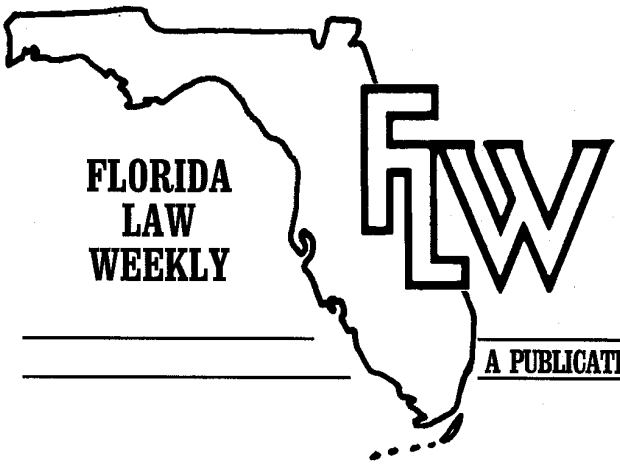
Volume 28, Number 3, July 31, 2020



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 177-247

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—MORTGAGE PROTECTION—STANDING—THIRD-PARTY BENEFICIARIES. A circuit court held that mortgagors do not have standing to bring a claim for damages against an insurer as third-party beneficiaries of a lender-placed mortgage protection insurance policy where the policy specifically excludes coverage for any interest that the mortgagors may have in the property. Having an insurable interest in the property is insufficient to provide the mortgagors with standing to pursue a claim under the policy as intended third-party beneficiaries where the policy language demonstrates a contrary intent.** *LORENCEAU v. GREAT AMERICAN ASSURANCE CO. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. May 7, 2020. Full Text at Circuit Courts-Original Section, page 217a.*

- **TAXATION—DOCUMENTARY STAMPS—MORTGAGES—AFFORDABLE HOUSING. A nonprofit corporation challenged the Department of Revenue's partial denial of requested refunds of documentary stamp and nonrecurring intangible taxes paid at the time a note and mortgage financing an affordable housing apartment complex was recorded. The court entered summary judgment in favor of the plaintiff. "[Section] 420.513(1)'s use of the word 'shall' in declaring that all notes, mortgages and security agreements that arise out of or are given to secure the repayment of loans issued in connection with the financing of any housing shall be exempt from taxation conveys a clear, ordinary and mandatory meaning that the Multifamily Mortgage and Promissory Note are exempt from the entire amount of documentary stamp tax and the entire amount of the nonrecurring intangible tax paid at the time of recording the Multifamily Mortgage."** *NONPROFIT HOUSING PRESERVATION SB, INC. v. EXECUTIVE DIRECTOR OF FLORIDA DEPARTMENT OF REVENUE. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. May 11, 2020. Full Text at Circuit Courts-Original Section, page 221a.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $275 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800) 351-0917; Fax (850) 222-7938. E-mail: staff@FloridaLawWeekly.com

Bold denotes decision by circuit court in its appellate capacity.

MUNICIPAL CORPORATIONS (continued)

REAL PROPERTY

SCHOOLS

TAXATION

TORTS

ZONING

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

* * *

Volume 28, Number 3
July 31, 2020
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Appeals—Certiorari—Where licensee received notice of revocation of his license but did not challenge revocation through Bureau of Administrative Reviews and obtain final order, there is no order to appeal—Revocation was mandated by law where licensee was convicted of four DUIs in California while he was a licensed Florida driver—Petition for writ of certiorari is denied

BRYAN ANTHONY DAVID, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2017-AP-000033. April 15, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(COOPER, J.) This matter comes before this Court on Petitioner, Bryan Anthony David's, Petition for Writ of Certiorari, filed on September 19, 2017. The Court heard Oral Argument on the Petition on February 21, 2020. Petitioner and Respondent both appeared before the Court, with Petitioner appearing by telephone. Having reviewed the Petition, Respondent's response thereto, considered arguments of Petitioner and Respondent, examined the record before this Court, and being otherwise fully advised, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief.

Petitioner argues that his procedural due process rights were violated by Respondent, Department of Highway Safety and Motor Vehicles (hereinafter "Department") due to its alleged failure to provide him notice of the permanent revocation of his license pursuant to Section 322.251, Florida Statutes (1989). Petitioner also argues that the Department violated his substantive due process rights by including his convictions for traffic offenses which took place outside of Florida, namely California. Petitioner's DUI convictions are as follows:

1. July 8, 1985 California disposition of guilty for Driving Under the Influence.
2. November 12, 1986 California disposition of guilty for Driving Under the Influence with property damage/personal injury.
3. September 7, 1988 California disposition of guilty for Driving Under the Influence, for a July 18, 1987 offense date.
4. September 7, 1988 California disposition of guilty for Driving Under the Influence, for a May 17, 1988 offense date.
5. September 1, 1989 California disposition of guilty for Driving Under the Influence with property damage/personal injury.

The Department permanently revoked Petitioner's license on September 7, 1988 due to the first four DUI convictions. Section 322.28(2)(e), Florida Statutes (1989), mandates that the Department permanently revoke the driving privilege of a person who has been convicted of four DUIs if the court has not permanently revoked the driver license or privilege. The provision further states that convictions of substantially similar traffic offenses outside of the state of Florida are considered convictions for purposes of the subsection. Thus, the Department permanently revoked Petitioner's driving privilege. In addition, Petitioner received notice of the permanent revocation of his driving privilege. Section 322.251(2), Florida Statutes (1989) states the following:

> The giving of notice and an order of cancellation, suspension, or revocation by mail is complete upon expiration of 20 days after deposit in the United States mail. *Proof of the giving of notice and an order of cancellation, suspension, or revocation in either such manner shall be made by entry in the records of the department that such notice was given.* **Such entry shall be admissible in the courts of this state and shall constitute sufficient proof that such notice was given.** (Emphasis added)

The Department's driving record for Petitioner states that he received notice of the permanent revocation of his license on October 2, 1989 and August 14, 1992 due to obtaining four or more DUI convictions. The Petitioner apparently did not challenge either such orders.

The pivotal issue facing this court at this stage of the case is one of jurisdiction. While Petitioner has filed a Petition for Writ of Certiorari concerning the permanent revocation of his Florida driver license, this court is unaware of any order from which Petitioner has appealed. Section 322.31, Florida Statutes (2019), states the following:

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

Petitioner received notice of the permanent revocation of his Florida driver license. However, Petitioner failed to appeal the permanent revocation of his license within 30 days of the notice of the permanent revocation of his driver license pursuant to Section 322.31, Florida Statutes and Rule 9.100 of the Florida Rules of Appellate Procedure.

Further, there is no documentation in the record indicating that there is a final order that Petitioner is timely appealing. While there is a June 27, 2017 letter from the Customer Service Center of the Department, in response to Petitioner's June 11, 2017, Consumer Appeal Form, the June 27 letter did not constitute a final order of the Department. The letter merely states that it confirmed that Petitioner's Florida driver license and record is under permanent revocation for having four or more DUI convictions. The letter further states that Petitioner had been previously referred to the Bureau of Administrative Reviews to resolve his concerns. The Bureau of Administrative Reviews, which is a Bureau within the Department of Highway Safety and Motor Vehicles, is the entity where individuals can challenge the cancellation, suspension, or revocation of their driver licenses, or apply to be granted the privilege of driving on a restricted basis. However, there is no record of the Bureau of Administrative Review having reviewed or issued a final order in this matter.

The Department stipulated at oral argument that the Petitioner has the option of having his record reviewed by the Department, allowing him to show cause why his license should not be revoked. Section 322.27(5), Florida Statutes (2019), allows a driver whose license has been revoked to petition the Department to show cause why his license should not be revoked. Rule 15A-1.0195, Florida Administrative Code also provides for a show cause hearing. Petitioner did not avail himself of this hearing in his pursuit of what he deems as a needed correction of his driver record. A final order would be issued after that proceeding and Petitioner could, depending on the outcome, appeal that order.

Even if this Court were to consider the merits of the Petition, Petitioner was convicted of at least four DUIs while a licensed Florida driver. The law clearly mandates that the Department revoke an individual's license or driving privilege under such circumstances.

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

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

* * *

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Hearing officer's order sustaining license revocation is supported by competent substantial evidence where driving record showing four DUI convictions was admitted into evidence—Invalidation of order sustaining permanent license revocation not warranted by illegible or missing citations underlying licensee's convictions

KERRY R. ROBERTS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2019 AP 35. April 9, 2020. Counsel: Lee Meadows, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(DEMPSEY, J.) **THIS CAUSE** came before the Court upon Petition for Writ of Certiorari filed on December 20, 2019. The Court having considered the Petition, Respondent's Response thereto, Petitioner's reply, and examined the record before this Court, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief as follows.

1. In a first-tier certiorari proceeding concerning an administrative action, the court is required to determine three things: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). When exercising certiorari review, the court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. *See DHSMV v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

2. Petitioner argues that there was no competent substantial evidence for the hearing officer below to sustain the revocation of his driving privilege. On April 17, 2000, Petitioner's driving privilege was permanently revoked pursuant to Section 322.26(1)(a), Florida Statutes for having four DUI convictions. The permanent revocation was added to the record on October 25, 2001, and notice was provided on November 1, 2001. Approximately 18 years after notice of the permanent revocation of his driving privilege, Petitioner requested a hearing to show cause why his driving privilege should not have been revoked, pursuant to Section 322.27(5), Florida Statutes and Rule 15A-1.0195, Florida Administrative Code (F.A.C.). On July 23, 2019, Petitioner made a public records request of the Department for documents used by the Department to support the convictions of Petitioner for DUI. The sole issue raised by Petitioner is whether the Department's lack of supporting records or alleged illegible supporting records require removal of the DUI convictions from his driving record. Petitioner argues that due to missing citations for two prior DUI convictions and one purportedly illegible citation, there is no competent substantial evidence to sustain the permanent revocation of his driving privilege.

3. There was competent substantial evidence to support the hearing officer's determination. Section 322.201, Florida Statutes (2001), provides that the driving record of an individual is self-authenticating evidence to establish the prior DUI convictions. *See also Littman v. State, Dept of Highway Safety and Motor Vehicles,* 869 So. 2d 771 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D851b]. The entries on Petitioner's driver record, which was admitted into evidence at the hearing below, constitute competent substantial evidence that he was convicted four times for DUI. *See Vandetti v. Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 399a (Fla. 2nd Cir. Ct. 2017). Section 322.26(1)(a), Florida Statutes (2001), mandates the permanent revocation of a person's driver license who is convicted of a fourth DUI. Petitioner's driving record, which was part of the evidence placed into the record at hearing, demonstrates that Petitioner received four DUI convictions—three in Leon County and one in Wakulla County.

4. Petitioner had the burden to show cause why his driving privilege should not have been permanently revoked. *Midgett v. Department of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 795b (Fla. 4th Jud. Ct. 2009). Rule 15A-1.0195, F.A.C. gives a person whose license has been cancelled, suspended, or revoked the opportunity to petition the Department to show cause why his or her driving privilege should not have been cancelled, suspended, or revoked. Petitioner did not meet this burden. Petitioner did not present any evidence establishing any error, mistake, or any other evidence indicating that the revocation of his license was incorrect. *See McKinnon v. Department of Highway Safety and Motor Vehicles*, (Fla. 13th Jud. Ct)(April 1, 2020) [28 Fla. L. Weekly Supp. 201a]. Illegible or missing citations do not warrant invalidation of the order sustaining the permanent revocation of his driving privilege or its reinstatement. *See Mikell v. Department of Highway Safety and Motor Vehicles,* 11 Fla. L. Weekly Supp. 683a (Fla. 2nd Jud. Ct. 2004). This is especially true when the records retention period for these records has lapsed. To hold otherwise would allow any driver with a permanently revocation to simply wait until records are purged and then demand removal of DUI convictions on the record. Such a tactic would frustrate the legislature's intent that the driving record establishing such convictions is self-authenticating and sufficient proof of the convictions. Further, the citation which Petitioner asserts is unreadable is sufficiently legible to discern his arrest for DUI.

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

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

* * *

Licensing—Driver's license—Hardship license—Denial—In second hardship license hearing following DUI conviction, Department of Highway Safety and Motor Vehicles is not required to follow decision made in initial hardship license hearing held after arrest

JAMES SCOTT AUGUSTINE, Plaintiff, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 4th Judicial Circuit (Appellate) in and for Nassau County. Case No. 45-2020-CA-000081-CAAY, Circuit Civil Division. April 20, 2020. Counsel: Susan Z. Cohen, Jacksonville, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Defendant.

AMENDED ORDER DENYING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

(FAHLGREN, J.) This matter is before the Court on Petitioner's Petition for Writ of Certiorari filed March 16, 2020. Having considered the Petition for Writ of Certiorari, the Respondent's Response to Petition for Writ of Certiorari filed on April 7, 2020, the Petitioner's Reply, and the Petitioner's Motion for Rehearing filed on April 17, 2020, and being otherwise fully advised, the Court finds that the arguments set forth in the Respondent's Brief have merit, to wit: "[i]f the Department was required to follow the decision made in a prior waiver hearing, it would make little sense for the legislature to provide for a hardship license hearing following a revocation based upon a DUI conviction. Instead, the initial decision made after arrest would wholly govern the matter. However, the legislature decided to provide

for such hearing following a DUI conviction." In addition, in the second waiver hearing, "there were two new facts on the driver record alone: (1) the Petitioner has been convicted of DUI, and not merely charged; and (2) at the time the Petitioner was driving with a breath alcohol level of 0.193g/210L, he was also travelling 109 mph in a 60-mph zone." Specifically, when considering a hardship license application of a habitual traffic offender, a hearing officer must investigate "the person's qualification, fitness, and need to drive." 322.27 1(1)(b), Fla. Stat. There was competent substantial evidence for the hearing officer's determination in this case and no violations of due process. In the alternative, any other arguments were waived because they were not raised to the hearing officer. Accordingly, it is, therefore, **ORDERED:**

Petitioner's Petition for Writ of Certiorari is hereby **DENIED**.

