the extreme sanction of suppression. *See Kurecka,* 67 So. 3d 1052. Under the implied consent statute, a defendant is not precluded from explaining to the jury his reasons for refusing to take the breath test. *Id.* A defendant can introduce refusal evidence, along with other testimony concerning the circumstances of refusal, which may militate in his favor and counter the state's consciousness-of-guilt argument. *See Commonwealth v. Ruttle,* 388 Pa.Super. 262, 565 A.2d 477 (1989); and *State v. Kline,* 764 So. 2d 716 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1522a] (noting defendant was free to argue that the jury should draw the inference not that he refused because he was guilty but because he did not trust the test).

CONCLUSION

The Court concludes that the Defendant's refusal to submit to a breath test is admissible, with the proper foundation, for trial purposes. Whether the Defendant's refusal to submit to the breath test was due to a language barrier and whether the refusal manifests a guilty conscious are questions of fact for the jury. It is hereby,

ORDERED and ADJUDGED that the Defendant's motion to suppress the admissibility of the breath test refusal is denied.

* * *

Insurance—Personal injury protection— Application—Misrepresentations—Where insurer breached PIP policy and violated PIP statute by failing to pay or deny claim within 30 days of its initiation and did not invoke additional time period for investigation of claim, insurer's rescission of policy for alleged misrepresentation in application was improper

REGIONS ALL CARE HEALTH CENTER, INC., (a/a/o Remy Jean), Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-054839. April 14, 2020. Michael C. Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on April 14, 2020 on Plaintiff's Motion for Final Summary Judgment, Defendant's Motion to Compel Plaintiff's Counsel to Produce Claimant for Deposition, Motion to Continue Plaintiff's Motion for Summary Judgment and Motion for Sanctions. The court having considered the Motions, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. This is a Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's rescission of the subject policy. Defendant's rescission was based upon an alleged material misrepresentation for an alleged failure to list household members on the insurance application by the named insured, Remy Jean.
2. Plaintiff's motion for summary judgment seeks entry of summary judgment arguing that Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract and Defendant's rescission of the policy was improper.
3. Defendant's Motion to Compel Plaintiff's Counsel to Produce Claimant for Deposition is **HEREBY DENIED**.
4. Defendant's Motion to Continue Plaintiff's Motion for Summary Judgment is **HEREBY DENIED**.
5. Defendant's Motion for Sanctions is **HEREBY DENIED**.
6. Regarding Plaintiff's Motion for Final Summary Judgment, the Court bases its ruling on three (3) cases. The claim must be denied or paid 30 days following the initiation of the claim. The failure to adhere to the statutorily time frame is itself a breach of contract. *Amador v. United Automobile Ins. Co.*, 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a]; The burden is clearly upon the insurer to authenticate the claim within the statutory time period. Nothing within the statute allows for the time to be arbitrarily increased by the insurer for an indefinite amount of time. *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a]; The denial of benefits implicates subsection (4)(b) which requires insurers to pay valid claims within 30 days or face a penalty. An insurer may elect to deny a claim under subsection (4)(b), when it has reasonable proof to establish that the insurer is not responsible for the payment. *State Farm Mut. Auto. Ins. Co. v. Williams*, 824 F.3d 1311 (2014) [25 Fla. L. Weekly Fed. C771a].
7. Because the Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), Defendant itself was in breach of contract. As such, Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Insurance—Automobile—Windshield repair—Appraisal— Prohibitive cost doctrine is not applicable to automobile insurance policy's appraisal provision where breach of contract claim under insurance policy does not involve statutory right—Furthermore, plaintiff erred in comparing cost of appraisal to amount in controversy; correct analysis under prohibitive cost doctrine is to compare cost of appraisal to cost of litigation—Motions to enforce appraisal and to dismiss are granted

BROWARD INSURANCE RECOVERY CENTER LLC a/a/o Chakevia Heams, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. Coce18020383, Division 52. April 10, 2020. Giuseppina Miranda, Judge. Counsel: Emilio R. Stillo and Andrew Davis-Henrichs, Emilio Stillo, P.A., Davie, for Plaintiff. Randi B. Franz, Antonio Roldan, and Jessica L. Pfeffer, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING

This matter is before the Court for consideration of Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Stay and Motion to Enforce Appraisal, and Plaintiff's Motion for Evidentiary Hearing.

The Court having reviewed the Motions, relevant case law and having considered argument of counsel, makes the following finds of fact and conclusions of law:

Plaintiff has filed a Statement of Claim alleging Defendant breached the terms of the insurance policy by failing to pay the full amount charged by Plaintiff's assignor (Clear Vision Windshield Repair, LLC) when making repairs to windshield of Defendant's insured (Chakevia Heams). Defendant responded to the Statement of Claim by filing the instant Motion alleging that they afforded coverage, made payment to Clear Vision and that Defendant properly invoked the appraisal provisions of the policy. Defendant asserts that Plaintiff has failed to comply with a condition precedent to maintain this lawsuit.

Defendant is asking the Court to dismiss this lawsuit and require Plaintiff's participation in the appraisal process.

In response to Defendant's Motion to Dismiss, Plaintiff has filed a Motion for Evidentiary Hearing arguing that the appraisal provision of the policy is unenforceable due to the Prohibitive Cost Doctrine espoused in the case of *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S.C. 513, 148 L.Ed. 2d 373 (2000).

There is no dispute that the insurance policy contains a valid written agreement for appraisal. The Court finds that the issue of the cost of repairs made to the insured's windshield and the proper reimbursement for said repair is appropriate for appraisal and that Defendant has not waived the right to appraisal. *See Progressive American Insurance Company v. Broward Insurance Recovery Center, LLC, a/a/o Michelle Campbell* (Case No. CACE 16-021931 (AP) (17th Judicial Circuit Appellate Court, April 2, 2020) (finding that the issue of the cost of the windshield repair to be "purely a question about 'the amount of loss' which falls within the scope of the appraisal provision.")

The question presented to this Court is whether Plaintiff can invalidate the appraisal provision of the contract by utilizing the Prohibitive Cost Doctrine (hereinafter referred to as the "Doctrine').

The U.S. Supreme Court, in the case of *Green Tree,* 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.*

Typically, courts compel arbitration when the parties have agreed to arbitrate pursuant to a contract. Notably, all cases interpreting the Doctrine and *Green Tree* confine their analysis to lawsuits involving statutory rights. *See Citibank (South Dakota) N.A. v. Desmond,* 114 So.3d 401 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1175a] (addressing class action waiver involving an alleged violation of Florida Security in Communications Act, Chapter 934, Fla. Stat.); see also *McKenzie Check Advance of Florida, LLC v. Betts,* 112 So.3d 1176, 1186 (2013) [38 Fla. L. Weekly S223a] (case involving claims based on the Florida lending practices statute (Chapter 687), Florida

Consumer Finance Act (Chapter 516), Florida Deceptive and Unfair Trade Practices Act (Chapter 501) (FDUTPA), and the Florida Civil Remedies for Criminal Practices Act (Chapter 772) (FCRCPA) *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.)

In their efforts to apply the precepts of *Green Tree,* federal courts have developed the following framework to be utilized in a "costs" analysis:

> We agree with *Williams* that the crucial inquiry under *Gilmer* is whether the particular claimant has an adequate and accessible substitute forum in which to resolve his *statutory rights* and that *Gilmer* does not call for the conclusion that fee splitting, in all cases, deprives the claimant of such a forum. We believe that the appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an *adequate and accessible substitute to litigation,* i.e., a case-by-case *analysis that focuses,* among other things, upon the claimant's ability to pay the arbitration fees and costs, *the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. See Williams,* 197 F.3d at 764 (focusing upon the inability to pay; whether the forum fees created a prohibitive expense; whether *Williams* had a full opportunity to vindicate his claims; and whether the forum fees prevented the arbitral forum from providing an adequate substitute for the judicial forum). . .

Bradford v. Rockwell Semiconductor Systems, Inc., 238 F.3d 549, 556 (4th Cir. 2001) (citations omitted) (emphasis added).

Therefore, after establishing that a claim involving a statutory right is at issue, the balancing test is the differential between the costs of arbitration vs. the costs of litigation. *See also Zephyr Haven Health & Rehab Center, Inc., v. Hardin ex rel. Hardin,* 122 So.3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (This case involved claims arising out of the care Hardin received at the nursing facility and whether the arbitration clause of the admission documents was enforceable. Though not specifically addressed in the opinion, these claims appear to be related to the statutory rights espoused in Fla. Stat. §400.022, Residents' Rights).