* * *

TIMOTHY JOHN SIPP, Petitioner, v. THE STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 502019CA011048XXXXMB. April 23, 2020. Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Heather Rose Cramer, Palm Beach Gardens, for Petitioner. Kristi M. Van Vleet, Jacksonville, for Respondent.

(PER CURIAM.) Petitioner seeks review of an order sustaining the suspension of his driver license based on the hearing officer's finding that Petitioner had an unlawful breath-alcohol level while driving. We affirm the decision of the hearing officer. *See Dep't of Highway Safety & Motor Vehicles v. Colling*, 178 So. 3d 2 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]. However, we write to caution law enforcement to take better care to ensure their reports do not contain scrivener's errors which can result in the unnecessary expenditure of judicial resources. We also caution hearing officers to be mindful that not all discrepancies can be dismissed as scrivener's errors. Nevertheless, we affirm the hearing officer's decision in the instant case and **DENY** the Petition for Writ of Certiorari. (ROWE, SMALL, and KERNER, JJ., concur.)

* * *

Criminal law—Search and seizure—Trial court erred by denying state's motion to strike defendant's motion to suppress certain statements as illegally obtained—Motion was not legally sufficient where it did not state with particularity the statements defendant sought to have suppressed—Ruling is without prejudice to defendant refiling legally sufficient motion

STATE OF FLORIDA, Appellant, v. DANA FAIRCLOTH, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Citrus County. Case No. 2019-AP-10. L.T. Case No. 2018-CT-0875. April 23, 2020. Appeal from the County Court in and for Citrus County. The Honorable Mark J. Yerman, Judge. Counsel: William Grant and Christopher Blaisdell, The Law Office of Grant & Dozier, LLC, Inverness, for Appellee. Michael Kotsifakis, Assistant State Attorney, Inverness, for Appellant.

OPINION

(DAVIS, H., J.) Appellant appeals the trial court's denial of its *ore tenus* Motion to Strike Appellee's Motion to Suppress. Appellant argues that the Motion to Suppress was legally insufficient, because it did not meet the requirements of Fla. R. Crim. Pro. 3.190(h)(2). We agree, and reverse.

Appellee moved to suppress "all evidence subsequently resulting from the violation of the Fifth Amendment Right of the Defendant on October 3, 2018, including. . .all statements made by the Defendant, Dana Faircloth, to any and all Law Enforcement Officers because Ms. Faircloth invoked her Fifth Amendment right." The Motion claims that the arresting officer read Appellee her *Miranda* rights and placed her under arrest for Driving under the Influence following the performance of field sobriety exercises, and that "Multiple Statements were solicited post invocation of the right to remain silent." At the suppression hearing, the state moved to strike the Motion to Suppress, arguing it did not comply with Fla. R. Crim. Pro. 3.190(h)(2). The trial court denied the motion. Appellee then took the stand and testified she had invoked her Fifth Amendment right to remain silent. The state on cross-examination asked what she was asked post-*Miranda*. Appellee objected on the basis that she had invoked her right to remain silent. No other questions were asked, and no other witnesses were called. The trial court then granted the Motion to Suppress.

On appeal, a ruling on a motion to suppress is presumptively correct as to disputed facts and all reasonable inferences and deductions drawn from them; however, we review the trial court's application of the law to the facts under the de novo standard. *State v. Gonzalez*, 919 So. 2d 702, 704 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D362a]. Since the issue here is whether the trial court should have granted the Motion to Strike, and therefore whether the Motion to Suppress was legally sufficient, the de novo standard applies.

Fla. R. Crim. Pro. 3.190(h)(2) requires that a motion to suppress an illegally obtained confession or admission must state "with particularity" any statement sought to be suppressed, the reasons for the suppression and a general statement of the facts on which the motion is based. *See also State v. Hernandez*, 841 So. 2d 469 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2568a] (finding a motion to suppress was legally insufficient). Here, unlike *Hernandez,* Appellee did sufficiently state the reason for suppression—that the statements were solicited after an invocation of the right to remain silent, and therefore violated Appellee's Fifth Amendment rights. Yet the motion does not state with particularity the statements which Appellee sought to have suppressed; they are identified only as "Any and all statements made by the Defendant, Dana Faircloth, to any and all Law Enforcement Officers" made as a result of the claimed violation. And while the Motion provides some details about the alleged violation(s), i.e., the name of the arresting officer, and the date and time she was arrested, it does not provide other important underlying facts. For example, the motion does not state whether the right to remain silent was invoked immediately after *Miranda* warnings or later, or which officer(s) solicited the post-*Miranda* statements, or whether the solicitation consisted of direct questioning or of words or actions that the officers that were reasonably likely to elicit a response, or if the statements were made spontaneously. Primarily, the Motion to Suppress does not identify the statements requested to be suppressed with particularity. This would be necessary to provide sufficient notice to the state as to what Appellee's allegations were so it could prepare a legal response or rebuttal evidence. We therefore find that the trial court erred by not granting the Motion to Strike the Motion to Suppress as legally insufficient. Our decision is without prejudice for Appellee to refile a legally sufficient motion.

REVERSED AND REMANDED. (FALVEY, C., and ROGERS, S., JJ., concur.)

* * *

Licensing—Driver's license—Revocation—Habitual traffic offender—Early reinstatement—Denial—Licensee cannot argue that she did not receive notice of license suspension that is predicate for her latest citation for driving with suspended license where notice of suspension was sent to licensee's last known mailing address furnished to Department of Highway Safety and Motor Vehicles but licensee had moved without notifying department—Where licensee's testimony concerning recent citations was inconsistent and contradictory, hearing officer's finding that licensee could not be trusted to lawfully operate vehicle was supported by competent substantial evidence—Petition for writ of certiorari is denied

KRISTINE BLAND, 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. 19-000073AP-88A. UCN Case No. 522019AP000073XXXXCV. April 23, 2020. Petition for Writ of Certiorari from Decision of Hearing Office Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Daniel D. Nawara, for Petitioner. Christine Utt, General Counsel and Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(**PER CURIAM**.) Petitioner, Kristine Bland, seeks certiorari review of the Final Order Denying Early Reinstatement of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered October 18, 2019. The Final Order denied Petitioner's request for early reinstatement of her driving privileges. The Petition is denied.

Statement of Facts

Petitioner's driving privilege was suspended for a period of five (5) years after being classified as a habitual traffic offender. A "habitual traffic offender" is defined as a person who accumulates a specified number of offenses, such as driving a motor vehicle while license suspended within a five-year period. §322.264(1)(d), Fla. Stat. The Department is statutorily required to revoke the license of any person designated as a habitual traffic offender "for a minimum of 5 years from the date of revocation" §322.27(5)(a), Fla. Stat.

The Petitioner's record shows the following convictions:

1.) January 4, 2010 conviction for driving while license suspended.

2.) March 2, 2010 conviction for driving while license suspended

3.) February 6, 2014 conviction for driving while license suspended

The 2014 conviction was not added to the Petitioner's diver record until September 13, 2018 due to a late submission by a clerk of court. The driver record further shows that a notice of a five-year revocation of the driving privilege was mailed to the Petitioner at the address on file with the Department on September 28, 2018, with an effective date of October 18, 2018.

Petitioner applied for a hardship license as provided for by statute. A hearing was set and held on October 18, 2019.

At the hearing, Petitioner testified that her current address was in Palm Harbor, FL. The hearing officer stated the address the Department had for Petitioner was a Dunedin address and went on to explain that the Department sends mail to the address on file. The hearing officer also informed Petitioner that by statute, a motorist is required to update the Department of a change of address within thirty days of moving. Petitioner stated she had not lived at the address the Department had for over eight years. Petitioner testified she was going to change her address with the Department that day.

The hearing officer asked Petitioner "Any other driving violations you're aware of, tickets, accidents, suspensions or other issues?" Petitioner testified she had not had a ticket or any contact with law enforcement regarding her driving since her license was suspended in 2014. Petitioner denied having any driving violations, tickets, accidents, suspensions or other issues. The hearing officer questioned Petitioner about three traffic tickets issued to her on December 15, 2018. The traffic tickets were for driving on the wrong side of the road, driving without tag lights and driving while license suspended. Petitioner at first denied any knowledge of the tickets. She then stated the tickets were pending in court. The hearing officer informed Petitioner the questions he asked about any driving violations were not limited to convictions. Petitioner at that point stated that she had no knowledge of the three pending traffic citations until informed by the hearing officer. Petitioner then testified she was unaware her driving privileges were suspended and stated the pending tickets had been dismissed. After further inquiry as to the status of the tickets, Petitioner testified she was hoping they would be dismissed the following Monday after this hearing.

The hearing officer then questioned the Petitioner on her need to drive and what she had learned from her driving education courses. The Department stipulates that Petitioner established her need to drive for reinstatement of her driving privileges.

The hearing officer issued a Final Order Denying Early Reinstatement on October 18, 2019. The Final Order Denying Early Reinstatement reads, in pertinent part, as follows:

> "After considering your driving record, your testimony during the hearing, and your qualification, and fitness and need to drive, during the Hardship Hearing, I find as follows:
>
> You received citations for driving while suspended, driving on the wrong side of the road and no tag light on December 15, 2018 after having your driving privileges revoked on October 18, 2018. The intent of Statute 322.263 is to provide maximum safety for all who use the public highways of Florida. Deny the privilege to persons that have demonstrated an indifference for the safety of other and disrespect for laws of Florida. Discourage repetition of violations and impose deprivation of the privilege of operating a motor vehicle upon habitual offenders who have been convicted repeatedly of traffic violations.
>
> Based on the above findings your application for early reinstatement is denied."

Petitioner timely filed this Petition for Writ of Certiorari.

Standard of Review

Section 322.31 (Florida Statutes 2019), governs the right to review final orders of the Department of Highway Safety and Motor Vehicles.

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State Department of Safety and Motor Vehicles v. Sarmiento,* 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a].

Discussion

Petitioner states the sole issue for consideration is whether the Department of Motor Vehicles erred when it denied Petitioner's petition for early reinstatement and restricted license, based upon Petitioner receiving citations for knowingly driving with a suspended license. Petitioner concedes that the written notice of her driving privileges was mailed by the Department but argues she did not receive the notice and was therefore unaware of the suspension of her driving privileges. Petitioner did not receive the notice because Petitioner moved and did not update her address as required by statute. Fla. Stat. §322.251(1) specifically provides that notices of revocation may be issued as follows:

> "[B]y deposit in the United States mail in an envelope, first class, postage prepaid, **addressed to the licensee at his or her last know mailing address furnished to the department**. Such mailing by the department constitutes notification, and any failure by the person to receive the mailed order will not affect or stay the effective date or term of the cancellation, suspension, revocation or disqualification of the licensee's driving privilege." (emphasis added)

Petitioner cannot argue she did not receive the notice when she failed to notify the Department of her correct address as required by Fla. Stat. §322.19(2).

The hearing officer is required by statute to determine the Petitioner's qualifications, fitness and need to drive. Fla. Stat. §322.271(1)(b). First-tier certiorari review does not allow the court to reweigh the testimony; it may only review the evidence to determine whether it supports the hearing officer's decision. *Department of Highway Safety and Motor Vehicles v. Stenmark* (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. The decision to reinstate driving privileges is a two prong analysis. Is the person eligible for a hardship license and can the person be trusted to lawfully operate a motor vehicle? In the case at bar, Petitioner demonstrated a need to drive; however, the hearing officer found that the Petitioner did not satisfy the intent of Fla. Stat. §322.263 to provide maximum safety for all who use the public highways of Florida. In *Ware v. Department of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 791a (Fla. 12 Cir. Ct. April, 2004) "the hearing officer relied on his discretion to deny relief based on his belief that Petitioner could not be trusted to operate a motor vehicle based on his driving history." See also *Bosecker v. Department of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 404a (Fla. 6th Cir. Ct. June 14, 2016). Petitioner's testimony at the informal administrative review hearing was inconsistent and contradictory.

Petitioner references in her brief the Department did not suspend her license until almost four years after Petitioner's third conviction for driving while license suspended. Petitioner did not raise the issue of the revocation period being backdated to the date of her most recent conviction in the lower tribunal or in the Petition. The issue was not preserved for appeal. *See Department of Highway Safety and Motor Vehicles v. Sperberg,* 257 So. 3d 560 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2318a].

Conclusion

This Court concludes that procedural due process has been accorded, the essential requirements of law have been observed and the hearing officer's decision in the Final Order Denying Early Reinstatement is supported by competent substantial evidence.

The Petition for Writ of Certiorari is denied. (ARNOLD, MUSCARELLA, MEYER, JJ.)

* * *

Licensing—Driver's license—Permanent revocation—DUI manslaughter—Hearing officer did not err in sustaining permanent revocation of licensee's driver's license where court that sentenced licensee for DUI manslaughter pronounced lifetime revocation of his license—Remand to correct scrivener's error in final order citing to statute authorizing license revocation for fourth DUI conviction rather than statute authorizing revocation for DUI manslaughter

SCOTT. D. RODRIQUEZ, 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. 18-000055AP-88A. UCN Case No. 522018AP000055XXXXCI. April 28, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer, Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles. Counsel: Scott Rodriquez, Clearwater, Petitioner. Christine Utt, General Counsel and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(**PER CURIAM**.) Scott Rodriquez seeks certiorari review of the "Final Order Sustaining Permanent Revocation for DUI" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles ("DHSMV") entered August 20, 2018. The Petition is granted only for the limited purpose to correct the scrivener's error in the Final Order. The matter is remanded to the Department of Highway Safety and Motor Vehicles to issue a Final Order Sustaining Permanent Revocation citing the correct statute.

"(U)pon the 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." *Moore v. Department of Highway Safety and Motor Vehicles*, 169 So. 3d 216, 219 (Fla. 2nd DCA 2015) [40 Fla. L. Weekly D1520a].

Petitioner's driving privileges were suspended pursuant to a negotiated plea of no contest February 21, 1995 to the charge of DUI Manslaughter, a violation of §316.193 (3), Fla. Stat. (1994). The court pronounced a lifetime revocation of Defendant's driver license. On June 6, 2018, Petitioner filed a Motion for Relief of Vacated Final Judgment/Permanent License Revocation Sanction which was denied. The Order stated "A sentence is separate from the administrative revocation and the Court could not vacate administrative action, and further, the 1995 conviction remained unchanged as a result of the 2004 resentencing." *(Respondent's Exhibit B)*

Petitioner requested a show cause hearing before the Department to show cause why Petitioner's license should not be reinstated. Petitioner's hearing was held August 20, 2018 to afford Petitioner the opportunity to submit evidence that the Petitioner's driving privilege should not have been permanently revoked. The hearing officer found the Petitioner did not provide any evidence to show that his driving privilege should not have been permanently revoked. The Final Order states Petitioner's driving privilege was revoked for four or more convictions of DUI pursuant to section §322.28(2)(e) Fla. Stat. rather than a permanent revocation for the DUI Manslaughter conviction.

There is not transcript of the administrative hearing contained in the record. However, Petitioner states that the hearing office had in his possession Petitioner's driving record "which he read aloud twice during the hearing." *Petitioner's Initial Brief page 4.* Petitioner's driving record has a description and length of the revocation. The description is "Sanction Code: 9; DUI Manslaughter/DUI/DUBAL/VEH HOM; Revocation is a Result of Violation; Number 16; Citation Number 70880DS; Circuit Court Action; Rev Period Recommended by Court. The length of the revocation is listed as Permanent.

Petitioner's arguments that the essential requirements of law were not observed and the findings of the DHSMV hearing officer were not based upon competent substantial evidence because the Final Order Sustaining Permanent Revocation for DUI cited the incorrect statute are without merit. The hearing officer performed the administrative function of abiding the lawful court order recommending permanent revocation of Petitioner's driving privilege. Petitioner's driving record, which was read aloud twice in the hearing, reflects that his driving privilege was permanently revoked by court action. A scrivener's error does not and cannot modify the prior court order of a lifetime revocation of Petitioner's driving privilege.

Accordingly, it is

ORDERED AND ADJUDGED that this matter is remanded to the Department of Highway Safety and Motor Vehicles for the limited purpose of issue a new order citing the correct statute sustaining Petitioner's permanent revocation for DUI manslaughter. (MUSCARELLA, ST. ARNOLD, and MEYER, JJ.)

* * *

Municipal corporations—Code enforcement—Request for fine reduction—Denial—Due process—Where city code enforcement board's rules of procedure provide that, at most, oral argument would be allowed at hearing on request for fine reduction, board violated due process by compelling property owner to testify at hearing

T & G PROPERTY MANAGEMENT OF CENTRAL FL, LLC, Appellant, v. CITY OF DUNEDIN, FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 18-0070AP-88B. UCN Case No. 522018AP000070XXXXCI. January 17, 2020.

ORDER AND OPINION

Appellant appeals a code enforcement order from the City of Dunedin, in which the City's Code Enforcement Board ("Board") denied Appellant's request for a fine reduction. Appellant raises several issues in its challenge to the code enforcement order denying the request for fine reduction; we find merit in only one. Because Appellant's due process rights were violated, we reverse.

Facts and Procedural History

Appellant is a company owned by a husband and wife. On September 27, 2017, Appellant received a notice of violation for its rental property that included several violations, including damage to the roof area from a tree falling during Hurricane Irma. The notice stated Appellant had until October 22 to come into compliance. In December, the code enforcement inspector determined the property was not in compliance and sent out a notice of hearing. On January 9, 2018, a hearing was held and Appellant was found to be in violation and ordered to come into compliance by January 29. A compliance hearing was held on March 6, and Appellant was found to still not be in compliance, and an order imposing a lien was entered that fined Appellant $200 a day. No one representing Appellant attended either hearing. The roof was finally deemed to be in compliance on July 3. In August, Appellee alerted Appellant that the fines, plus interest, were still due in the amount of $31,205.96. The letter included the following: "Also enclosed with this letter is Rule 5, Section 4 of the Code Enforcement Board's Rule of Procedure, which provides the process for requesting a fine reduction by the Board." Appellant timely requested a fine reduction via a short email and several attachments. On October 2, a hearing was held. One of Appellant's owners and an attorney were present to represent Appellant. The request for a fine reduction was denied, and Appellant filed the instant appeal.

Discussion

Appellant asserts its due process rights were violated when the Board took testimony at a non-evidentiary hearing without notice. Rule 5, section 4 of Appellee's code enforcement rules of procedure states in pertinent part:

> After a fine has been imposed by the Board and within thirty (30) days after the violation is brought into compliance, a violator may petition for reconsideration of a fine. The Petition must include conclusive evidence showing extreme or undue hardship in the payment of the fine or preventing the violator from coming into compliance within the time period established by the Board's order. . . . The City may present, in written form, a response to the petition for reduction of fine. The Board shall make its determination based solely upon the written petition and the City's written response, unless the Board determines that it is necessary to hear oral argument from the violator and/or the City. The Board may request information from the Code Officer.

Here, after requesting information from the code enforcement officer, the Board called upon one of Appellant's owners to testify. Appellant contends that compelling one of the owners to testify without warning was detrimental to its motion, and if Appellant had known testimony would be taken, the other owner, who had worked on the roof and spoken with the code enforcement officers, would have attended. Moreover, Appellant maintains that it had counsel ready if the Board decided oral argument was necessary.

Appellee's rules put Appellant on notice that, at most, oral argument would be allowed. Therefore, eliciting testimony was a violation of due process. *See Messing v. Nieradka,* 230 So. 3d 962, 965 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2530a] ("Blindsiding a party by announcing on the day of the hearing that the court will entertain evidence at a hearing not noticed as an evidentiary hearing is the epitome of a due process violation").

Conclusion

Because Appellee violated Appellant's due process rights by having Appellant's owner testify when the matter was not noticed as an evidentiary hearing, it is

ORDERD AND ADJUDGED that the Order Denying Request for Reduction of Fine is **REVERSED** and **REMANDED**. (PAMELA A.M. CAMPBELL, AMY M. WILLIAMS, and THOMAS M. RAMSBERGER, JJ.)

* * *

Landlord-tenant—Eviction—Jurisdiction—County court—Where amount in controversy of tenant's counterclaims in eviction action exceeded $15,000, and counterclaims raised contested issues regarding title and existence of rent-to-own agreement within exclusive jurisdiction of circuit court that are required to be resolved in residential eviction action before landlord-tenant statute can be applied, county court should have transferred entire case to circuit trial court—Further, where there is allegation that occupancy agreement was for more than one year, proper cause of action to remove tenant is ejectment, over which circuit court has subject matter jurisdiction—All orders issued by county court are reversed and case is remanded for transfer to circuit court

DIANE LOMBARDI, Appellant, v. RONALD V. HOWARTH, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 18-AP-56. L.T. Case No. 18-CC-00473. UCN Case No. 512018AP000056APAXWS. March 10, 2020. On appeal from Pasco County Court, Honorable Paul Firmani, Judge. Counsel: Nickolas C. Ekonomides, Nickolas C. Ekonomides, P.A., Clearwater, for Appellant. Edward C. Castagna, Jr., Castagna Law Firm, P.A., Clearwater, for Appellee.

ORDER DENYING APPELLEE'S MOTION FOR REHEARING

The motion for rehearing is denied as to Appellee's legal arguments without further comment. However, footnote 3 of Appellee's Motion for Rehearing is correct that this Court mischaracterized paragraph 11 of his motion to dismiss the counterclaims. Accordingly, we withdraw the Court's Opinion rendered on January 22, 2020, and issue the following opinion in its stead.

ORDER AND OPINION

The parties make several arguments in their briefs. However, our review of the record found multiple jurisdictional issues not addressed by either party. For the reasons detailed below, this Court holds that the county court was divested of subject-matter jurisdiction no later than March 29, 2018. Because one of the jurisdictional problems was the amount in controversy of Appellant's counterclaims exceeding $15,000, the county court should have transferred the entire case to the circuit trial court. Accordingly, all orders issued by the county court in this case, including the order issuing the writ of possession, must be reversed for lack of subject-matter jurisdiction, regardless of the arguments of the parties.

STATEMENT OF THE CASE AND FACTS

Appellant was the occupant of a mobile home on a parcel of land and paid money monthly to either Appellee or non-party Ronnie's Rentals, Inc., a corporation owned in whole or in part by Appellee. Appellee filed a two-count Complaint in the county court for eviction

(Count I) and damages for nonpayment of rent (Count II).[1] In the Complaint, Appellee alleged that the parties' relationship was an oral at-will tenancy and sought to evict Appellant from the residential property.

Process was served on February 2, 2018. Because that date was a Friday, the fifth day to respond was February 9, 2018. *See* Fla. R. Jud. Adm. 2.514(a)(1); (a)(3). On the fifth day, Appellant filed a Motion to Dismiss for Fraud upon the Court, a Motion to Dismiss for Failure to State a Cause of Action, and a four-count Counterclaim. The Motion to Dismiss for Fraud upon the Court argued that Appellee had committed fraud in his Complaint by alleging an oral at-will tenancy.

Relevant to the resolution of the appeal, one of the motions asserted that the parties had entered into a rent-to-own agreement for a term of 11 years after which Appellant would own the property outright. As a result, the motion argued, Appellant "may have some legal and equitable title, before the facts of the title can be made clear before the court." Also relevant to the resolution of the appeal, Appellant's four-count Counterclaim sought damages in excess of $15,000 before interest, attorney fees, and costs.

Appellant submitted all of the above in a single filing. Attached to Appellant's filing were the following relevant documents:

- A lease agreement with an illegible ending date.
- A rental application stating a term of 11 years.
- A Warranty Deed dated December 29, 2010 and recorded on January 5, 2011 in Pasco County records at OR 8498 PG 2773, showing a conveyance in a property interest from Ronnie's Rentals, Inc. to Appellant and Keith Howarth (presumably Appellee's brother). There is a legal description and a parcel number listed as 06-26-16-0030-00000-0360 (parcel 360). The street address is listed as *6973 Edgewater Drive*. (Emphasis added.)
- A letter from the property appraiser's office dated February 9, 2011 stating that the Warranty Deed gave the legal description of parcel number 06-26-16-0030-00000-0350 (parcel 350) and not parcel 360. The letter states that parcel 350 is "presently assessed to Keith Howard and Phillip Goins and Ruth Wells, as per the Warranty Deed recorded in OR 8498 PG 2772." The letter goes on to state that the property at parcel 360 "remains assessed to Ronnie's Rentals, Inc."
- A Quitclaim Deed signed by Appellee and recorded on March 24, 2003. The Quitclaim Deed contains parcel 350 *and* parcel 360. Despite including both parcels, the Quitclaim Deed lists only one street address; *an address different than the address listed in the Warranty Deed for parcel 360: 6953 Edgewater Drive*. (Emphasis added.)

Appellant neither moved to determine rent nor paid rent into the court registry on or before February 9, 2018.

The county court did not issue any orders prior to March 29, 2018. On March 29, 2018, Appellee filed a Motion to Dismiss Counterclaims. Relevant to the resolution of the appeal, Appellee made the following factual assertions and legal arguments:

- The counterclaims allege damages in excess of $15,000. Therefore, they should be dismissed because they exceed the subject-matter jurisdiction limits of the county court.
- As to counterclaim 2, the Florida Deceptive and Unfair Trade Practices Act counterclaim, failure to state a cause of action, arguing that there is no evidence of a written rent-to-own agreement and a conveyance of real property must be made in writing and signed in the presence of two witnesses. Section 689.01, Florida Statutes.
- As to counterclaim 2, the 2011 letter from the Property Appraiser shows that Appellant was on notice for years that an interest in the property she was renting had not been conveyed to her.
- As to counterclaims 3 and 4, the fraud in the inducement and specific performance counterclaims, respectively, Appellee argued that a lack of a written rent-to-own agreement should also result in these counterclaims' dismissal.
- In Paragraph 11 of his Motion to Dismiss Counterclaims, Appellee wrote "Lombardi's attempt to cobble together a contract that would meet the strict requirements of section 689.01, Florida Statutes, out of a[n] . . . at best *two-year lease agreement* . . ." (Emphasis added.)

A hearing on the competing motions to dismiss was held on April 20, 2018; however the hearing was not transcribed and thus not made part of the record. On May 8, 2019, the trial court issued an order denying Appellant's motions to dismiss and granting her 20 days to file an Answer and Affirmative Defenses. The order also granted Appellee's Motion to Dismiss Counterclaims, dismissed Appellant's counterclaim 1 with prejudice and the rest without prejudice, and granted her 10 days to file amended counterclaims. Appellant did not attempt to file an answer and affirmative defenses or amended counterclaims until after the Final Judgment had issued.

On June 19, 2018, Appellee filed a motion for judicial default, alleging failure to pay rent into the court registry or move to determine rent within 5 days of service of process. *See* § 83.60(2), Fla. Stat. (2017).

On June 29, 2018, Appellant's counsel moved to withdraw. Consequently, it appears that between June 30, 2018 and July 17, 2018, Appellant proceeded *pro se*.

On July 2, 2018, the county court issued a default judgment for nonpayment of rent into the court registry. Later that day, Appellant moved *pro se* to stay the default judgment until she could obtain new counsel. The trial court issued a final judgment of eviction and writ of possession on July 6, 2018 but later granted Appellant's motion to stay.

On July 17, 2018, through newly-obtained counsel, Appellant filed her "Verified Emergency Motion of [Appellant], Diane Lombardi, to Vacate Final Eviction Judgment, Dissolve Writ, Reopen Case, and Dismiss the Eviction Action, and Memorandum of Law" (Motion to Vacate Final Judgment). The motion stated that it was brought pursuant to Florida Rule of Civil Procedure 1.540(b)(4).

On August 2, 2018, Appellee filed a memorandum in opposition to the motion. Relevant to the resolution of this appeal, Appellee argued that Appellant was required to raise any title issues in a separate cause of action but had not done so and therefore there were no pending title issues to be resolved. He also argued that Appellant's failure to pay rent into the court registry served as an absolute waiver of all of Appellants' defenses other than payment of rent.