> Here, Hardin has not met her burden under *Green Tree.* First, she has not presented evidence of the likely cost of arbitrating her claim. ... Second, even if Hardin's evidence had addressed the cost of arbitrating this specific claim, she did not attempt to compare that cost with what she would pay in litigation.

Id. at 922.

Plaintiff incorrectly asks this Court to apply the Doctrine to a contract *not* involving a statutory right. Plaintiff further compounds this error by misapplying the differential between the costs of appraisal vs. the amount of damages sought[1] instead of the cost of litigation. Plaintiff wrongly emphasizes the cost of appraisal being more than the amount in controversy.

Ultimately, the proper context for the application of the Prohibitive Cost Doctrine is in matters where there is a question as to the enforceability of arbitration agreements involving statutory rights, not in matters, such as here, involving a breach of contract claim where a party is seeking to avoid appraisal pursuant to the terms of a governing contract.

Thus, this Court declines to apply the Prohibitive Cost Doctrine to the instant small claims case involving a contractual appraisal provision, the terms of which were freely contracted for between the insured and the Defendant.

Furthermore, the question of the Prohibitive Cost Doctrine was been fully brief as part of the recent ruling in favor of Defendant in the 17th Circuit Appellate Court case of *Progressive American Insurance Company v. Broward Insurance Recovery Center, supra.*[2]

In its Answer Brief, the instant Plaintiff framed its argument as follows:

> The Court properly recognized the logical application of the Cost Prohibitive Doctrine to the facts of the case given that the cost of appraisal greatly exceeds the amount in controversy rendering appraisal to act as a deterrent to those who suffered windshield damage and seeking to enforce the promise contained in the policy of insurance.

(See Answer Brief of Appellee, Broward Insurance Recovery Center, LLC (a/a/o Michelle Campbell, IV at page 32-35.)

Though the 17th Circuit Appellate Court ultimately appears to base its ruling on the interpretation of Fla. Stat. §627.7288 and *Progressive American Insurance Company v. SHL Enterprises, LLC,* 264 So.3d 1013 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2434a], the Appellate Court clearly rejects Plaintiff's argument "that the amount of loss is less than the amount it would cost for an insured to pay for an appraisal; and, therefore makes the appraisal cost prohibitive." *Id.* at page 4.[3]

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Evidentiary Hearing is hereby DENIED.

2. Defendant's Motion to Enforce Appraisal is GRANTED. The parties shall participate in the appraisal process, pursuant to the terms of the subject policy.

3. Defendant's Motion to Dismiss is GRANTED, without prejudice. The Court retains jurisdiction for the purpose of completion of the appraisal process, specifically the appointment of an umpire and determination of entitlement to fees and costs.

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[1]Plaintiff's Statement of Claim seeks "damages in an amount less than $100.00, exclusive of interest, costs and attorneys' fees."

[2]The Doctrine was also fully brief in CACE 16-021757 *Progressive American Insurance Company v. Broward Insurance Recovery Center, LLC, a/a/o Isabella Cardona* (Fla. 17th Cir. Ct. May 26, 2017 (appellate capacity) and the appellate court found in Progressive's favor, without commenting on the application of the Doctrine.

[3]A ruling from the 17th Circuit Appellant Court is pending in CACE 19-20706 *Progressive American Insurance Company v. Broward Insurance Recovery Center, LLC, a/a/o Laura Florez.* The questions presented there are more directly on point with the instant lawsuit.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Officer did not have reasonable suspicion necessary to detain defendant for DUI investigation and request that he perform field sobriety exercises where officer did not observe any indicia of impairment in defendant's driving or appearance apart from odor of alcohol detected on his person and inside his vehicle—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. DANIEL LOUIME, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-6392MU10A. March 17, 2020. Kim Mollica, Judge. Counsel: Russell J. Williams, Williams Hilal Wigand Grande, PLLC, Fort Lauderdale, for Defendant.

[Editor's note: Punctuation is as it appeared in court document.]

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE, having come before this Court on February 28,

2020 on the Defendant's Motion to Suppress, pursuant to the Florida Rules of Criminal Procedure, Rule 3 190, Florida Statute 316 193, the Fourth and Fourteenth Amendments to the United States Constitution, Article I Section 23 of the Florida Constitution, and *Wong Sun v. United States,* 371 U S 47 (1963), and the Court, being otherwise fully advised in the premises, the Court finds as follows

FINDINGS OF FACT

1 Officer Dwayne Campbell of the Miramar Police Department was the only witness to testify at the motion to suppress He testified that he received a communication from and began to investigate a vehicle that allegedly may have been driving improperly

2 When he approached the vehicle there were other law enforcement officers, who were behind the vehicle, he was not sure how many He did not personally observe any improper driving pattern

3 Officer Campbell activated his emergency lights and the vehicle pulled over to the roadside The driver had no problem doing so Officer Campbell approached the vehicle and spoke to the driver At some point the defendant was asked to produce his drivers license, insurance, and registration However, Officer Campbell is unsure if the documents were provided to him, or to other officers, who were also on scene as back-up However, he did not note the defendant having any issues producing these documents

4 When speaking to the defendant he observed an odor of alcohol on his person as well as coming from inside the vehicle At some point the defendant exited the car Although Officer Campbell testified the defendant exhibited some balance issues in doing so, he testified this was not noted in his police report[1]

5 Additionally, the officer did not observe the usual indicia of impairment For example, Officer Campbell did not observe, flushed face, slurred speech, bloodshot watery eyes, and there was no admission of any alcohol consumption by the defendant

6 In fact, when the State asked him on direct examination why he initiated a DUI investigation, Office Campbell replied, "The smell of alcohol coming from his person and car, the dark liquid in a cup in the center console, and his personal responses to questions asked The latter, again, was not noted in the officer's police report When pressed by defense counsel as to what questions were asked and what were the defendant's responses, Officer Campbell could not answer[2]

7 Officer Campbell then asked the defendant if he would perform voluntary roadside field sobriety exercises and the defendant agreed Although defendant's motion ends here, this court presumes that based upon the defendant's performance on the roadside exercises he was arrested, and requested to submit to a breath test, which he refused

CONCLUSIONS OF LAW

A law enforcement officer cannot request that a citizen perform field sobriety exercises unless the officer *at least* has a reasonable suspicion to believe that the driver is DUI *See, e g , Jones v. State,* 459 So 2d 1068, 1080 (Fla. 2d Dist Ct App 1984), *affirmed,* 483 So 2d 433 (Fla. 1986), *State v. Wood,* 662 A 2d 919 (Me 1995) *Department of Highway Safety & Motor Vehicles v. Guthrie,* 662 So 2d 404 (Fla. 1st Dist Ct App 1995) [20 Fla. L. Weekly D2480b] *And see Campbell v. State,* 962 P 2d 1150 (Kan App 1998), which discusses the reasonable suspicion versus probable cause standards for requesting field sobriety exercises The mere odor of an alcoholic beverage upon an individual's breath is not inconsistent with the ability to operate a motor vehicle in compliance with the law *See State v. Kliphouse,* 771 So 2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]

A lawful investigative detention and order of a citizen to perform field sobriety tests or otherwise "audition" for their freedom cannot occur unless the officer has some objective manifestation that the person stopped is driving under the influence *State v. Ameqrane,* 39 So 3d 339 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D1148b] *See also Jones v. State,* 459 So 2d 1068, 1080 (Fla. 2d DCA 1984, *affirmed,* 483 So 2d 433 (Fla. 1986)

In *State v. Taylor,* 648 So 2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b] the Florida Supreme Court provided an example of what constitutes "reasonable suspicion" sufficient to detain a citizen and then conduct a DUI investigation

When [the defendant] exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being committed, i e , DUI The officer was entitled under *section 901 151* to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest [The officer's] request that [the defendant] perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights

Unlike in the *Taylor* case, the only objective factor that might confirm that the Defendant has consumed alcohol, as opposed to being under the influence of it, was that the officer detected an odor of alcohol coming from the defendant's person and there was an odor coming from inside the vehicle

This Court finds that Officer Campbell did *not* have the requisite cause necessary to request that the Defendant submit himself to such field sobriety exercises *State v. Marshall,* 36 Fla. Supp 2d 34, 35 (Fla. 4th Jud Cir 1989) *See also Davis v. State,* 40 Fla. Supp 2d 35, 36 (Fla. 15th Jud Cir 1989), *State v. Stephens,* 354 So 2d 1244 (Fla. 4th DCA 1978) *See also State v. Jacobs,* 22 Fla. L. Weekly Supp 831a (Fla. 7th Jud Cir County Court) (where officer who stopped defendant for driving in without headlights did not observe any indicia of impairment other than a slight odor of alcohol and slightly slurred speech, officer did not have reasonable suspicion to detain defendant for a DUI investigation) and *State v. Ameqrane,* supra (a lawful investigative detention and order of a citizen to perform field sobriety tests or otherwise "audition" for their freedom cannot occur unless the officer has some objective manifestation that the person stopped is driving under the influence)