Appellant's Motion to Vacate Final Judgment was heard on August 3, 2018. The trial court's order denying the motion was rendered on August 14, 2018 and the stay was lifted. On September 7, 2018, Appellant filed her Notice of Appeal. The notice was timely-filed as to the order denying the Motion to Vacate Final Judgment. The parties disagree whether it was timely-filed as to the Final Judgment. However, a determination on that issue is not required to resolve this appeal.

STANDARD OF REVIEW

A lack of subject-matter jurisdiction can be raised at any time and can be raised *sua sponte* by an appellate court. *Strommen v. Strommen*, 927 So. 2d 176, 178-79 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1199a]; *Synchron, Inc. v. Kogan*, 757 So. 2d 564, 565 n.1 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1033b]. Appellate courts review subject-matter jurisdiction *de novo*. *Solar Dynamics, Inc. v. Buchanan Ingersoll & Rooney, P.C.*, 211 So. 3d 294, 296 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D334a].

LAW AND ANALYSIS

A. County Court was Divested of Subject-Matter Jurisdiction

A trial court does not have the authority to act without subject-matter jurisdiction. Subject-matter jurisdiction is established via

statute, rule, or constitutional provision. An order issued without subject-matter jurisdiction is void *ab initio*. *Ricci v. Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC*, 276 So. 3d 5, 7-8 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1489a]. Lack of subject-matter jurisdiction cannot be waived. *Strommen*, 927 So. 2d at 178-79. Subject-matter jurisdiction cannot be conferred by consent or stipulation of the parties. *Id*. A lack of subject-matter jurisdiction can be raised at any time and can be raised *sua sponte* by an appellate court. *Id*.; *Kogan*, 757 So. 2d at 565 n.1.

The county court was divested of subject-matter jurisdiction for three reasons: First, as noted by Appellee in his own motion to dismiss before the county court, Appellant's counterclaims alleged an amount in controversy exceeding $15,000. Second, Appellant's February 9, 2018 filing and attachments presented the possibility of the existence of a rent-to-own agreement and a possible title issue that did not require a separate cause of action to resolve. Third, regardless of the nature of the occupancy agreement between the parties, Appellant argued and Appellee conceded the possibility that the length of the agreement exceeded one year.

1. Counterclaims—Amount in Controversy Exceeded $15,000

County courts have "original jurisdiction . . . of all actions at law, except those within the exclusive jurisdiction of the circuit courts, in which the matter in controversy does not exceed, exclusive of interest, costs, and attorney fees, if filed on or before December 31, 2019, the sum of $15,000." § 34.01(1)(c)(1), Fla. Stat. (2017).

While county courts have "exclusive jurisdiction of proceedings relating to the right of possession of real property" where the amount in controversy does not exceed $15,000, an exception exists "[i]n cases transferred to the circuit court pursuant to Rule 1.170(j), Florida Rules of Civil Procedure." In such a situation, "the demands of all parties shall be resolved by the circuit court." § 34.011(2), Fla. Stat. (2017).

Florida Rule of Civil Procedure 1.170(j) provides: "If the demand of any counterclaim or crossclaim exceeds the jurisdiction of the court in which the action is pending, the action must be transferred immediately to the court of the same county having jurisdiction of the demand in the counterclaim or crossclaim with only such alterations in the pleadings as are essential." Essentially, under rule 1.170(j), if a counterclaim exceeds the subject-matter jurisdiction of the county court, jurisdiction vests in, and the entire action must be transferred to, the circuit court. *A-One Coin Laundry Equipment Co. v. Waterside Towers Condominium Ass'n*, 561 So. 2d 590, 592 (Fla. 3d DCA 1990); *Columbus Mills, Inc. v. Dionne*, 328 So. 2d 467, 468 n.2 (Fla. 2d DCA 1976).

In the case below, Appellee himself moved to dismiss Appellant's counterclaims on the basis that they exceeded $15,000 and therefore the county court did not have subject-matter jurisdiction over them. However, in addressing the proper remedy for this jurisdictional problem, Appellee incorrectly argued that the county court was required only to dismiss the counterclaims and leave the Complaint before the county court.

Once both parties agreed with the factual assertion that the counterclaims exceeded $15,000, the county court was divested of subject-matter jurisdiction over the entire case and was required to transfer the case, Complaint, counterclaims, and all, to the circuit trial court. *See* § 34.011(2), Fla. Stat. (2017); Fla.R.Civ.P. 1.170(j); *A-One Coin Laundry Equipment Co.*, 561 So. 2d at 592; *Dionne*, 328 So. 2d at 468 n.2.

2. Contested Title or Ownership Interest

Even if the amount in controversy of the counterclaims was less than $15,000, the parties' pre-March 30, 2018 filings created contested issues regarding title of the real property and/or the existence of a rent-to-own agreement which divested the county court of subject-matter jurisdiction over the Complaint.

County courts have "exclusive jurisdiction of proceedings relating to the right of possession of real property . . . except that the circuit court also has jurisdiction if . . . the circuit court otherwise has jurisdiction as provided in s. 26.012. § 34.011(2), Fla. Stat. (2017). The relevant portion of section 26.012 provides that circuit courts "have *exclusive* jurisdiction . . . in all actions *involving the title* and boundaries *of real property*." §26.012(2)(g), Fla. Stat. (2017) (emphases added). Additionally, circuit courts have exclusive jurisdiction over all "actions of ejectment." § 26.012(2)(f), Fla. Stat. (2017).

In the case below, in response to Appellee's Complaint alleging that the relationship between the parties was an oral at-will tenancy, Appellant filed a motion to dismiss asserting the existence of a rent-to-own agreement. She also filed a Warranty Deed and a Quitclaim Deed showing a possible title interest in the real property. Appellee's arguments below regarding Appellant's claim of ownership and title interest, which were relied upon by the county court, were incorrect for two reasons.

First, Appellee argued the existence of, and therefore the merits of, Appellant's title interest and rent-to-own agreement arguments raised by the motion and deeds. However, a county court does not have subject-matter jurisdiction to make such merits determinations. *See* § 26.012(2)(g), Fla. Stat. (2017) (circuit courts have exclusive jurisdiction over real property title issues); 26.012(2)(f), Fla. Stat. (2017) (circuit courts have exclusive jurisdiction over ejectment actions); *Grimm v. Huckabee*, 891 So. 2d 608, 609 n.3 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D260b] (appeal from a circuit court order where the appellate court had to analyze whether a rent-to-own agreement existed and therefore whether the plaintiff's cause of action sounded in eviction or ejectment).

Second, Appellee improperly argued that Appellant was required to make title or ownership a contested issue by filing a separate cause of action and because no such cause of action had been filed, there was no pending title or ownership issue. Contrary to that assertion, a contested title or ownership issue can be raised within a residential eviction complaint. *See, e.g., Mobley v. Hunt*, 722 So. 2d 248 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2711d]; *Toledo v. Escamilla*, 962 So. 2d 1028 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1876a]; *Minalla v. Equinamics Corp.*, 954 So. 2d 645, 646-47 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D758a].

And once the issue is raised, it must be resolved before the residential landlord/tenant statute can be applied. *See Frey v. Livecchi*, 852 So. 2d 896, 897-98 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1824b] (holding that the trial court erred in requiring the defendants to pay rent into the court registry pursuant to section 83.60(2) before holding an evidentiary hearing to determine if occupancy was under a contract for sale pursuant to section 83.42(2)).

For these reasons, even if the counterclaims' amount in controversy did not exceed $15,000, the county court was divested of subject-matter jurisdiction over the Complaint itself once title of the residential property and the existence of a rent-to-own agreement became contested issues.

3. Agreement Length may have Exceeded One Year

Even if the parties' pre-March 30, 2018 filings were insufficient to create a contested title or ownership issue, *a contested issue regarding*[2] the length of the occupancy agreement between the parties also divested the county court of subject-matter jurisdiction. County courts have subject-matter jurisdiction over evictions pursuant to the residential landlord/tenant statute. *See* § 34.011(2), Fla. Stat. (2017). However, as previously noted, circuit courts have exclusive jurisdic-

tion over ejectment actions. § 26.012(2)(f), Fla. Stat. (2017).

A "tenant" under the residential landlord/tenant statute is defined as "any person entitled to occupy a dwelling unit under a rental agreement." § 83.43(4), Fla. Stat. (2017). A lease agreement that exceeds one year in length is not a "rental agreement" within the meaning of the residential landlord/tenant statute. *See* § 83.43(7), Fla. Stat. (2017). As a result, where the lease agreement is longer than one year, the occupant is not a tenant within the meaning of the residential landlord/tenant statute. *Toledo*, 962 So. 2d at 1030. In that situation, the proper cause of action to remove the occupant is ejectment, over which the circuit court and not the county court has subject-matter jurisdiction. *See id*.

Appellant alleged the existence of a multi-year rent-to-own agreement in her February 9, 2018 filing. She attached to that filing a rental application showing a possible rental term of 11 years. *Appellee argued in his motion to dismiss that there was no multi-year rent-to-own agreement, writing that Appellant was attempting to "cobble together a contract . . . out of a one-year, or at best, two-year lease agreement" and other documents. The competing assertions in Appellant's counterclaims and Appellee's motion to dismiss created a contested issue regarding the length of the agreement. As a result, Appellant's Complaint may have sounded in ejectment rather than eviction.*[3]

This question divested the county court of subject-matter jurisdiction over the Complaint as only the circuit court has subject-matter jurisdiction over questions of ejectment. *See, e.g., Minalla*, 954 So. 2d at 646-47 (appeal of a circuit court order addressing the contested issue of whether the parties' contract was a mortgage or a sale with a turn-around lease as only the latter results in a landlord/tenant relationship that permits the application of section 83.60(2)); *Grimm*, 891 So. 2d at 609-10 (determining whether a complaint sounded in eviction or ejectment).

B. Remedy for Divestment of County Court's Subject-matter Jurisdiction

While it may be debated whether the county court was divested of jurisdiction on February 9, 2018 or March 29, 2018, the exact date is irrelevant in this particular case. The county court did not hold any hearings or issue any orders until after March 29, 2018. Because the county court had lost subject-matter jurisdiction no later than March 29, 2018, the county court never had the authority to hold any of its hearings and every order it issued was void *ab initio*. Accordingly, every order of the county court in this case, including the order issuing the writ of possession, are reversed. Procedurally, as a result of this Order and Opinion, the parties are now back in their respective postures as they existed prior to the April 20, 2018 hearing on the parties' competing motions to dismiss as the county court did not have subject-matter jurisdiction to hold that hearing.

What must happen on remand is determined by how the county court's subject-matter jurisdiction was divested. Any of the three issues detailed above was sufficient, by itself, to divest the county court of subject-matter jurisdiction by March 29, 2018. While a county court usually has discretion to either dismiss or transfer the Complaint, the counterclaims' amount in controversy issue removes that discretion. *See* § 34.011(2), Fla. Stat. (2017); Fla.R.Civ.P. 1.170(j). On remand, the county court must transfer the entire case to the circuit trial court.

CONCLUSION

Because the county court was divested of subject-matter jurisdiction for multiple reasons no later than March 29, 2018, the county court did not have jurisdiction to hold any hearings and all orders issued in the case below are reversed as void *ab initio*. The case and the parties are reverted back to their procedural postures as they existed prior to the April 20, 2018 hearing on the parties' competing motions to dismiss. The case is remanded for the county court to transfer case number 18-CC-00473 to the circuit trial court.

It is therefore ORDERED and ADJUDGED that all orders of the trial court are REVERSED and the case REMANDED for proceedings consistent with this Opinion. (SHAWN CRANE, KIMBERLY SHARPE-BYRD, and KIMBERLY CAMPBELL, JJ.)

---

[1]Appellee voluntarily dismissed Count II on March 29, 2018.
[2]Italicized portion changed from original Order and Opinion.
[3]Italicized portion changed from original Order and Opinion.

* * *

Insurance—Personal injury protection—Where district court of appeal held that circuit court in its appellate capacity departed from essential requirements of law by holding that PIP statute mandates that insurer must reimburse full amount billed when amount billed is less than maximum allowed under statutory fee schedule, circuit court remands matter to trial court with instructions to enter judgment consistent with DCA decision

GEICO INDEMNITY COMPANY, Appellant, v. ACCIDENT & INJURY CLINIC, INC. a/a/o Frank Irizarry, Appellee. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2018-10031-APCC. May 4, 2020. Counsel: Michael A. Rosenberg, Thomas L. Hunker, and Peter D. Weinstein, Cole, Scott & Kissane, P.A., for Appellant. Doug Stein, for Appellee.

ORDER ON MOTIONS TO ENTER OPINION ON REMAND

[Prior report at 27 Fla. L. Weekly Supp. 239a]

(ROWE, III, J.) This matter came before this Court in its appellate capacity for review of "Appellant's Motion for Entry of Opinion Consistent With Decision From Fifth District Court of Appeal and to Vacate Conditional Award of Appellate Attorney's Fees" and of "Appellee's Motion to Enter an Opinion in Accordance With the Instructions of the Fifth District Court of Appeal." The Court, having considered the motions along with each party's response brief filed, hereby finds as follows:

On March 14, 2019, this Court entered an Opinion affirming the trial court's "Order Granting Plaintiff's Motion for Summary Disposition and Final Judgment in Favor of Plaintiff" entered on June 7, 2018. On December 20, 2019, the Fifth District Court of Appeal reached a different conclusion and entered its Opinion granting GEICO's certiorari petition, quashing this Court's decision affirming the trial court, and remanding "for proceedings consistent with this opinion." [44 Fla. L. Weekly D3045b]

Therefore, pursuant to the appellate court's Mandate, it is hereby

ORDERED AND ADJUDGED:

That the trial court's June 7, 2018, Final Judgment is REVERSED, and this matter is REMANDED with instructions that the trial court vacate its "Order Granting Plaintiff's Motion for Summary Disposition and Final Judgment in Favor of Plaintiff" and enter a judgment consistent with the decision of the Fifth District Court of Appeal.