Therefore, based on the totality of the circumstances and facts of this case it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is hereby **GRANTED** and this Court orders the suppression of any and all evidence illegally obtained in the above styled case Such evidence includes, but is not limited to, any statements made by the Defendant, any observations made by the officer during the defendant's performance on roadside field sobriety exercises and the defendant's refusal to submit to breath test

After having held a full evidentiary hearing on the matter, this Court makes the following findings of fact and conclusions of law This court will note that defendant's seizure was conducted without a warrant signed by a neutral and detached magistrate

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[1]On this issue this court finds that Officer Campbell's credibility is questionable

[2]Also, on this issue this court finds that Officer Campbell's credibility is questionable

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Use of workers' compensation fee schedule to cap payment—Motion for summary judgment on plaintiff's claim of underpayment denied—Question certified: When a PIP insurer has elected the Medicare fee schedule limitation permitted by Florida Statute §627.736(5)(a)1, which provides that the insurer may limit reimbursement to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B," and the "allowable amount" under the fee schedule is not specified in a general amount but instead must be determined on an individualized basis, is the PIP insurer entitled to limit the reimbursement to 80 percent of the workers' compensation fee schedule?

GOOD HEALTH MEDICAL REHAB, INC. (a/a/o Carole Dieudonne), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 18-9322 COCE 53. May 6, 2020. Robert W. Lee, Judge. Counsel: Matthew Emanuel, Sunrise, for Plaintiff. Michael Walsh, Fort Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING UNDERPAYMENT and CERTIFICATION TO THE FOURTH DISTRICT COURT OF APPEAL AS A QUESTION AFFECTING THE UNIFORM ADMINSTRATION OF JUSTICE, PURSUANT TO FLA. STAT. §34.017(1)(b), RULES 9.030(b)(4) and 9.160, FLA. R. APP. P.[1]

THIS CAUSE came before the Court on May 4, 2020 for hearing of the Plaintiff's Motion for Summary Judgment Regarding Underpayment, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

Background: This case involves an issue currently arising in PIP cases throughout the State. Currently, in this Court's view, there is no controlling precedent on the horizon. In light of the five-year statute of limitations pertaining to PIP cases, as well as the continuing practice of PIP parties to challenge legal rulings even when a Circuit appellate decision is issued,[2] this Court respectfully submits that this is an issue that the District Court of Appeal could resolve and save a substantial amount of judicial labor in the courts below. *See State Farm Mutual Automobile Ins. Co. v. CC Chiropractic LLC*, 245 So.3d 755, 760 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D583a] (reminding county courts that the certification process is a method to seek precedent needed for the orderly administration of justice on issues that have statewide application).

This case involves the same legal issue that this Court addressed on *Good Health Medical Rehab, Inc. (a/a/o Thelizia Belfleur) v. State Farm Mutual Automobile Insurance Company*, Case No. 18-9214 COCE 53 in which this Court on February 11, 2020 entered its Order Denying Plaintiff's Motion for Summary Judgment Regarding Underpayment. In the instant Motion, the Plaintiff urges that this Court should recede from its prior ruling based on a review of the development and legislative history of the statute at issue in these cases, an argument not made in the prior case.

As noted on page 4 of the Court's proper ruling,

> In sum, under Florida PIP law, an insurer must pay a medical charge that is "reasonable," as long as the service is medically necessary and related to the accident. Fla. Stat. §627.736(1)(a) (2017). However, as pertains to the issues in this case, an insurer is permitted to limit its reimbursement by using a "schedule of maximum charges," which is equivalent to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B." *Id.* §§627.736(5)(a)1 & 5(a)1f(I). If, however, the medical service "is not reimbursable under Medicare Part B," then "the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation." *Id.* §627.736(5)(a)1. Therefore, if a medical service is "reimbursable under Medicare Part B, as provided in this sub-subparagraph" an insurer cannot cap its payment by using the workers' compensation fee schedule. In the instant case, however, although CPT code 97039 is reimbursable under Medicare Part B, CPT code 97039 is *not* reimbursable under "Medicare Part B, as provided in this sub-subparagraph," the operative language of the current statute. Otherwise, the phrase "as provided in this sub-subparagraph" has no meaning. *See Brown & Brown, Inc. v. Gelsomino*, 262 So.3d 755, 759 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2642a] (the "court is required to give effect to every part of a statute if possible and avoid construing any portion of a statute as mere surplusage").

In the Court's view, this issue is dictated by the plain meaning of the statute, without need to review legislative history. While the statute may be cumbersome to read and difficult to construe, it does not mean that the statute is ambiguous. *Cf. Eagle American Ins. Co. v. Nichols*, 814 So.2d 1083, 1085 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D596a] (just because a contract is complex does not mean it is ambiguous). Because the statute is not ambiguous, the legislative intent as discerned from a review of legislative history is not relevant. *Department of Revenue v. Bank of America, N.A.*, 752 So.2d 637, 641 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D118a]; *Coleman v. Coleman*, 614 So.2d 532, 533 n.2 (Fla. 4th DCA 1993); W. Reynolds, Judicial Process §5.6 (1980) (under the plain meaning rule, "resources other than the statute are not to be consulted unless the language of the statute is ambiguous"). Therefore, while there may be some persuasive appeal in Plaintiff's argument, this Court concludes that there is no legal reason to recede from its prior decision. Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff' Motion for Final Summary Judgment is DENIED.

However, because of the high volume of cases pending with this issue throughout the State of Florida, and the lack of a controlling precedent that would ameliorate the substantial amount of judicial labor given to this issue, the Court certifies the following question to the Florida Fourth District Court of Appeal as a question affecting the uniform administration of justice:

> **When a PIP insurer has elected the Medicare fee schedule limitation permitted by Florida Statute §627.736(5)(a)1, which provides that the insurer may limit reimbursement to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B," and the "allowable amount" under the fee schedule is not specified in a general amount but instead must be determined on an individualized basis, is the PIP insurer entitled to limit the reimbursement to 80 percent of the workers' compensation fee schedule?**

[1]Pursuant to Rule 9.160(b), any appeal of the Court's decision in this matter must be filed in the Fourth District Court of Appeal, and not the Circuit Court.

[2]*See* J. Sebastien Rogers, *The Chasm in Florida Appellate Law: Intra-Circuit Conflicting Appellate Decisions*, FLA. B.J., Apr. 2018, at 52-55.

* * *

Criminal law—Driving under influence—Scientific evidence—Breath-testing machine—Motion for *Daubert* hearing on reliability of Intoxilyzer 8000 is denied where statutes establish presumption that breath test taken using approved machine and following certain procedures is reliable and admissible, and defendant has not specifically alleged that test of his breath did not apply principles and methods reliably

STATE OF FLORIDA, Plaintiff, v. DANIEL ARCHER, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 59-2014-MM-1882-A. September 24, 2019. Debra L. Krause, Judge.

ORDER ON MOTION FOR DAUBERT HEARING

THIS CAUSE came before this Court upon the Defendant's Motion for Daubert Hearing filed August 1, 2019. Based on the motion, the Court requested counsel submit a memorandum of law on the potential requirement for a hearing addressing the reliability of the Intoxilyzer 8000 as a result of the recent Florida Supreme Court decision adopting Florida Statute §90.702 of the Florida Rules of Evidence which adopted the standard for admissibility of scientific evidence created in *Daubert v. Merrel Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

Daubert substantially altered the evidence landscape concerning the admissibility of scientific evidence and testimony. Prior to *Daubert*, scientific evidence, to be admissible, only had to meet the standard announced in *Frye v. United States,* 293 F. 1013 (D.C. Cir 1923). The *Frye* standard allowed scientific evidence to be admissible if it was generally accepted in the scientific community without any regard for the reliability of the evidence. After *Daubert,* scientific evidence is admissible only if the testimony will assist the trier of fact to understand the evidence and it meets a three prong test set forth in in rule 702.[1] The three prong test is

1. The testimony is based upon sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case.

Additionally, the *Daubert* Standard requires that the Court be the "gatekeeper" to determine if the evidence will assist the trier of fact and whether it meets the three prong test and is thereby admissible.

Clearly, a breath test determining the alcohol content of a person's breath based on the principles of infrared spectroscopy is scientific evidence designed to assist the trier of fact to understand the evidence. Therefore, the Court must continue with its "gatekeeper's" role to determine the admissibility of this evidence.