IT IS FURTHER ORDERED AND ADJUDGED:

That this Court's "Revised Order on Appellee's Motion for Attorney's Fees" entered December 5, 2019, is vacated, and the Appellee's three pending attorney's fees motions are denied.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Petition for writ of certiorari challenging hearing officer's order sustaining license suspension is denied—Arresting officers' reports regarding licensee's condition and uncontroverted fact that licensee refused impairment testing provided competent substantial evidence to support order, notwithstanding licensee's presentation of video of stop that arguably supports different conclusion

JORGE MADRIGAL TORRES-LOPEZ, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2019-AP-34. April 28, 2020. Petition for Writ of Certiorari from the Osceola County Court. Counsel: Shon Douctre, for Petitioner. Christine Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, for Respondent.

(Before SHAFFER, TYNAN, and MURPHY, JJ.)

Petition Denied.

(SHAFFER, J.) Petitioner Jorge Torres-Lopez was the subject of a vehicle stop on September 13, 2019. The officers that detained him suspected him of driving while impaired. Torres-Lopez refused all field sobriety testing but was subsequently arrested and charged with DUI—Alcohol or Drugs (1st Offense). Due to the testing refusals, Torres-Lopez's driver's license was suspended for one year pursuant to the implied-consent law, section 322.2615, Florida Statutes. That section also provides that the suspended driver may request a formal review of the suspension by a DHSMV hearing officer. Torres-Lopez made that request and the hearing was held on October 9, 2019, and November 22, 2019.[1]

At the November 22 hearing, Torres-Lopez's counsel presented a video of the stop and argued that, although Torres-Lopez admitted to the officers that he had consumed two beers, he did not appear intoxicated. The hearing officer noted that counsel had not subpoenaed any witnesses for the hearing. After making his argument that the video demonstrated that Torres-Lopez was not impaired despite the officers' reports to the contrary, no further evidence was offered and the hearing officer took the matter under advisement. After receiving a ruling affirming the suspension, Torres-Lopez filed this petition for a writ of certiorari.

In his petition, Torres-Lopez offers the same substantive arguments about Torres-Lopez's lack of impairment and invalidity of the stop that resulted in his arrest and license suspension. However, it is not this Court's role to second-guess the substantive findings of the administrative hearing officer by way of certiorari review. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982) ("Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence."). Given that Torres-Lopez was provided a full and unimpeded opportunity to present evidence, call witnesses, and make argument, we conclude that the requirements of due process were met by the proceeding below. Further, the officers' reports of Torres-Lopez's condition before his arrest, and the uncontroverted fact that he refused field and precinct-level impairment testing, provide competent substantial evidence supporting the conclusion of the hearing officer to uphold the suspension. Accordingly, the petition for a writ of certiorari is DENIED. (TYNAN, J., concur.)

(MURPHY, J., concurring specially.) I write separately to focus on the element of competent substantial evidence. The answer is simply regardless of whether the hearing officer relied on the instant video and invalidated the suspension or whether the hearing officer relied on the non-video evidence to support the suspension, this Court would be required to uphold the hearing officer's decision because competent substantial evidence would support either decision under the specific facts of this case.

Fla. Stat. 322.2615 relies on the inherent belief that a hearing officer is not simply looking for evidence to support the officer's determination, but instead, that the hearing officer is a neutral arbiter of facts. A hearing officer that is predisposed to ignore evidence favorable to the driver is not impartial, violates the driver's due process rights,[2] and has no business being a hearing officer. However, the driver has not shown that the instant hearing officer had such predisposition.

[1]A transcript of the October hearing was not provided as part of the record in this case.

[2]See *Conahan v. Dep't of Highway Safety & Motor Vehicles, Bureau of Driver Imp.*, 619 So. 2d 988, 990 (Fla. 5th DCA 1993) (Griffin, J., concurring).

* * *

Counties—Animal control—Dangerous dogs—County departed from essential requirements of law by allowing animal services division manager to conduct administrative hearings to review classification of dogs as dangerous where county code provides that classification committee shall conduct hearings in which dog owners can contest dangerous classification and does not provide for any hearing other than one before classification committee—No merit to argument that code's reference to hearing before classification committee as "appeal" means that this is an appellate proceeding where code contemplates presentation of witnesses, evidence and argument at classification committee hearing—Petitions for writ of certiorari are granted

MELISSA NEWMONS, Petitioner, v. ORANGE COUNTY, FLORIDA, Respondent. SERGIO GUARNIZO, Petitioner, v. ORANGE COUNTY, FLORIDA, Respondent. VIRGILIA ZABALA, Petitioner, v. ORANGE COUNTY, FLORIDA, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case Nos. 2018-CA-4578-O, 2019-CA-4639-O, 2019-CA-8683-O. March 30, 2020. Petitions for Writ of Certiorari from Final Orders of the Orange County Animal Services Classification Committee. Counsel: Marcy I. LaHart, for Petitioners. Adolphus Thompson, for Respondent.

(Before YOUNG, ROCHE, and HIGBEE, JJ.)

(**PER CURIAM.**) Petitioners in these cases[1] seek a writ of certiorari pursuant to Article V, § (5)(b), of the Florida Constitution and Rule 9.100 (c), Florida Rules of Appellate Procedure, to review final orders of the Orange County Animal Services Classification Committee upholding determinations which classified Petitioners' dogs as dangerous under § 767.12(3), Florida Statutes, and Section 5-32, of the Orange County Code. Petitioners request this Court to enter an order quashing the underlying final orders and requiring Respondent to refund any fees collected in connection with the dangerous dog classifications.[2] We have jurisdiction based on § 767.12(4), Fla. Stat.

RELEVANT FACTS

The Petitioners in these consolidated cases each received a letter from the Orange County Animal Services Division ("Animal Services") titled "Notice of Initial Determination and Sufficient Cause Finding." These letters notified Petitioners that Animal Services had conducted an investigation into an incident involving their pet dogs and had determined there was sufficient cause to classify the dogs as "dangerous" based on the definition of section 767.11(1)(a), Florida Statutes. The letters stated that, pursuant to Chapter 767 of the Florida Statutes, Petitioners had seven days to request a hearing in writing regarding the classification, penalty, or both.

In each case, counsel for Petitioners responded to letters with a written request for a hearing that included a "preliminary list of witnesses." In response to the requests for a hearing, Animal Services sent Petitioners a letter indicating that the Division Manager would "conduct an administrative hearing to consider the initial determination."

In at least one of the consolidated cases, counsel for Petitioners engaged in email correspondence with the Division Manager and other division staff regarding the nature of the administrative hearings to be held. In one email, the Division Manager provided a "brief overview" of the administrative hearing process. He explained that while witnesses would be provided "an opportunity to provide their prospective to event [sic]" there would be "no cross examination." He further explained that there would be two steps for appellate review "ultimately ending in court for a de novo hearing."

The Division Manager then conducted administrative hearings in each of these cases. At the hearings, counsel for Petitioners raised, among other issues, that Orange County ordinance "provides that a hearing like this is to be held in front [of] a classification committee" and that the Division Manager's powers, established by county ordinance, made no mention of a power to hold such administrative hearings. The hearings contained testimony regarding Animal Services' investigation into the dogs, as well as testimony from witnesses. There was no cross examination allowed at the hearings.

After the administrative hearings, the Division Manager sent letters to Petitioners which summarized the conclusions he had reached based on the evidence at the hearings. In each case the Division Manager upheld the "Initial Determination of 'Dangerous.' " The letters further advised Petitioners that both parties had the "right to appeal my determination and request a hearing before the Animal Services Classification Committee ("the Classification Committee")."

In response to these post-hearing letters, counsel for Petitioners submitted detailed written requests for a hearing before the Classification Committee. The requests included a list of witnesses and alleged that the Division Manager had failed to comply with the requirements of sections 767.11(1)(a) and 767.12, Florida Statutes, as well as the related Orange County ordinances. Specifically, the requests asserted that the earlier hearings should have been held before the Classification Committee and that the Division Manager did not have jurisdiction to conduct those hearings.

Animal Services responded to Petitioners' request by sending letters setting a date and time for hearings before the Classification Committee. The hearings primarily consisted of the Classification Committee reviewing the records that had been compiled by Animal Services, apparently containing the investigations, as well as the administrative hearings which had been conducted by the Division Manager. Petitioners were not allowed to offer any new evidence or witness testimony in these "appellate hearings." The result of these hearings was the issuance of final orders containing "findings of fact" and "conclusions of law" each of which upheld the Division Manager's initial determination and notified Petitioners of their right to appeal to this Court.

DISCUSSION

Standard of Review

This Court reviews quasi-judicial actions of county boards by writ of certiorari. In this context, the Court's certiorari review involves a three prong test, looking at whether (1) due process was afforded, (2) the essential requirements of the law were observed, and (3) the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Fla. Dep't of High. Saf. & Motor Vehs.,* 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a]. The departure from the essential requirements of the law necessary for granting a writ of certiorari is something more than "a simple legal error." *See Dept. of Highway Safety and Motor Vehicles v. Morrical,* 262 So. 3d 865 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D233a].

State Law Regarding Dangerous Dog Classifications

The process for classifying an individual's dog as "dangerous" has been laid out by the Florida Legislature in Chapter 767 of the Florida Statutes. Specifically, section 767.12, Florida Statutes, provides the general process for dangerous dog classifications. This section describes a step-by-step process beginning with 1) an investigation, 2) an "initial determination" that there is sufficient cause for the dangerous classification, 3) a requirement to afford the dog owner an "opportunity for a hearing prior to making a final determination," and, finally, 4) a final order and right to "appeal the classification, penalty, or both, to the circuit court." The statute also requires the "local governing authority" to establish procedures for the contemplated hearing and appeal processes. *Id.*

County Code Regarding Dangerous Dog Classifications

In accordance with the state statute, Orange County has adopted its own process for the classification of dangerous dogs in Chapter 5, Article II of its Code of Ordinances. Section 5-32, deals specifically with "classification of dogs as dangerous or potentially dangerous." This section empowers Animals Services to investigate incidents involving any dog that may be dangerous, and empowers the Division Manager, to make "an initial determination as to whether there is sufficient cause to classify the dog as dangerous or potentially dangerous." The ordinance further explains that "if the owner decides to appeal the initial determination . . . they may request a hearing before the Animal Services Classification Committee to show cause why such dog should not be declared dangerous or potentially dangerous." The Code provides that the owner must make a "written hearing request" which must "briefly state the grounds" and "list the names and addresses of any witnesses the owner intends to call at the hearing." This is the first and only reference to any hearing related to the dangerous dog classification in the County Code and it specifically requires the Division Manager to refer a "timely written request for a hearing" to the Classification Committee.

Departure from the Essential Requirements of Law

The record in this case reflects that Respondent has employed a mixed approach to compliance with the state statute and the county ordinance. However, this mixed approach amounts to a departure from the essential requirements of the law for the reasons described below.

Nowhere in the County Code is there any reference to a power of the Division Manager to preside over an administrative hearing with respect to dangerous dog classifications. Respondent concedes as much when it argues that although "the hearing the Division Manager conducts prior to the Animal Classification Committee is not explicitly provided for in the Orange County Code, it is in conformity with Fla. Stat. 767.12(3)." Respondent relies solely on the language of the state statute to support the Division Manager's authority to preside over an administrative hearing. However, as described above, the statute specifically requires the "local governing authority" to establish procedures for the contemplated hearing. The County Code complies with this requirement in section 5-32(c) where it describes a hearing before the Classification Committee, not the Division Manager. This presents a question regarding whether the County Code's provision for a hearing before the Classification Committee deprives the Division Manager of any authority to conduct a dangerous dog hearing under the statute. We conclude that it does.

Respondent's suggestion is that the County Code's described hearing before the Classification Committee is appellate in nature and, therefore, is not a one-to-one match for the hearing required by the statute. Respondent refers to the administrative hearing before the Division Manager as "an actual hearing . . . where evidence can be presented by parties." Respondent states that this "hearing affords dog owners an opportunity to actually present their case" by having witnesses, petitioner testimony, and presentation of evidence and arguments. Respondent contrasts this type of administrative hearing

with the "appellate style hearing" before the Classification Committee "where the committee only reviews the record of the previous hearing." Accordingly, Respondent suggests that the fact the County Code provides for this "appellate" hearing does not deprive the Division Manager of the authority to hold an "actual hearing" based solely on the statute.

Respondent points to several parts of the County Code to support its position that the hearing before the Classification Committee is "appellate" in nature. First is the use of the word "appeal" in Section 5-32[3] of the County Code, as well as in the definition for the Classification Committee in Section 5-29.[4] However, the use of the term *appeal* in these instances can be interpreted as a potentially misleading description of the fact that the hearing before the Classification Committee is requested only after there has been an initial determination made by the Division Manager. It is not clear that the term "appeal" is being used in the strict sense as a term of art. The fact that it is used in conjunction with "hearings," which are not commonplace in genuine appellate proceedings, tends to support the interpretation of an "appeal" in a more general sense.

Next, Orange County Resolution No. 2005-M-17 provides, in relevant part, that the Classification Committee "shall, within five (5) working days of the referral, review each completed investigation and initial classification that is referred to the Committee by the Animal Services Division Manager . . . pursuant to Section 5-32, Orange County Code." While this resolution establishing the Classification Committee does not make use of the word "appeal," Respondent contends that the language here confining the Committee to "review" of the "completed investigation and initial classification" is indicative of its appellate nature. However, this interpretation is in direct conflict with the description of the hearing before the Classification Committee.

It is clear that the County Code's description of the hearing before the Classification Committee is not appellate in nature, as it contemplates the presentation of witnesses. Orange County Code Section 5-32(c) provides that:

> If the owner decides to appeal the initial determination of dangerous . . . they may request a hearing before the animal services classification committee to show cause why such dog should not be declared dangerous . . . The request for a hearing must be filed, in writing, with the division manager within seven (7) working days after receipt of written notice of the division manager's determination or action. The written hearing request must briefly state the grounds therefore *and list the names and addresses of any witnesses the owner intends to call at the hearing*. If the division manager receives a timely written request for a hearing regarding a dangerous or potentially dangerous dog classification, he/she shall immediately refer the request, completed investigation, and initial determination to the classification committee. The classification committee shall schedule a hearing to be held not more than twenty-one (21) working days and no sooner than five (5) working days after the division manager's receipt of the request from the owner. (emphasis added).