As it relates to Breath Tests, the Legislature has lawfully delegated, pursuant to a statutory scheme, the ability to establish the procedures to determine whether a particular method of determining alcohol content of a person's breath is reliable and whether a particular breath instrument using this method is reliable to the Florida Department of Law Enforcement (FDLE). As such, the courts of this state are bound to rely on this determination of reliability as it relates to the admissibility of evidence. FDLE has complied with its statutory duty and established procedures to determine whether infrared spectroscopy and a particular instrument using infrared spectroscopy is reliable. Then FDLE applied those procedures and determined that infrared spectroscopy and a particular instrument, the Intoxilyzer 8000, are reliable. Additionally, FDLE established procedures to ensure that a particular test, utilizing the Intoxilyzer 8000, is reliable.

The Legislature by establishing this statutory scheme and FDLE by establishing the procedures to determine whether a particular method, a particular instrument, and a particular test are reliable, and then determining that infrared spectroscopy and the lntoxilyzer 8000 are reliable satisfies the first two requirements of Rule 702. That leaves the third prong of rule 702 to be addressed; whether the witness has applied the principles and methods reliably to the facts of the case. FDLE has addressed this issue by establishing the procedures to be followed in a particular test to ensure that a particular test is reliable. Therefore, if these procedures are followed the test is presumed reliable and admissible under rule 702. The statutory scheme establishes a presumption that the breath test taken pursuant to certain procedures is reliable and therefore admissible. A Defendant is permitted to attack this presumption by making specific allegations that a particular test did not apply the principles and methods reliably to the facts of a particular case. However, a general claim that the Intoxilyzer 8000 is not reliable is insufficient to warrant a Defendant's Motion on the matter.

In the instant case, the Defendant's Motion fails to make any specific allegations that the Defendant's particular test did not apply the principles and methods reliably to the facts of this case.

Therefore, it is **ORDERED AND ADJUDGED:**

That the Defendant Motion for a Daubert Hearing is **DENIED.**

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[1]For the purposes of this opinion, when referring to rule of evidence 702, the Court is referring to the Florida version of 702 found in Florida Statute 90.702.

* * *

Criminal law—Driving under influence—Scientific evidence—Primary jurisdiction—Article V, section 21 of Florida Constitution, which provides that an officer hearing an administrative action may not defer to an administrative agency's interpretation of statute or rule and must interpret such statute or rule de novo, does not preclude court from deferring question of whether administrative rules are sufficient to establish reliability of Intoxilyzer to administrative tribunal—Motion for *Daubert* hearing on reliability of Intoxilyzer is denied where court has previously held hearing and examined reliability of Intoxilyzer based on same issues raised by defense and found breath test results to be admissible

STATE OF FLORIDA, Plaintiff, v. STEVEN CONFIELD, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019 MM 3419. March 20, 2020. Jerri Collins, Judge.

ORDER DENYING AMENDED DAUBERT HEARING MOTION

THIS CAUSE came before the Court on the Defendant's Amended Motion for Daubert Hearing on the scientific reliability of the Intoxilizer and Intoxilizer test results.

The defense asserts that the software used in the intoxilizers make the instruments unreliable. Additionally, the defense argues that deferring to the Florida Administrative Procedure Act to determine whether the FDLE rules are sufficient to establish reliability is a violation of Article V, Section 21 of the Florida Constitution.

Regarding the Article V argument, the Court does not agree with the defense's interpretation of the amendment. The amendment does not obliterate the Doctrine of Primary Jurisdiction. Article V, Section 21 of the Florida Constitution states:

In ***interpreting*** a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative ***agency's interpretation*** of such statute or rule and must instead interpret such statute or rule de novo. (Emphasis added.)

The amendment speaks to the interpretation of a statute or rule. It does not mean that a state court must hear all state agency matters. In

the case of *Southern Baptist Hospital of Florida v. Agency for Health Care Admin.,* 270 So.3d 488 (1st DCA 2019) [44 Fla. L. Weekly D1109a] the issue involved existing and proposed rates for Medicaid outpatient hospital services. In a Final Order, an administrative law judge sided with the Agency and found that neither the proposed nor the existing rules exceeded the legislative authority. The hospital appealed and the appellant court found that the rules promulgated by the Agency of Health Care Administration were an invalid exercise of delegated legislative authority under the de novo review standard. The Court found that under the new constitutional amendment, appellate courts may refer to the lower court's record to determine the facts but will rule on the evidence and matters of law without deferring to that court's findings thus a de nova standard of review applies. Article V. Section 21 of the Florida Constitution does not challenge this Court's authority to defer to a matter to an administrative court.

The second issue raised by the defense is that the Intoxilizer 8000 is unreliable because of defects in the software. The issue of reliability is to be determine by this Court in considering the admissibility of evidence. When considering the reliability of scientific evidence, this Court must consider whether the theory or technique has been tested, whether it has been subject to peer review, whether there is a known or potential rate of error and whether the methodology has gained general acceptance. *Daubert v. Merrel Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

This Court finds that the State is not required to demonstrate the general scientific reliability of a breath test instrument (Intoxilizer 8000) before introducing it at trial, *State v. Massie,* 2008 WL754804, 2007CA-23 2008 Ohio 1321, *State v. Vega,* 465 N.E. 2d 1303, (1984), *Rutledge v. NCL* 464 Fed.Appx. 825, (2012). In the Motion for a Daubert Hearing, the defense asserts that there are specific issues dealing with the intoxilizer software that warrant further consideration as to the reliability of the instrument.

Pursuant to Fla. Stat. 90.202(6) this Court takes judicial notice of *State of Florida v. Ford,* 2013 MM 505, not limited to but including the hearings held on August 31, 2015, September 1-2, 2015, April 28-29, 2016, October 20, 2016 and October 25, 2016. On these dates, this Court heard expert testimony, reviewed exhibits, considered case law and listened to arguments by the parties regarding the reliability of the Intoxilizer 8000 and the software utilized in the instrument. The same issues brought forth in this motion were addressed in 45 hours of testimony and hundreds of exhibits. This Court issued an order on June 19, 2017 finding that the issues raised by the defense did not render the intoxilizer 8000 unreliable. See Attached Order.

The case before this Court involves the same intoxilizer and the same software. The Court has previously examined the reliability of the evidence as required by the law, even beyond what is required in a Daubert hearing, and has made a finding that the evidence is admissible.

THEREFORE based upon the foregoing, the Defendant's Motion for a Daubert hearing along with Motion to Suppress and or in Limine with regard to Breath Test Result Affidavit, Motion in Limine and or to Suppress Intoxilizer test results, Motion to Suppress Breath Test II, III, IV, V, VI, VIII, IX, X, XI, XII, XIII, Motion to Dismiss with regard to Breath Test, Motion to Dismiss Breath test results based upon Involuntary Consent, Motion to Dismiss or Suppress with regard to insufficiency of rules, Motion to Produce, I, II Motion to Inspect, Motion for Issuance of Subpoena Duces Tecum, Motion to Produce Source Code are **DENIED**.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Chiropractic services—Medicare fee schedule—PIP insurer is not entitled to 2% reduction in payment for chiropractic treatment implemented by Medicare where 2% reduction is specifically reserved only for claims that Medicare is required to reimburse

COMPREHENSIVE HEALTH CENTER, LLC., Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-003075-SP-05, Section CC06. March 2, 2020. Luis Perez-Medina, Judge. Counsel: Theophilos G. Poulopoulos, The Schiller Kessler Group, PLC, Fort Lauderdale, for Plaintiff. Michael S. Walsh, Kubicki Draper, Fort Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before this Court on cross Motions for Partial Summary Judgment, and this Court, having reviewed all of the Motions, Responses, Memoranda, Exhibits or Attachments filed, after reviewing all applicable Florida law and other applicable law provided to this Court, after hearing argument from the parties' respective counsels, reviewing the entirety of the record, and having been sufficiently advised in the premises, it is hereby:

ORDERED and ADJUDGED, as follows:

The Plaintiff's Motion for Partial Summary Judgment as to CPT Code 98940 is GRANTED and Defendant's Motion for Partial Summary Judgment as to CPT Code 98940 is DENIED.

BACKGROUND

This action involves Plaintiff's claim against Defendant, State Farm Mutual Automobile Insurance Company, (State Farm) for Personal Injury Protection (PIP) benefits pursuant to an assignment of benefits for chiropractic manipulations. Plaintiff, a South Florida Medical Provider, contends in its Motion for Partial Summary Judgment that Defendant improperly reduced the statutorily required payments for chiropractic manipulation represented by CPT code 98940 by 2% for the year 2014. Defendant argues that the Florida No-Fault Statute (PIP statute) as well as State Farm's policy permits the 2% reduction.

Defendant alleges that the 2% fee reduction is calculated into the Centers for Medicare and Medicaid Services (CMS) payment files. According to the 2014 Payment File, CPT code 98940 for Miami-Dade County equals $28.81 which at 200% equals $57.62.

Plaintiff contends that the CMS payment file, relied on by Defendant to pay the chiropractic manipulations billed in this case, is not the same "fee schedule" mentioned in the PIP statute. Plaintiff argues that the appropriate reimbursement rate for CPT code 98940 under Medicare Part B Physician Fee Schedule for Miami-Dade County is $29.40 which at 200% equals $58.80.

ISSUE

This case involves an issue of statutory construction that can be decided as a matter of law. The sole issue for determination by this Court is what constitutes the "allowable amount under the participating physicians fee schedule of Medicare Part B" as provided in Florida Statute § 627.736(5)(a)(1)(f).

ANALYSIS

"[W]hen the language of a 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 plaint and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). "When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) [29 Fla. L. Weekly S149a]. "Courts are not to add, subtract, or distort the words the Legislature has written." *Anderson Columbia v. Brewer*, 994 So. 2d 419, 420 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D2473a]. Statutory language that is plain and unambiguous must be read as written, "for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker*, 668 So. 2d 989, 990-91 (Fla. 1996) [21 Fla. L. Weekly S96a]. "If the statutory wording is unambiguous, then judicial inquiry is complete." *Klonis v. State*, 776 So. 2d 1186, 1189 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2635a].

A. Florida's PIP Statute

Florida Statute section 627.736, entitled "Required Personal Injury Protection Benefits; Exclusions; Priority; Claims," contains section (5)(a), which states:

> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.
>
> (a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered . . . . However, such a charge may not exceed the amount the person or institution customarily charges for like services or supplies. 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.
>
> 1. 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**:
>
> (l) The **participating physicians fee schedule of Medicare Part B**, except as provided in sub-sub-subparagraphs (II) and (III).

Florida Statute § 627.736(5)(a)(1) (emphasis added).

State Farm's policy limits PIP payments of medical expenses to no more than 80% of the "No-Fault Act 'schedule of maximum charges' including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers:" *State Farm's Certified Policy Record for Policy Form 9810A, March 12, 2019*, 16.

B. Participating Physicians Fee Schedule of Medicare Part B

While the definition of "allowable amount under the participating physicians fee schedule of Medicare Part B," (PFS) is not defined under Florida's PIP statute, its definition can be derived by looking at the federal code and the regulations pertaining to Medicare under the Social Security Act.

> "Since January 1, 1992, Medicare has paid for physicians' services under section 1848 of the Social Security Act (the Act), "Payment for Physicians' Services." The Act requires that payments under the physician fee schedule (PFS) are based on national uniform **relative value units (RVUs)** based on the relative resources used in furnishing a service. Section 1848(c) of the Act requires that national RVUs be established for physician work, practice expense (PE), and malpractice expense.

74 Fed. Reg. 226 (Nov. 25, 2009), 61741 (emphasis added).

The federal statute establishing the participating physicians fee schedule of Medicare Part B is 42 U.S.C. § 1395w-4. Payment of services under the fee schedule is determined by the product of the "**relative value** for the service," the "conversion factor" for the year, and the "geographic adjustment factor" for the service for the fee schedule area. 42 U.S.C. § 1395w-4(b)(1) (emphasis added). To determine the relative value for physicians' services, the federal code divides the services into three components; (A) the work component, (B) the practice expense component, and (C) the malpractice component. 42 U.S.C. § 1395w-4(c)(1). The Secretary of the Department of Health and Human Services (the Secretary) is tasked with developing "a methodology for combining the work, practice expense, and malpractice **relative value units**, determined under subparagraph (c), for each service in a manner to produce a single **relative value** for that service." 42 U.S.C. § 1395w-4(c)(2)(A)(i) (emphasis added). Subsection (b)(1) of the federal code instructs the Secretary to "establish, by regulation, fee schedules that establish payment amounts for all physicians' services furnished in all fee schedule areas." 42 U.S.C. § 1395w-4(b)(1); *All Family Clinic of Daytona Beach, Inc. v. State Farm Mut. Auto. Ins. Co.*, 685 F. Supp. 2d 1297, 1299 (S.D. Fla. 2010). Pursuant to a final rule published by the Department of Health and Human Services, "payments under the **physician fee schedule (PFS)** are based on the national uniform **relative value units (RVUs)** based on the relative resources used in furnishing a service. *74 Fed. Reg. 226 (Nov. 25, 2009)*, 61741.

C. The 2% Reduction in the Payment File

On November 25, 2009, the Department of Health and Human Services (DHHS), which is the supervising branch of CMS, published is annual Final Rule in the Federal Register. *74 Fed. Reg. 226 (Nov. 25, 2009)*. Under the Rule, Medicare implemented a 2% reduction for certain chiropractic fee codes (CPT Codes 98940, 98941, and 98941) "for calendar years 2010 through 2014." *Id.* at 61927. The reason for the 2% reduction was to recoup $50 million in Medicare expenditures over a 5-year period, at $10 million per year, starting in year 2010. *Id.* According to the Rule, the 2% reduction would not be reflected in the RUVs so as not to affect the physician's fee schedules. The 2% reduction only applied to providers who directly billed Medicare for reimbursement of their claims.

> [W]e 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. The RVUs published in Addendum B and posted on our Web site will not show this reduction but will be annotated to state that the reduction resulting from the chiropractic demonstration is not reflected in the RVUs.

74 Fed. Reg. 226 (Nov. 25, 2009), 61927. Therefore, DHHS applied the 2% reduction to the payment files, used by Medicare providers, but did not change the RUVs which forms the basis for the PFS pricing for each CPT code and is used by private payers to calculate their reimbursement levels.

In the present case Defendant is asking the Court to adopt a reimbursement methodology not contemplated by the plain language in the federal code or regulation. Pursuant to 42 U.C.C. § 1395w-4,

the Secretary of the Department of Health and Human Services establishes, by regulation, the fee schedules for all physicians' services furnished in all fee schedule areas. The participating physician fee schedules for all CPT codes are calculated using the RVUs factors, not the CMS payment files. Under the regulation, the 2% reduction was purposely excluded from the RUVs as a way of maintaining the integrity of the PFS. Defendant is therefore asking this Court to calculate the PFS codes using the CMS payment files rather than the method outlined under the federal code and regulation. This Court declines Defendant's invitation to "add, subtract, or distort the words" of the federal code or Florida's PIP statute. *Brewer*, 994 So. 2d at 420.

Based upon the forgoing, Defendant could not take advantage of the 2% reduction in fee payment by Medicare since this reduction was not reflected in the RUVs which forms the basis for the reimbursement rates for the CPT codes under Medicare part B participating physician fee schedule. As a result, Plaintiff is entitled to prevail on this issue. The appropriate reimbursement rate for CPT code 98940 under Medicare Part B participating physicians fee schedule for Miami-Dade County is therefore, $29.40 which at 200% equals $58.80.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Plaintiff's Motion for Partial Summary Judgment is GRANTED. Defendant Motion for Partial Summary Judgment is DENIED.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee— Elections— Fundraising—Judicial candidate may permit the candidate's father-in-law to send a letter soliciting generic, non-financial support of candidate's candidacy

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-7. Date of Issue: March 25, 2020.

ISSUES

Whether a candidate may permit the candidate's father-in-law to write letters and emails to professional acquaintances in support of the candidate's candidacy (while refraining from asking for contributions).

ANSWER: Yes, subject to appropriate precautions.

FACTS

The inquiring judicial candidate would like to permit the candidate's father-in-law to write letters soliciting support of the candidate's candidacy. The letter would include a reference to the candidate's web page. The candidate informs us that the candidate is not "close by any means" to the father-in-law, nor are they on especially friendly terms (apparently, the father-in-law is nevertheless willing to offer this support). It does not appear that the candidate would request the father-in-law to serve on the candidate's campaign committee. The candidate asks whether this would be permissible under Canon 7.

DISCUSSION

Two subsections of Canon 7 form the framework for our consideration of this issue. Florida Code of Judicial Conduct, Canon 7C(1) provides that "[a] candidate . . . for a judicial office . . . shall not personally solicit campaign funds . . ., but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy." Canon 7A(3)(b) extends that prohibition insofar as it requires a judicial candidate to "encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate[.]" The Code of Judicial Conduct defines a member of a candidate's family to include "a spouse, child, grandchild, parent, grandparent, *or other relative or person with whom the judge maintains a close familial relationship*." (emphasis supplied).