This description of a hearing, where the owner is permitted to call witnesses, does not read like the sort of "appellate style hearing" described by Respondent. In fact, this language portrays the hearing before the Classification Committee as the type of "actual hearing"—including witnesses, evidence, and argument—described by Respondent. Accordingly, Respondent's practice of treating this hearing as a purely appellate review of an existing record is not in accordance with the plain language of section 5-32(c).

There is clear conflict both within the description of the hearing in section 5-32(c), and when compared to the definition of the Classification Committee in section 5-29 and in the 2005 resolution. While this Court will not attempt to determine the intent of the drafters of these ordinances, we must attempt to interpret them in a way that comports with section 767.12, Florida Statutes. We conclude that the use of the word "appeal" is not meant in the strict sense, but rather to merely describe the process by which a dog owner may request a hearing before the Classification Committee to contest the initial determination made by the Division Manager. Further, because the County Code does not provide for any hearing other than the one before the Classification Committee, the Division Manager does not have the authority to preside over an administrative hearing regarding his own initial determination. This interpretation aligns the County Code with the statute by providing the opportunity for a single hearing regarding the initial determination with the only true appeal being to this Court.

CONCLUSION

Based on the absence of any provision of the County Code granting the Division Manager the authority to conduct a hearing, and the fact that the County Code explicitly provides for an "actual hearing," including witnesses, before the Classification Committee, we conclude that Respondent's practice of conducting preliminary administrative hearings before the Division Manager and allowing only "appellate style hearings" before the Classification Committee is a departure from the essential requirements of the law. Further, we conclude that future proceedings conducted in this manner will *ipso facto* be departures from the essential requirements of law and violations of due process.

We **GRANT** the Petition for Writ of Certiorari in 2018-CA-4578-O.[5]

We **GRANT** the Petition for Writ of Certiorari in 2019-CA-4639-O and order Respondent to issue a refund of any fees it collected as a result of the dangerous dog classification.

We **GRANT** the Petition for Writ of Certiorari in 2019-CA-8683-O and order Respondent to issue a refund of any fees it collected as a result of the dangerous dog classification.

Petitioner's "Motion for Appellate Attorney's Fees" as a sanction against Respondent, filed in 2018-CA-4578-O on July 18, 2019 is **DENIED**. (ROCHE and HIGBEE, JJ., concur.)

---

[1]The three Petitions here were designated to "travel together" by an order of this Court entered on August 29, 2019.

[2]We note that the specific request for an order requiring Respondent to issue a refund of fees related to the classification was made only in 2019-CA-4639-O and 2019-CA-8683-O. The Petition in 2018-CA-4578-O only requests the court to quash the final order and makes no request for a refund of fees.

[3]"If the owner decides to *appeal* the initial determination of dangerous . . . they may request a hearing before the animal services classification committee. . ."

[4]Section 5-29 of the Orange County Code defines the Animal services classification committee to "mean a committee appointed by the board of county commissioners to hear *appeals* regarding the classification of dogs as dangerous."

[5]We determine that this Petition was not mooted by Respondent's rescission of the underlying classification because the "issues are likely to recur." *See Dep't of Health v. Shands Jacksonville Med. Ctr.*, 259 So. 3d 247, 251 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2519b].

* * *

Colleges and universities—Contracts—Bid protest—Attorney's fees—Where Board of Governors regulation on bid protests provides that quasi-judicial officer may award attorney's fees and costs to prevailing party if officer determines that non-prevailing party participated in the hearing for an improper purpose, and regulation does not provide for review of that determination by university president, university president departed from essential requirements of law by issuing order abrogating officer's award of fee and costs—Issue of whether BOG regulation is facially unconstitutional encroachment on legislative branch power is not appropriate for resolution in circuit court certiorari proceeding

BOSTON CULINARY GROUP INC., d/b/a/ CENTERPLATE, Petitioner, v. UNIVERSITY OF CENTRAL FLORIDA, Respondent. Circuit Court, 9th Judicial

Circuit (Appellate) in and for Orange County. Case No. 2019-CA-003653-O. March 20, 2020. Petition for Writ of Certiorari from the decision of the University of Central Florida. Counsel: Cindy A. Laquidara, Allison M. Staocker, and Thomas O. Ingram, for Petitioner. Michael D. Crosbie, Nicole L. Ballante, and Jennifer P. Sommerville, for Respondent.

(Before ASHTON, CRANER, and O'KANE, JJ.)

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Petitioner Boston Culinary Group Inc., d/b/a/ Centerplate (hereinafter Centerplate) seeks a writ of certiorari quashing an order issued by the University of Central Florida (hereinafter "UCF") regarding the award of attorney's fees and costs. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.190(b)(3). The Petition for Writ of Certiorari is granted.

FACTS AND PROCEDURAL BACKGROUND

Centerplate held a ten-year concessions-service contract with UCF which was set to expire in 2017. In preparation for the award of the next contract, UCF began the bidding process as mandated by the Florida Board of Governors (hereinafter "BOG").[1] *See* BOG Regulation 18.001.[2] Centerplate made a bid as did several other vendors. UCF posted an intent to award the contract to a company other than Centerplate on July 20, 2017. In accordance with BOG Regulation 18.002, Centerplate protested the Intent to Award (hereinafter "ITA") and on August 8, 2017, pursuant to the same regulation, UCF referred the protest to the Division of Administrative Hearings for the appointment of an Administrative Law Judge, as a Quasi-Judicial Officer,[3] to decide the merits of Centerplate's protest. A hearing was held before Administrative Law Judge John D. C. Newton, II, (hereinafter "Q-JO" or "Judge Newton") on September 6, 2017, after which he issued a recommended order on November 21, 2017 in compliance with BOG Regulation 18.002(13)(i). Judge Newton's Recommended Order effectively upheld Centerplate's protest and recommended UCF "enter a final order declaring the Intent to Award invalid and rejecting all proposals to Invitation to Negotiate Number ITN1617NCSA."[4] After some back and forth pursuant to BOG Regulation 18.002(13)(j) retiring, long-time UCF President, Dr. John Hitt, signed the "Final Order for Final Action" (hereinafter "Hitt Order") in February 2018 in compliance with BOG Regulation 18.002(13)(k) incorporating, in toto, Q-JO's Recommended Order. Notably, the Hitt Order specifically included language acknowledging Q-JO's retention of jurisdiction to "resolve [the] issue [of attorney's fees] . . . after the final order is rendered and any appeal has been finally disposed of[.]" Pet'r's App. 217.

Having ostensibly prevailed on the merits, Centerplate moved Q-JO to award fees and costs. The award of attorney's fees and costs, in the present case, is controlled by BOG Regulation 18.002(22) which Judge Newton found, after an extensive hearing, to be applicable and awarded Centerplate $140,769.90 in fees and $4,141.63 in costs. Judge Newton issued his Final Order Awarding Fees and Costs (hereinafter "Q-JO Fees Order") on January 10, 2019 and sent a copy to Dr. Dale Whitaker who had replaced Dr. Hitt as UCF President. Events of no apparent relevance to the case at bar took place at UCF causing Dr. Whitaker to abruptly resign leaving Chief Innovation Officer and Vice President for Partnerships, Dr. Thad Seymour, Jr. to be named by the UCF Board of Trustees as interim President on February 21, 2019. The next day, Dr. Seymour signed an order, over Centerplate's exceptions, abrogating Q-JO's award of fees and costs, and substituted UCF's own "Final Order on Petitioner's Motion for Attorney's Fees and Costs" awarding neither fees nor costs. It is UCF's Final Order on Petitioner's Motion for Attorney's Fees and Costs (hereinafter "UCF Fees Order") dated February 22, 2019 signed by Dr. Seymour that is the subject of the Petition before this Court.

STANDARD OF REVIEW

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal's decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]; *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (en banc).

ARGUMENTS PRESENTED

Essentially, the Court is being asked to determine by who, when, and how attorney's fees should be awarded in this procurement protest as viewed through the lens of this certiorari proceeding. Centerplate petitions for a writ quashing the UCF Fees Order as *ultra vires*; resultantly this would mean the Q-JO Fee Order would stand. Centerplate argues that the plain meaning of 18.002(22) vests the authority to determine fees and costs in a quasi-judicial officer and is not subject to review and amendment by UCF. UCF counters that any order by a quasi-judicial officer under BOG Regulation 18.002 is subject to final approval by its President under 18.002(13) therefore issuance of the UCF Fees Order denying fees and costs was appropriate and Q-JO's issuance of a final order usurped UCF's authority.[5] UCF argues that Centerplate's Petition should be denied because the UCF Fees Order afforded Centerplate due process, the essential requirements of the law were observed, and it was supported by competent substantial evidence. Alternatively, UCF argues, 18.002(22) is "unconstitutional as it violates the separation of powers guaranteed by the Florida Constitution."

DISCUSSION

The UCF Fees Order of February 22, 2019 is the "lower tribunal decision" the certainty of which this Court is being asked to determine using the standard from *Heggs* and *Vaillant* stated *supra.* Certiorari review requires the Court to examine whether procedural due process was accorded the Petitioner. The Court agrees with UCF that Centerplate has not made arguments in its Petition regarding whether the UCF Fees Order afforded due process. Resp. 10. Likewise Centerplate has not made arguments that there was not substantial evidence for UCF to make a determination of fees and costs. Reply 3. Rather, Centerplate has only made arguments contending that UCF departed from the essential elements of the law in attempting to abrogate the Q-JO Fees Order. Pet. 16-21. The Court need not address arguments that the Petitioner has not made as they are deemed waived. *See D.H. v. Adept Community Services, Inc.*, 271 So. 3d 870, 880 (Fla. 2018) [43 Fla. L. Weekly S533a]. The sole remaining *Heggs/Vaillant* determination is whether UCF deviated from the essential elements of the law in issuing the UCF Fees Order.

In its certiorari review the Court finds three provisions of the BOG Regulations that are dispositive: 1) The entirety of this procurement dispute, including attorney's fees, is controlled by a BOG Regulation 18.002 which unequivocally states, "[T]his Regulation . . . . shall be the exclusive set of procedures applicable to all such [procurement] protests."; 2) The record shows that the award of attorney's fees was disposed of by motion, and BOG 18.002(18) gives Q-JO the power to conduct proceedings and enter orders necessary to dispose of issues raised by motion; and 3) BOG Regulation 18.002(22) allows for the award of attorney's fees and costs, and has vested the power to award same in the Quasi-Judicial Officer. "If the *Quasi-Judicial Officer determines* that the non-prevailing party has participated in the hearing for an improper purpose, the *Quasi-Judicial Officer may award* attorney's fees and cost to the prevailing party, as appropriate." BOG Regulation 18.002(22) (emphasis added).

An order deviates from the essential elements of law when it purports to order something outside the scope of its authority. *See e.g. Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. It is the decision of the University President, as reflected in the UCF Fees Order, that we examine today, not the decision of the Q-JO; however, an understanding of both decisions is essential to our ruling. This Court expresses no opinion as to the ultimate propriety of the ruling of the Q-JO Fees Order. The record in the present case shows that the Q-JO was tasked with answering two questions using separate sections of BOG Regulation 18.002. First, did Centerplate's protest have merit? Using the entirety of 18.002(13), including the judicial review provision of 18.002(13)(l), the question of merit was answered in the affirmative when the time to appeal the Hitt Order expired in March 2018. UCF agreed in the Hitt Order to the procedure and resolution of the question of fees and costs by Q-JO when it included language that any award of attorney's fees was to be resolved by the Q-JO after the time to appeal the final order on the merits had expired.

The second question, was Centerplate entitled to attorney's fees and cost? The Q-JO utilized a separate provision of 18.002, 18.002(22), in reaching its conclusion that the award of Attorney's fee and costs were appropriate. The University then utilized the procedure set forth in 18.002(13)(l) to abrogate the ruling of the Q-JO. It is this aspect of the UCF Fees Order that we find departed from the essential requirements of law. Regulation 18.002(22) clearly sets forth a right to attorney's fees and costs independent of the review procedure contained in 18.002(13)(l). Simply put, the plain reading of 18.002(22) does not permit a University President to abrogate the ruling of a quasi-judicial officer pertaining to fees and costs.

Finally, UCF has raised a constitutionality question for the first time in its Response to Petition for Writ of Certiorari. Resp. 23-29. UCF is challenging BOG 18.002(22) as a facially unconstitutional regulation implementing a constitutional provision. While the circuit courts have the power to rule on constitutional questions, in the context of challenges to administrative action, this type of constitutional challenge should be refrained from as a matter of judicial policy. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Tr. Fund*, 147 So. 2d 153, 157 (Fla. 1982). "Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." *Id.* In the present case, UCF is arguing that it is proper for the Court to deny the Petition and allow the UCF Fee Order to stand because the portion of the regulation allowing for the award of fees unconstitutionally encroaches on an arguably exclusive legislative branch power. Continuing, UCF says that the tipsy coachman doctrine allows that the UCF Fee Order to stand, though completely silent as to unconstitutionality, because it is nevertheless correct in its denial of fees. As *de novo* review is demanded when declaring a statute or rule unconstitutional, this is a bridge too far in the context of a certiorari proceeding in circuit court. *See Id.* at 158 ("If the agency fails to act to correct the rule, then the district court may review both the constitutionality of the rule and the agency action "comprehensively, on all appropriate issues, in a single judicial forum.").

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the Final Order on Petitioner's Motion for Attorney's Fees and Costs issued by UCF on February 22, 2019 is hereby **QUASHED**. (CRANER, and O'KANE, JJ., concur.)

[1]Since 2003 the State University System of Florida, of which UCF is a member, has been administered by the Florida Board of Governors.

[2]Current BOG regulations are published at: https://www.flbog.edu/regulations/active-regulations/

[3]BOG Regulation 18.002(2)(q) defines "Quasi-Judicial Officer" as the presiding official which may be an Administrative Law Judge or a qualified attorney with a minimum of five years' experience practicing law. 18.002(13)(a) requires the appointment of a quasi-judicial officer in cases involving issues of material fact.

[4]ITN1617NCSA was issued by UCF at the beginning of the bidding process. An "invitation to negotiate", otherwise known as an ITN, invites venders to bid on contracts for goods and services.