Unfortunately, this definition necessarily imposes a potentially awkward (and inherently ambiguous) query that candidates must be prepared to answer: which family members are sufficiently "close" such that the candidate should "encourage" their adherence to Canon 7's various restrictions?[1] In Fla. JEAC Op. 10-16 [18 Fla. L. Weekly Supp. 117a], we gave this precautionary advice:

> In the current inquiry, the relatives (brothers, mother-in-law, and cousins) are not within the definition a judge's family provided in the Code. However, if the judge "maintains a close familial relationship" with any of the persons identified, then that person would also fall within the admonition of Canon 7A(3)(b).
>
> Therefore, if the judge maintains a close familial relationship with the family member identified, the judge must encourage that person to refrain from soliciting contributions and endorsements. If the judge does not maintain a close familial relationship with the family member identified, then the judge is not required to encourage that person to refrain from soliciting contributions and endorsements.
>
> The peril of the situation, as is evident from the distinction drawn in the previous paragraphs, is that whether or not a relative (who is not within the definition of "family") maintains a close familial relationship with a judge is question of fact. Therefore, if it were determined that the relative did have a close familial relationship with the person soliciting support, and if it were determined that the judge had failed to encourage that person to abstain from solicitation of contributions or support, then the judge would have committed a violation of the Code. *See Inquiry Concerning a Judge, re Angel*, 867 So. 2d 379 (Fla. 2004) [29 Fla. L. Weekly S87a] (The Supreme Court of Florida publicly reprimanded a judicial candidate for, among other improprieties, permitting the judge's spouse and family members to attend and campaign at partisan political gatherings.)

The inquiring candidate states that the father-in-law is not close. Insofar as the candidate is satisfied that "the peril of the situation"—that is, that a finder of fact might deem otherwise—is sufficiently minimal, then the candidate need not "encourage" the father-in-law to refrain from sending a letter soliciting support.

The inquiring candidate here also tempers any potential violation of Canon 7 in that it does not appear that the letter the candidate's father-in-law contemplates sending would solicit financial contributions or endorsements, but would simply ask for "support" in a more generic sense. *Cf.* Fla. JEAC Op. 16-13 [24 Fla. L. Weekly Supp. 583a] ("Nothing in Canon 7 prohibits a judicial candidate from asking the electorate to vote for him or her—whether on Facebook, in person, or through the mass media."). However, we would caution the inquiring candidate that if the father-in-law were deemed a "member of the candidate's family," and if the letter he sends refers the reader to the candidate's campaign website, and if the website includes a feature that facilitates financial contributions or endorsements, then this solicitation (although admittedly somewhat attenuated) could potentially run afoul of Canon 7A(3)(b). *See* Fla. JEAC Op. 19-22 [27 Fla. L. Weekly Supp. 493a] ("Likewise, a candidate may not 'share' the candidate's campaign website, as doing so would be re-directing the recipient of the 'share' to the actual campaign's website where contributions and support are being solicited.").

REFERENCES

Fla. Code Jud. Conduct, Canon 7A(3)(b); 7C(1)
Fla. JEAC Op. 19-22, 16-13, 10-16

[1]We would note that Canon 7A(3)(b)'s prohibition further extends an already significant curtailment upon candidates' constitutional rights in contested elections. Crafting a more narrow, "bright line" definition of "Member of a candidate's family" might better serve everyone concerned while also minimizing the encroachment on civil liberties.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Family member affiliations—Disqualification is required when judge's brother-in-law is a partner in a large firm whose members may appear before the judge

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-8. Date of Issue: March 26, 2020.

ISSUES

1. Whether disqualification is required when the judge's brother-in-law is a partner in a large law firm whose members may appear before the judge, in view of the decision in *Sands Pointe Condominium Association, Inc. v. Aelion*?

ANSWER: Yes.

2. If disqualification is required, is remittal of disqualification pursuant to Canon 3F permissible?

ANSWER: Yes, so long as the procedures set forth in Canon 3F are followed.

3. If disqualification is not required, is disclosure required?

ANSWER: This question is rendered moot by the answer to

question 1.

FACTS

Issue # 1:

A judge's brother-in-law is a member of a large law firm whose members appear before the judge. The judge asks if one is required to disqualify himself or herself from cases in which the brother-in-law is not involved, in view of the holding in *Sands Pointe Ocean Beach Condominium Association, Inc. v. Aelion*, 251 So 3d 950 (Fla. 3rd DCA 2018) [43 Fla. L. Weekly D1283a]. The district court of appeal in that decision found that disqualification of the entire firm was not required in a situation in which one member of a large firm was the opponent of the judge in an upcoming judicial election.

In the *Sands Pointe* case, *id*., the court, after thoroughly considering both prior appellate decisions and opinions issued by the Judicial Ethics Advisory Committee, determined that disqualification is not automatically required if the judge's opponent is merely a member of a large law firm and there is no significant relationship between the attorney appearing before the court and the judge's opponent and if nothing had been done by the attorney's law firm to take a position or to otherwise become involved in the election.

Further information provided by the inquiring judge reveals that the firm with which the judge's brother-in-law is associated employs about fifty attorneys and has offices in three counties. The judge's brother-in-law is a partner in the firm but works in a division separate from the attorneys who appear before the judge.

DISCUSSIONS

Fla. Code Jud. Conduct, Canon 3E (l) states that a judge should disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a parties' lawyer. . ." [or] (d) "the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:" . . . (iii) "is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding."

The inquiring judge seeks a determination of whether the reasoning of the *Sands Pointe* court, based on its analysis of the rationale behind disqualification, would allow the judge to preside over a case in which a member of the judge's brother-in-law's law firm represents a party if the firm is large and the brother-in-law has no involvement in the case.

Though judges should always be disqualified if evidence of actual prejudice exists, the decisions of both this committee and of the appellate courts suggest that questions involving elections must be analyzed in a somewhat different manner from those involving familial or financial relationships. The importance of allowing attorneys to participate in various ways in judicial election campaigns without undue consequences for them or for their law firms was recognized in the *Sands Pointe* court's analysis and has been noted by the Florida Supreme Court in several of its decisions. See *Nathanson v. Korvick*, 577 So. 2d 943 (Fla. 1991) and *Zaias v. Kaye*, 643 So. 2d 687 (Fla. 1994).

Such situations in which the constitutional issue of encouraging free and fair elections is implicated must be viewed somewhat differently from other cases. Those cases are affected not only by the strictures of Canon 3 of the Florida Code of Judicial Conduct, but also add the specific protections and restrictions included under Canon 7 of the Code. In the present inquiry, only Canon 3 is to be considered.

The commentary to Canon 3E (1) (D) provides:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(l), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E (l) (d) (iii) may require the judge's disqualification.

The committee finds that the inquiry before it is controlled by Canon 3E and that Fla. JEAC Op. 17-20 [25 Fla. L. Weekly Supp. 765a] addresses the exact question posed. In that opinion, a judge had inquired whether a judge must be disqualified if an attorney from a law firm in which the judge's brother-in-law is a partner appears as counsel in a case before the judge. The answer was an unequivocal yes. That same opinion, to which the inquiring judge is referred, cites numerous prior decisions of this committee involving inquiries concerning the employment of a judge's relative by a law firm. While the need for disqualification becomes less clear as the relative's kinship to the judge becomes more distant or the relative's position in the firm is less directly related to the practice of law, one party having a lawyer from a firm in which someone as close as the judge's brother-in-law is a partner could indeed cause other parties to reasonably question the judge's impartiality. As stated in Fla. JEAC Op. 17-20 [25 Fla. L. Weekly Supp. 765a], "We believe that a partner in a law firm has more than a *de minimus* interest in any case in which an attorney from that firm appears, whether it be a matter of reputation, client satisfaction, or economics." The committee finds nothing in the *Sands Pointe* case that would cause it to recede from its holding in Fla. JEAC Op. 17-20 [25 Fla. L. Weekly Supp. 765a]. It is the opinion of the committee that the inquiring judge should disqualify himself or herself from the case.

Issue # 2:

In answer to the judge's second question, whether a remittal of disqualification is appropriate, the committee agrees that the judge may disclose on the record the basis for the disqualification and, in accordance with the procedures set forth in Canon 3F, may ask the parties whether they wish to waive the disqualification. *See* Fla. JEAC Op. 06-26 [14 Fla. L. Weekly Supp. 110a].

Issue # 3:

The judge's third question, whether disclosure is required if disqualification is not required, is rendered moot by the committee's determination that disqualification *is* required in the circumstances described by the judge.

REFERENCES

Sands Pointe Condominium Association, Inc. v. Aelion, 251 So.3d 950 (Fla. 3d DCA 2018)
Nathanson v. Korvick, 577 So. 2d 943 (Fla. 1991)
Zaias v. Kaye, 643 So. 2d 687 (Fla. 1994)
Fla. Code Jud. Conduct, Canons 3E(1)(a) and (d), 3F
Fla. JEAC Op. 07-17, 06-26

* * *

Judges—Judicial Ethics Advisory Committee—Elections—Virtual campaigning—Public appearances—Campaign tactics—Fund-raising—Principles applicable to in-person campaign events and activities are applicable to virtual campaign events and activities—A judicial candidate may not appear on a computer or television screen during a video meet-and-greet or video fundraiser while a donation button appears on the screen—Candidate may not appear on a computer monitor for a virtual fundraiser, leave the screen temporarily while donation button appears, and then reappear on screen when donation button disappears—Candidate may not permit a member of the committee of responsible persons to solicit donations during a telephonic campaign event if committee member is in another room than the candidate and the candidate temporarily leaves the event during the request—Candidate may not call a prospective contributor, engage in preliminary conversation, and then turn over phone to a member of the committee of responsible persons who would make actual solicitation

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-9 (Election).[1] Date of Issue: March 27, 2020.

ISSUES

1. May a judicial candidate appear on a computer or TV screen during a video meet and greet or video fundraiser while a donation button appears on the screen?

ANSWER: No; however, a judicial candidate may participate in a virtual campaign event as provided herein.

2. May a judicial candidate appear on a computer monitor for a virtual fundraiser and can a donation button appear if the candidate leaves the screen temporarily, and then the button disappears when the judicial candidate reappears on the screen?

ANSWER: No; however, a judicial candidate may participate in a virtual fundraiser as provided herein.

3. May a committee of responsible persons solicit donations for a judicial candidate during a telephonic campaign event if they are in another room other than the judicial candidate and the judicial candidate temporarily leaves the event during the request?

ANSWER: No; however, a judicial candidate may participate in a telephonic campaign event as provided herein.

4. May a judicial candidate work with a committee of responsible persons to do introductions telephonically and once the judicial candidate leaves the conversation may members of the committee solicit support and/or donations?

ANSWER: No.

FACTS

A judicial candidate notes that due to the social distancing, self-quarantine requirements, and other requirements in view of the COVID-19 pandemic, it has become necessary to consider new methods of fundraising for judicial campaigns. To that end, guidance is sought regarding the inquiries noted above.

DISCUSSION

Our response to these issues is guided by Fla. Code Jud. Conduct, Canon 7C(1), which provides in pertinent part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

This Committee has steadfastly safeguarded Canon 7C(1)'s prohibition against candidates' solicitation of funds and applied it to prohibit proposed conduct when it could appear to a reasonable person that the conduct was a solicitation by the candidate. JEAC Op. 12-14 [19 Fla. L. Weekly Supp. 755a]. "An individual who solicits a contribution must be a member of the committee of responsible persons." JEAC Op. 18-16 [26 Fla. L. Weekly Supp. 253a].

With respect to Issues 1, 2 and 3, the inquiring candidate seeks guidance as to virtual campaign events and activities in the context of a "virtual meeting."[2] In this context, the same principles applicable to in-person campaign events and activities are applicable to virtual campaign events and activities. Specifically, a judge or judicial candidate may not in any way take part in the solicitation of campaign contributions.

In JEAC Op. 12-14 [19 Fla. L. Weekly Supp. 755a], this Committee addressed an inquiry as to whether a committee of responsible persons, established by a judicial candidate to support the candidate's campaign, could hold an event at the candidate's parents' home, at which funds will be solicited for the candidate's campaign and whether the Committee could solicit contributions at the event. We opined:

> "while the committee is expressly allowed to solicit and raise funds, neither the candidate nor the parents may be present when those solicitations occur. Any solicitation of funds at this party must be made only by the members of the committee, in such a way that a reasonable person would not consider that the solicitation is being made by the candidate or the candidate's parents. Accordingly, the solicitation must be made outside the presence of the candidate and the parents. The candidate and the parents should remove themselves from the party when the solicitation occurs, so as to avoid the impression which a reasonable person may draw that the solicitation was being made by the candidate or the candidate's parents."

Thus, in response to Issue 1, a judicial candidate may not appear on a computer or TV screen during a video meet and greet or video fundraiser while a donation button appears on the screen. To opine otherwise would be equivalent to permitting a member of the committee of responsible persons to hold up a donate sign, while the judicial candidate was addressing potential supporters at an in-person campaign event or activity.

In response to Issue 2, a candidate may appear during the virtual fundraiser sponsored by the committee of responsible persons but must leave the virtual meeting before the committee asks for contributions via the donation button. However, the candidate may not come back to the virtual meeting after the ask. Consistent with JEAC Op. 12-14 [19 Fla. L. Weekly Supp. 755a], the candidate should leave the virtual meeting when the solicitation occurs, so as to avoid the impression which a reasonable person may draw that the solicitation was being made by the candidate. The candidates' departure should be announced when the candidate departs so that it is clear to all concerned that he/she has departed. Such announcement would more clearly eliminate concerns over the appearance of improper soliciting. Simply leaving a virtual meeting is not always that easily noticed by those who continue to participate.

With respect to Issue 3, a candidate may appear during a telephonic campaign event sponsored by the committee of responsible persons but must leave the event before the committee asks for contributions. However, the candidate may not come back to the telephonic campaign event after the ask. Similarly, when the candidate leaves the telephonic meeting, it should be announced so that it is clear to all concerned that he/she has departed.

This Committee has not previously addressed the extent to which a judicial candidate can be personally involved in directing or overseeing the activities of the members of the committee of responsible persons in the solicitation of support[3] or donations. In JEAC

Op.14-04 [21 Fla. L. Weekly Supp. 459a], this Committee opined:

> There is no language in Canon 7 that would prohibit a candidate from being campaign treasurer, directing or managing the campaign (including its website), making campaign expenditures for campaign expenses, or advising or giving direction to a committee of responsible persons, whose responsibility would be to do what the candidate cannot personally do, that is, seek contributions or solicit attorneys for publicly stated support.

With respect to Issue 4, the inquiry posits that candidate might call a prospective contributor, engage in some preliminary conversation, and then turn over the phone to a member of the committee of responsible persons who would make the actual solicitation. The Committee agrees with and adopts the reasoning of the Wisconsin Judicial Conduct Advisory Committee when opining on a similar inquiry:

> The Committee believes that such a solicitation method violates the Code of Judicial Conduct because of the candidate's transparent attempt to avoid a "personal" solicitation. It remains solicitation by the candidate but done with a wink and a nod. The presence of the candidate in the conversation continues. It is as if the candidate is looking over the shoulder of the solicitor." Wis. Jud. Cond. Adv. Comm, Op. 97-7 (1997) [22 Fla. L. Weekly S552a]

It should be noted that nothing in Canon 7 prohibits a candidate from advising or giving direction to a member of the committee of responsible persons from whom to solicit contributions, without otherwise being present during the solicitation.

REFERENCES

Fla. Code Jud. Conduct, Canon 7C(1)
Fla. JEAC Ops. 18-16, 1714, 14-04, and 12-14
Wis. Jud. Cond. Adv. Comm. Op. 97-7 (1997)

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[1]The Judicial Ethics Advisory Committee has appointed an Election Practices Subcommittee. The purpose of this subcommittee is to give immediate responses to campaign questions in instances where the normal Committee procedure would not provide a response in time to be useful to the inquiring candidate or judge. Opinions designated with the "(Election)" notation are opinions of the Election Practices Subcommittee of the Judicial Ethics Advisory Committee, and have the same authority as an opinion of the whole Committee.

[2]The Committee uses the term "virtual meeting" as permitting individuals, regardless of their location, to use video, audio, and text to link up online, permitting participants to share information and data in real-time without being physically located together.

[3]In JEAC Op. 17-14 [25 Fla. L. Weekly Supp. 681a], the Committee opined that a judicial candidate may personally submit support and endorsements from public officials and individuals who are not attorneys, subject to certain ethical restrictions.

* * *

Judges—Judicial Ethics Advisory Committee—Elections—Campaign tactics—A judicial candidate's campaign committee may maintain a Facebook page on behalf of the candidate and post updates and communications on behalf of the candidate that are written in the first person provided the "first person" communications do not seek or solicit financial support or public statements of support—Candidate may retain a vendor whose principal is publicly involved in partisan political campaigning subject to restrictions

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-10 (Election). Date of Issue: April 8, 2020.