[5]In his Final Order Awarding Fees and Costs, entered January 10, 2019, Judge Newton references Florida Statutes § 120.68 as the proper procedure for judicial review of his order. UCF has used the procedure found in § 120.68 to appeal the Q-JO Fees Order to the Fifth DCA, however, this fact is immaterial to the Petition before this Court, as the order at issue is UCF Fees Order of February 22, 2019, not the QJ-O's. Nor does the Court reach whether the Q-JO's invocation of Florida Statutes is proper.

* * *

Debt collection—Credit card—Account stated—Trial court erred in denying motion for involuntary dismissal of debt collection action where plaintiff that was successor in interest to credit card account failed to prove that its predecessor in interest sent or otherwise rendered final account statement to defendant, which is essential element of claim for account stated

YOSLEIDIS FLEITAS, Appellant, v. MIDLAND FUNDING, LLC, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2018-AP-4. L.T. Case No. 2017-SC-003506-SP. May 6, 2020. Appeal from the Order of Hal Epperson, Jr. County Court Judge. Counsel: Bryan A. Dangler, The Power Law Firm, Winter Park, for Appellant. Sean Fisher and Valeria Obi, Tampa, for Appellee.

(Before TYNAN, BARBOUR, RODRIGUEZ, JJ.)

(**PER CURIAM**.) Appellant, Yosleidis Fleitas, appeals the denial of her motion for involuntary dismissal of the complaint and the subsequent award of judgment in favor of Appellee, Midland Funding, LLC. For the reasons discussed below, we **REVERSE** the judgment of the lower court and **REMAND** for the issuance of an order granting Appellant's motion for involuntary dismissal.[1]

Relevant Facts

Midland Funding, LLC, Appellee, brought the underlying action to recover an unpaid debt from Yosleidis Felitas, Appellant. Appellee's complaint alleged a single count of "account stated" based on a credit account which was originated between Appellant and Credit One Bank but had since been purchased by Appellee. At a non-jury trial, an employee of Appellee provided testimony regarding the credit card industry. The employee testified that although Appellee had received copies of the relevant account statements from Credit One, she had no records or knowledge regarding the mailing or business practices of Credit One and therefore could not testify that any account statements, including any final statement, had been mailed or otherwise rendered to Appellant. There was no other testimony regarding the business or mailing practices of Credit One.

Appellant made a motion for involuntary dismissal on the basis that Appellee had not established a prima facie case for account stated because it had not proven that the final statement had ever been rendered to Appellant. The trial court denied the motion and entered final judgment in favor of Appellee. The court found that Credit One Bank had sent monthly account statements to Appellant and that, for a time, Appellant had made payments. The court concluded that the evidence established a series of transactions between Credit One Bank and Appellant which satisfied the requirement that the account statements were rendered to Appellant.

Discussion

This Court reviews the denial of a motion for involuntary dismissal *de novo. Deutsche Bank Nat'l Trust Co. v. Kummer,* 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1548a]. In this type of case our review is limited to determining "whether or not the plaintiff made a prima facie case." *Capital Media, Inc. v. Haase,* 639 So. 2d 632, 633 (Fla. 2d DCA 1994).

In order to state a claim for account stated a plaintiff must prove: 1) the parties had business transactions between them; 2) the plaintiff rendered a statement to the defendant, who failed to object within a reasonable time; 3) the defendant promised to pay the amount set forth in the statement; and 4) the defendant has not paid the amount owed under the statement. *In Re: Standard Jury Instructions—Contract and Business Cases,* "416.39 Account Stated," 116 So. 3d 284, 331 (Fla. 2013) [38 Fla. L. Weekly S385a] (Mem.). *See also Farley v. Chase Bank, NA.,* 37 So. 3d 936, 937 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1296a].

An appellate panel of the Thirteenth Judicial Circuit considered an appeal from a trial court order which granted a similar motion for involuntary dismissal. *Portfolio Recovery Associates, LLC v. Jamie Mantilla,* 25 Fla. L. Weekly Supp. 939a (13th Jud. Cir. App. December 20, 2017). In that case, the plaintiff, a successor in interest to a credit account, sought to recover from the defendant based on account stated. The trial court dismissed the case because the plaintiff failed to prove that the predecessor in interest properly mailed the final account notice. On appeal, the plaintiff argued that it was not required to prove the standard mailing practices of its predecessor in interest where there was evidence the defendant had received other account statements. The court rejected this argument, concluding that evidence of receipt of previous account statements is irrelevant to the claim for account stated. The court affirmed the trial court's dismissal of the complaint.

The Thirteenth Circuit case is strikingly similar to the case at bar. Here, the trial court concluded that based on the series of transactions between Appellee's predecessor in interest and Appellant it was evident that the account statement had been sufficiently rendered. However, just as in *Mantilla,* Appellee did not introduce any evidence that the final statement had been mailed, or otherwise rendered, to Appellant. Appellee's witness was an employee of Appellee who admitted to possessing no knowledge of Credit One's mailing practices and could not establish Credit One's business practices. *See Allen v. Wilmington Tr., NA.,* 216 So. 3d. 685, 688 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b]. Accordingly, Appellee did not establish that the final account statement, upon which its claim for account stated was based, was rendered to Appellant and therefore Appellee failed to present a prima facie case for account stated.

The final judgment against Appellant is **REVERSED** and the matter is **REMANDED** to the trial court for the issuance of an order granting Appellant's motion for involuntary dismissal.

Appellant's "Amended Motion for Appellate Attorney's Fees" filed October 12, 2018 is **CONDITONALLY GRANTED**. Appellate fees are conditioned on Appellant ultimately prevailing on a motion for attorney's fees based on the underlying contractual agreement to be determined in the trial court. *See Cunliffe v. Portfolio Recovery Associates, LLC,* 20 Fla. L. Weekly Supp. 1125b (Fla. 9th Jud. Cir. App. August 19, 2013). (BARBOUR and RODRIGUEZ, JJ., concur.)

[1]The Court notes that Appellee elected to file no Answer Brief in this case.

* * *

Counties—Permitting—Excavation—Due process—County code does not afford board of county commissioners unfettered discretion to deny permits for borrow pits and excavation and fill activity where code states that activity shall be a permitted use "subject to meeting the requirements of chapter 16"—No merit to claim that failure to raise issue of compliance with subsection of chapter 16 relating to traffic control measures at hearing denied applicants due process where it is uncontested that any and all portions of chapter 16 would be at issue at hearing, and board clearly raised concerns about traffic at hearing—Board's failure to include findings of fact or reasoning in its decision letter does not amount to departure from essential requirements of law—Even if county staff's recommendation that permit be granted satisfied applicants' initial burden to establish compliance with chapter 16, board was authorized to deny permit where its decision that application failed to comply with chapter 16 is supported by competent substantial evidence of site maps and materials provided by applicants and testimony of area residents

ROGER HOLT AS TRUSTEE OF THE ROGER HOLT REVOCABLE TRUST U/T/D SEPTEMBER 28, 2011 AND JOSEPH E. HOLT, SR., AS TRUSTEE OF THE J.E. HOLT LIVING TRUST U/T/D AUGUST 27, 1993, Petitioners, v. ORANGE COUNTY, a political subdivision of the State of Florida, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018-CA-7274-O. April 14, 2020. Appeal from a final decision of the Orange County Board of Commissioners. Counsel: Victor L. Chapman, for Petitioners. Joel D. Prinsell, Deputy County Attorney, and Erin E. Hartigan, Assistant County Attorney, for Respondent.

(Before HARRIS, MARQUES, and BLACKWELL JJ.)

(**PER CURIAM.**) Petitioners, Roger Holt and Joseph E. Holt, Sr., seek a writ of certiorari to review a final decision of the Orange County ("County") Board of County Commissions ("BCC") which denied their application for an excavation permit to construct a borrow pit in Orange County, Florida, following a public hearing held June 5, 2018. This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(c)(3) and Fla. R. App. P. 9.100(c) and (f), as well as Sec. 16-23(d) of the Orange County Code ("O.C.C."). For the reasons discussed below, this Petition for Writ of Certiorari is **DENIED**.

RELEVANT FACTS

Petitioners own substantial property in Orange County, Florida. On July 15, 2015, Petitioners applied for an excavation permit from the County to develop a portion of their property into a borrow pit from which they would extract sand and other fill material to be used in various approved County project sites over a five-year period.

The subject land was zoned "A-2 agricultural" which includes "borrow pits, excavation and fill" as permitted uses under that classification. Section 38-79 of the O.C.C. details the conditions for permitted uses of property. Subsection 57 of this section explains that "borrow pits, and excavation and fill activity shall be a permitted use subject to meeting the requirements of chapter 16 (Excavation and Fill)."

Petitioners undertook a three-year-long application process, during which time the application was under consideration by County officials and staff. The process included at least two community meetings in which nearby residents were allowed to voice their concerns. The application underwent multiple changes and additional submissions of material in order to accommodate staff and community concerns. The culmination of this process was the preparation of a County staff report which recommended to the Mayor and BCC that the permit should be approved, subject to certain specified conditions.

On June 5, 2018 at a public hearing, the BCC considered Petitioners' application for a permit. At the hearing, members of County staff presented their report recommending approval of the application and noted the staff's conclusion that the submitted plans were "in conformance with the requirements of O.C.C. Ch. 16 (Excavations and Fill)." Counsel for Petitioners also spoke on behalf of the proposal before the BCC. The BCC also provided time for residents of the community to speak and offer their concerns regarding the proposed project.

The residents primarily raised concerns regarding the proposed access road that would be built for the project. The access road would stretch from S.R. 520 across several parcels of property owned by Petitioners to the excavation site. A major point of contention was the proposed use of a perpetual easement in favor of Petitioners for the access road to cross another road which served as a sort-of driveway for a number of area residents. These residents worried about the effect of dozens upon dozens of dump trucks crossing what was

essentially their driveway. Additionally, residents voiced concerns about the amount of dust that would be generated by the trucks hauling fill up and down the access road and the effects on neighbors with chronic respiratory illness.

The BCC focused on whether the proposed access road was in the best possible location and were similarly concerned about the access road crossing the residents' driveway. The BCC spent considerable time reviewing the submitted project site maps and other application materials which demonstrated the proposed location of the access road.

In addition, members of the BCC were concerned about the traffic of dump trucks on S.R. 520. The permit application noted that it had negotiated with the Florida Department of Transportation ("FDOT") regarding the allowable means of ingress and egress onto and from the highway. Petitioners' application included a proposed permit from FDOT for the construction of a deceleration, turn lane onto the access road from S.R. 520. However, FDOT had not approved of a median-cut which would have allowed direct turn-in for the trucks, and instead the proposed plan would require the trucks to make a U-turn at an adjacent intersection which also served as the only entrance to the residential neighborhood. A number of members of the BCC expressed their dissatisfaction with this result.

The hearing culminated with a motion by Commissioner Thompson. The motion noted dissatisfaction with the proposed access point on S.R. 520, as well as concern with the many trucks that would be crossing area residents' driveway and a "sheer disruption of lifestyle." The motion recommended denial of the permit application. The motion was seconded by Commissioner Siplin and was passed unanimously. This Petition ensued.

DISCUSSION

Standard of Review

Certiorari review is the appropriate manner for review of quasi-judicial acts such as building permits, site plans, and development orders. *Broward Cnty v. G. B.V. Int'l,* 787 So. 2d 838, 842 n.4 (Fla. 2001) [26 Fla. L. Weekly S463a]. In such cases this Court's review is limited to determining (1) whether procedural due process is accorded, (2) whether there has been a departure from the essential requirements of the law, and (3) whether the administrative findings and judgment are supported by competent, substantial evidence. *Dusseau v. Metro. Dade Cnty Bd. Of Cnty Comm'rs,* 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a].

Procedural Due Process was Afforded

Petitioners' principal argument regarding due process is that portion of O.C.C. Ch. 16 is unconstitutionally vague. The contested subsection of the O.C.C. states: "[t]he board of county commissioners may approve the permit application and may include any conditions necessary to ensure compliance with these regulations or may deny the permit." According to Petitioners, this language grants the BCC "unfettered discretion to approve or deny a permit for use of property that is proper under the application zoning code."

Notwithstanding Respondent's contention that this argument amounts to a prohibited substantive due process claim, this reading of the O.C.C. is misguided. Section 38-79(57) states that "borrow pits, and excavation and fill activity shall be a permitted use subject to meeting the requirements of chapter 16 (Excavation and Fill)." This subsection's use of the word "shall" demonstrates that the B.C.C.'s may deny such a permitted use only where the activity fails to meet "the requirements of chapter 16." Consequently, the B.C.C.'s discretion is not "unfettered" in this respect and the contested language does not afford the B.C.C. the opportunity to deny the application on the basis of whim or caprice. *See Fla. Mining & Materials Corp. v. Port Orange,* 518 So. 2d 311, 313 (Fla. 5th DCA 1987) (*citing Effie, Inc. v. City of Ocala,* 428 So. 2d 506 (Fla. 5th DCA 1983), *rev. denied,* 444 So. 2d 416 (Fla. 1984)).

On the other hand, Petitioners only assert a failure to afford procedural due process for the first time in their Reply. Petitioners point to the fact that Respondent only raised the issue of compliance with a specific subsection of O.C.C. (Section 16-8(2)) explicitly for the first time in their Response and claim that, because the issue was never raised, addressed, or mentioned explicitly during the BCC hearing, Petitioners were deprived of a meaningful opportunity to be heard in response to those issues. *Keys Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. While it may be true that there was no explicit reference to any specific portions of Chapter 16 during the BCC hearing, it is uncontested that the hearing was focused on Petitioners' application for a permit and that any and all provisions of Chapter 16 would be relevant in that proceeding.