ISSUES

1. May a judicial candidate's campaign committee maintain a Facebook page on behalf of the candidate and post updates and communications on behalf of the candidate that are written in the first person (i.e., as if the candidate is communicating directly to the reader)?

ANSWER: Yes, provided the "first person" communications do not seek or solicit financial support or public statements of support.

2. May a judicial candidate hire a vendor company where a principal of that company is an officer in a partisan political committee?

ANSWER: A majority of the Committee answers, yes, subject to the restrictions the candidate reports. A dissenting Committee member would answer the question in the negative.

FACTS

A judicial candidate wishes to know whether a Facebook page that is maintained by the candidate's committee can include communications and posts that would appear to be directly from the candidate. That is, the page's communications and posts would be phrased in the first person ("I" for the candidate, instead of "we" for the committee).

The candidate also wishes to know whether the candidate may hire a certain vendor. According to the candidate, this vendor "happens to also be an officer in a partisan political committee. This person would not be my campaign manager and is being hired in his individual capacity as a business man. This individual also is up for election in a neighboring county but will not be on my ballot. . . . The officer's company and not the individual would be named on the work completed. Additionally, the vendor has other people who work for or with him and he may only oversee and not do the actual work on my campaign. . . . [T]he vendor would not be utilizing the resources or materials of the political party he is affiliated with. . . [T]he vendor does digital work and I wanted to hire his company to assist me in my campaign. My committee and I would be responsible for content and the vendor for distribution."

DISCUSSION

Our response to the first issue begins with Fla. Code Jud. Conduct, Canon 7C(1), which provides in pertinent part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law,

The canons (and this Committee's opinions interpreting the canons) have consistently emphasized that a candidate cannot do indirectly through others what the candidate would be prohibited from doing directly. See Fla. Code Jud. Conduct, Canon 7A(3)(d) ("except to the extent permitted by Section 7C(1), [a judicial candidate] shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon"). Since the candidate cannot "personally solicit" financial contributions or statements of public support, any Facebook page communication or post that appears to come directly from the candidate, although authored by somebody else, could not do so either. In other words, it makes no difference whether the candidate posts "I am asking for your financial support for my campaign," or whether a committee member writing as if he or she were the candidate posts "I am asking for your financial support for my campaign." The reader would understand either communication as coming from the candidate. According to Canon 7C(1), that is improper.

But to the extent the posts contemplated by the candidate would encompass such things as updates on campaign events, candidate appearances, public speeches, statements by the candidate about the candidate's qualifications, and the like, there is no reason that the posts couldn't be written in the first person, as if they were from the candidate. We do not believe Canon 7 was intended to completely stifle a candidate's ability to communicate about his or her candidacy

through what has become a very common method of campaigning. *Cf.* Fla. JEAC Op. 16-13 [24 Fla. L. Weekly Supp. 583a] ("Nothing in Canon 7 prohibits a judicial candidate from asking the electorate to vote for him or her—whether on Facebook, in person, or through mass media.").

The second inquiry poses a harder question, such that we do not have a unanimous opinion for the inquiring candidate.

A majority of the Committee answers the second question as follows: In Fla. JEAC Op. 18-20 [26 Fla. L. Weekly Supp. 338b] we stated that Fla. Code Jud. Conduct, Canon 7 and Florida Statute section 105.071 "unequivocally prohibit judicial candidates . . . from becoming involved in partisan politics." In that opinion we indicated that a candidate who had retained a campaign management firm, "not knowing that one of the owners or principals of the firm . . . holds an executive position in a partisan organization, in an individual capacity" could continue to employ the firm under those circumstances as long as "the judicial candidate takes all steps necessary to ensure that the campaign management firm does not utilize the resources, facilities, or materials of the partisan political organization on behalf of the judicial candidate." Our opinion in 18-20 balanced the letter and spirit of Canon 7, section 105.071, and the reality that "[c]ampaign management films and consultants often times advise several different candidates for different offices during the same election cycle."

The present inquirer, however, is fully aware of the partisan connection between the vendor and its officer. Moreover, the candidate knows that the vendor's officer is a candidate for election in a different county (we were not informed whether the election is partisan or non-partisan, but we assume it is the former). Thus, the inquiring candidate could not rely entirely on the guidance of that opinion here. Nevertheless, we think the precautions the candidate proposes sufficiently mitigate any risk that the candidate might be perceived as "becoming involved in partisan politics."

In Fla. JEAC Op. 08-16 [15 Fla. L. Weekly Supp. 1035a], a divided Election Subcommittee opined that a candidate could not employ "a partisan political candidate running for a different office or an executive officer of a partisan political party" as the candidate's "campaign manager/consultant." One of the then-subcommittee members believed that the candidate could hire such an individual as long as the campaign manager/consultant did not utilize any resources, facilities, or materials of his partisan political committee while performing work for the candidate and the candidate did not hold out the campaign manager/consultant in his individual capacity or as an executive officer of a partisan political committee as working for the candidate.

Those very restrictions are what the inquiring candidate proposes here. More than that, though, as we understand the inquiry the candidate would not hire an individual (who happens to be publicly engaged in partisan politics), but rather his business, thus further removing the possible perception that the judicial candidate is engaged in partisan politics (we assume the business' name is readily distinguishable from the principal's). And the scope of the contemplated employment appears to be limited—the candidate would hire the business as a digital advertising vendor, not as a campaign manager or consultant.[1] Given these restrictions, we are confident that the candidate would not be perceived as participating in partisan politics for purposes of Canon 7 and Fla. Stat. §105.071. To the extent that our current opinion differs from Fla. JEAC Op. 08-16 [15 Fla. L. Weekly Supp. 1035a], we recede from our former opinion.

A dissenting Committee member would answer the second question as follows: The facts underlying this opinion indicate that the candidate proposes to hire an individual who is "an officer in a partisan political committee" and who is up for election in a neighboring county," presumably as a partisan candidate, but who will not be on the same ballot as the candidate.

In Fla. JEAC Op. 10-18 [18 Fla. L. Weekly Supp. 119a], Issue 2, the Committee opined that a candidate for judicial office could use as a campaign consultant a sitting member of the county commission who is not currently running for office or asserting any political party view in support of any other non-judicial or judicial candidate. The Committee's conclusion: "In sum, we find no basis for a per se rule forbidding other, nonjudicial officeholders—who are not themselves candidates in the same election cycle, are not acting on behalf of any partisan organization, and are not presenting judicial candidates to the public as a group—to serve as campaign managers for judicial candidates." One of the assumptions underlying that opinion was "that the county commissioner is not an executive officer of a partisan political committee."

The question before the Committee in Fla. JEAC Op. 08-16 [15 Fla. L. Weekly Supp. 1035a], Issue 2, was: May a candidate for election to judicial office hire an executive officer of a partisan political committee to be the judicial candidate's campaign manager/consultant? The answer of the Committee was: No.

Reliance on the single dissenting member of the Election Subcommittee in Fla. JEAC Op. 08-16 [15 Fla. L. Weekly Supp. 1035a] ignores the view of the majority of the then-members of the Subcommittee:

> Two members of the elections subcommittee believe that such action would improperly inject partisan politics into the campaign because the judicial candidate would likely have access (or would be perceived to have access) to the resources and materials of the partisan political committee for which the prospective campaign manager/consultant serves as executive officer. These two subcommittee members further believe that the employment of an executive officer of a partisan political committee in the high profile role of campaign manager could create the public perception that the judicial candidate was seeking the support, or had sought the support, of that partisan political committee.

I would answer the second inquiry in the same way here, and respectfully dissent from that part of the Committee's opinion today.

REFERENCES

Fla. Stat. §105.071

Fla. Code Jud. Conduct, Canons 7A(3)(d), 7C(1) Fla. JEAC Ops. 18-20, 16-13, 10-18 , 08-16

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[1]A campaign manager or consultant is something of a term of art. There is no statutory or regulatory definition of the role of a "campaign manager" or "consultant" for purposes of judicial elections. Nor do the canons make any mention of campaign managers or consultants. Nevertheless, the Committee is well aware of the vital (and sometimes public) role that consultants or campaign managers frequently play in judicial elections. *See generally* www.theaapc.org (American Association of Political Consultants, explaining that political consultants provide "survey research, television or radio production and placement, telemarketing, direct mail, fund raising, media relations, computer use, and a host of additional forms of expertise" in political campaigning). Because the inquiring candidate does not propose to hire this vendor as the candidate's consultant or campaign manager, we do not believe the resolution of the second issue in Fla. JEAC Op. 10-18 [18 Fla. L. Weekly Supp. 119a] would have any application here.

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