Further, the BCC clearly raised concerns about the traffic on both the proposed access road and on S.R. 520 both of which were relevant at least to O.C.C. Section 16-8(6) which states "additional traffic control measures may be required" and "additional improvements to the existing roadway (including, but not limited to, turn lanes. . .) may be required." Accordingly, Petitioners were afforded both notice of the hearing, which they attended, and a fair opportunity to be heard. *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

No Departure from the Essential Requirements of the Law

To constitute a departure from the essential requirements of law for the purposes of certiorari, the violation must result in a "miscarriage of justice." *State v. Pettis,* 520 So. 2d 250, 253-54 (Fla. 1988). Petitioners contend that the BCC departed from the essential requirements of the law by failing to make any factual findings or to provide any reason for the denial in its written denial letter and did not satisfy its burden to show Petitioners failed to meet the requirements of O.C.C. Ch. 16.

It is true that the written decision letter provided by the BCC does not include any findings of fact or reasoning for the denial. The decision letter merely makes reference to the motion made by Commissioner Thomson to deny the application, and the unanimous vote that followed. However, this lack of specificity does not necessarily amount to a departure from the essential requirements of law. The Florida Supreme Court has consistently refrained from implementing a rule requiring "written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts." *Broward County v. G.B.V. Intern., Ltd.,* 787 So. 2d 838, 846 (Fla. 2001) [26 Fla. L. Weekly S463a]. Instead, the Florida Supreme Court has reiterated that "in order to sustain the board's action . . . it must be shown that there was competent substantial evidence presented to the board to support its ruling." *Board of County Commissioners v. Snyder,* 627 So.2d 469, 476 (Fla.1993). Accordingly, the BCC's decision to not include any findings of fact or reasoning is not sufficient, in its own right, to amount to a departure from the essential requirements of the law.

Petitioners next argue that they had satisfied their initial burden of showing that their application complied with the regulations of O.C.C. Chapter 16. Petitioners point principally to the recommendation of the staff report as evidence that they had complied and that therefore the burden had shifted to the BCC to show that Petitioners had not satisfied the standards of Chapter 16, or that the project was not in the public interest. Petitioners claim that the BCC did not even attempt to meet its burden and instead departed from the essential requirements of the law by continuing to require Petitioners to carry the burden of showing compliance with applicable County permit requirements, as well as to prove that the permit was in the public interest.

Petitioners rely heavily on the analysis of the burden shifting issue in cases involving applications for special exceptions. *See Irvine v. Duval County Planning Commission,* 495 So. 2d 167 (Fla. 1986). The Florida Supreme Court in *Irvine* approved of the Fourth DCA's definition of the difference in the burdens between rezoning cases and special exception cases. The Fourth DCA explained that "a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards in the zoning ordinance that such use would adversely affect the public interest." *Rural New Town, Inc. v. Palm Beach County,* 315 So. 2d 478, 480 (Fla. 4th DCA 1975). This definition for special exception demonstrates its similarity to the situation in the instant case where O.C.C. Section 38-79(57) mandates that property zoned A-2 be permitted for use as a borrow pit subject to Chapter 16.

However, under O.C.C. Section 16-23(2), the BCC is the final arbiter in the process of deciding whether a permit application has complied with Chapter 16. The recommendations of staff are just that: recommendations. Accordingly, even if we assume that the county staff's recommendation of approval satisfies Petitioners' initial burden of establishing compliance with Chapter 16, the BCC may still lawfully deny the application. In order to be lawful, the denial must be related to some failure of the application to comply with Chapter 16 and, on review by certiorari, must be supported competent substantial evidence. As discussed in greater detail below, we conclude that both of these conditions are met.

The concerns raised by the BCC as the basis for its denial were not merely "speculative concerns of the individual commissioners without any objective criteria" as claimed by Petitioners. Instead, the concerns were related to an area in which the BCC had explicit authority to explore and "require" additional improvements under O.C.C. Section 16-8. Subsection (6) grants the BCC the discretionary authority to require "additional traffic control measures" or "additional improvements to the existing roadway." Although this subsection was not referenced explicitly, the BCC's concern regarding the traffic on S.R. 520 and the proposed use of a U-turn, and their preference for other options, is clearly one of the discretionary additional requirements the BCC "may" impose.

Although we do not have the benefit of a written summary of reasons in the decision letter, the record does include the reasons enumerated by Commissioner Thompson upon her motion to deny the application. The Commissioner stated "because I have concerns about the crossing of people's driveway . . . because I have concerns about FDOT's decision about that U-turn . . . and because of the just sheer disruption of lifestyle . . . I'm going to move that we deny the requested action." This motion was seconded and passed unanimously, and the reasons therefore are record evidence of the reason for the denial. *See Snyder,* 627 So.2d at 476. This rationale can be considered a discretionary choice by the BCC to require additional measures. Because at least one of the stated reasons is related to an explicit part of the requirements of O.C.C. Section 16-8(6), the BCC did not depart from the essential requirements of the law by denying the application on these grounds.

BCC's Decision Supported by Competent Substantial Evidence

The BCC's decision to deny the application was supported by competent substantial evidence in the form of the site maps and materials provided by Petitioners themselves, as well as the testimony of area residents at the public hearing. It is clear from the record that the Commissioners spent considerable time reviewing the proposed access to the excavation site. The BCC could reasonably conclude on the basis of the provided evidence that reliance on a U-turn, rather than a median cut through, was insufficient. In making this conclusion, the BCC relied on the provided evidence regarding the potential number of trucks and trips that would be made. The fact that this evidence was provided in the permit application and the staff's report, does not mean that the BCC could not rely on it to arrive at a different conclusion than the staff recommendation. Petitioners' contention that there was no competent substantial evidence beyond the "unsworn testimony" of the area residents neglects the fact that the Commissioners decision was supportable by the evidence included in the application and staff report.

Further, the mere fact that the testimony of area residents at the public hearing was "unsworn" is not enough to conclude that their testimony could not be considered competent or substantial evidence. As explained by the Florida Supreme Court:

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

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The area residents testified regarding the impact of the access road passing over another road that operated as a driveway. There was limited testimony regarding the impact of having trucks performing U-turns at the intersection that also served as the primary entrance to the community. To the extent that this testimony was relevant to the BCC's consideration of additional traffic measures or potential required changes to existing roadways it constituted competent substantial evidence to support the BCC's decision.

CONCLUSION

Accordingly, for the reasons described above, we conclude that Petitioners were afforded procedural due process, that the decision of the BCC did not involve a departure from the essential requirements of the law, and that it was supported by competent, substantial evidence. Therefore, we **DENY** the petition for writ of certiorari. (MARQUES and BLACKWELL, JJ., concur.)

* * *

SERGIOS AUTO BODY SHOP, SERGE J. HOVHANESSIAN, JANO Z. HOVHANESSIAN, and THERESE HOVHANESSIAN, Petitioners, v. MONTGOMERY PROPERTY HOLDINGS, JOHNSON'S WRECKER SERVICE, and JOHN DOE 1, Respondents. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CA-006179-O. April 30, 2020. Petition for Writ of Certiorari from the Orders of the Orange County Trial Court. The Honorable Elizabeth Starr, Judge. Counsel: Ortavia D. Simon, for Petitioners. Alexander B. Cvercko, for Respondent.

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

(PER CURIAM.) **DENIED.** The cause is **REMANDED** to the trial court, such that it can hold an evidentiary hearing to determine the appropriate amount of the required bond. *See* Fla. R. Civ. P. 1.610(b); *Ralicki v. 998 SW 144 Court Rd, LLC*, 254 So. 3d 1155, 1157 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D2091c].

Additionally, the Petitioners' "Motion to Determine Entitlement to Attorney's Fees and to Tax Attorney's Fees, Costs and Related Expenses," filed on June 24, 2019, is **DENIED.** The Respondent's "Respondent, MPH's Motion for Appellate Attorney's Fees," filed on July 3, 2019, is **GRANTED. (**CARSTEN and YOUNG, JJ., concur.)

* * *

Judges—Disqualification—Prohibition—Where movant filed motion for disqualification with clerk but did not serve motion on trial judge, as is required by rule 2.330(c)(4), judge did not err in denying motion as legally insufficient—Moreover, even if motion had been served on judge, judge's conclusion that motion was legally insufficient would be supportable under "tipsy coachman" doctrine where motion did not comply with rule requirement to include dates of all previously granted motions to disqualify filed in case and dates of orders granting those motions—Petition for writ of prohibition is denied

JULIO E. GIL DE LAMADRID a/k/a JULIO ENRIQUE GIL DE LAMADRID PEREZ, Appellant, v. BOWLES CUSTOM POOLS & SPAS, INC., a Florida Corporation, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018-CV-000062-A-O. April 9, 2020. Appeal from the Order of Judge David P. Johnson, Orange County Judge. Counsel: Julio E. Gil De Lamadrid, pro se, Appellant. Barry Kalmanson, for Appellee.

(Before CARSTEN, WHITEHEAD, WILSON, JJ.)

(**PER CURIAM**.) Based on this Court's order of April 26, 2019, this appeal is being treated as a Writ of Prohibition seeking review of the trial court's order denying a motion to disqualify the trial judge David P. Johnson ("Judge Johnson").

Relevant Facts

On March 23, 2018, Appellant filed the underlying "New Motion and Affidavit for Disqualification" ("the Motion"). There is nothing in the record to indicate that the Motion was ever served personally on Judge Johnson or sent directly by Appellant to his office. Further, the Motion did not contain the dates of all previously granted motions to disqualify under the rule. Subsequently, on April 24, 2018, Appellant filed an "Informative Motion," as well as a letter to Judge Johnson, stating that because the Judge had not acted on the Motion within the thirty-days required by Rule 2.330(j), Fla. R. Jud. Admin., the Motion was deemed granted. The "informative motion" requested immediate reassignment of the case to another county court judge. On the same day, Judge Johnson entered an order denying the Motion for legal insufficiency because it had not been properly served according to Rule 2.330(c)(4), Fla. R. Jud. Admin. Appellant then sought review via the instant writ of prohibition.

Standard of Review

This Court reviews challenges to orders on motions for disqualification *de novo. See Peterson v. Asklipious,* 833 So. 2d 262, 263 (Fla. 4th DCA 2002) [28 Fla. L. Weekly D111a]. A writ of prohibition is the proper procedure for appellate review to test the validity of a motion to disqualify. *Time Warner Entm't Co. v. Baker,* 647 So. 2d 1070, 1071 (Fla. 5th DCA 1994).

Discussion

It is clear from the record that Judge Johnson based his decision on the legal insufficiency of the Motion. Judge Johnson stated that the Motion was not properly served on the court in the manner prescribed by Rule 2.330(c)(4), Florida R. Jud. Admin. Rule 2.330(c)(4) reads in pertinent part that "[I]n addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080."

Appellant argues that the Motion had been properly filed with the clerk and was therefore before Judge Johnson and on his docket. Appellant notably does not contend that he attempted any service on Judge Johnson beyond the filing of the Motion with the clerk, which he believes was sufficient. However, the text of Rule 2.330(c)(4) is clear that "in addition to filing. . .the movant shall immediately serve a copy of the motion on the subject judge." Indeed, there is nothing in the record that indicates Appellant took any additional steps beyond filing the Motion with the clerk. Accordingly, Judge Johnson's conclusion that the Motion was legally insufficient was correct as a matter of law.

We also note that, even if Appellant had properly served the Motion on Judge Johnson and complied with that part of Rule 2.330(c)(4), Judge Johnson's conclusion of legal insufficiency would be supportable under the "tipsy coachman" doctrine. *See Dade County Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644 (Fla. 1999) [24 Fla. L. Weekly S216a]. The record shows that the Motion was also legally insufficient under Rule 2.330(c)(4) because it did not "include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions." Fla. R. Jud. Admin. 2.330(c)(4). While the Motion does make reference to a previous motion against and order by Judge Johnson, as well as previous motions and orders involving previous trial judges, the relevant dates of those motions and orders are contained nowhere in the Motion.

Based on the foregoing, Appellant's Petition for Writ of Prohibition is **DENIED**. **(**WHITEHEAD and WILSON, JJ. Concur.)

* * *

Insurance—Personal injury protection—Attorney's fees—Appeal of trial court's determination that predecessor attorney was not entitled to attorney's fee and costs for representation of insured in PIP action after successor attorney filed voluntary notice of dismissal providing that each party would bear own attorney's fees and costs—Where uncontroverted evidence shows that predecessor attorney was involuntarily discharged and his lien for fees and costs was timely filed and perfected, thus surviving notice of voluntary withdrawal and lack of occurrence of contingency specified in retainer agreement, order denying entitlement to fees and costs is reversed

MARK J. FELDMAN, P.A., Appellant, v. UNITED AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-202-AP-01. L.T. Case No. 2008-16789-CC-25. May 4, 2020. An Appeal from the County Court in and for Miami-Dade County, Hon. Patricia Marino-Pedraza, County Court Judge. Counsel: Mark J. Feldman, Mark Feldman P.A., for Appellant. Michael J. Niemand, United Automobile Insurance Company, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(TRAWICK, J.) Appellant Mark J. Feldman (Feldman) contests the determination of the trial court that he was not entitled to attorney's fees. Upon our review of the record, we agree that the trial court was incorrect in its findings regarding Feldman's entitlement to fees. As a result, we must reverse the decision below.

Feldman was retained pursuant to a contingency fee contract by Lety Castillo to represent her in an insurance claim dispute with Appellee United Automobile Insurance Company (United). Castillo alleged that United failed to pay certain medical bills she incurred directly related to an automobile accident. On December 1, 2008, Feldman filed a complaint on behalf of Castillo alleging breach of contract for the denial of personal insurance protection (PIP) benefits. Within the complaint was a claim for attorney's fees pursuant to Florida Statutes §627.428.

On November 27, 2010, a stipulation for substitution of counsel was executed by Feldman, Castillo and Castillo's new attorney, Carlos Cruances. No reason was given in the stipulation for the change of counsel. This stipulation was accepted by the trial court on December 14, 2010. On December 20, 2010, a notice of charging and retaining liens was filed by Feldman. On June 17, 2016, a notice of voluntary dismissal was filed by a successor counsel on behalf of Castillo. The notice indicated that each party would bear its own attorney's fees and costs.

Feldman subsequently filed a supplemental complaint to enforce the charging and retaining liens against both United and Castillo. During an evidentiary hearing on Feldman's entitlement to fees and costs, the court heard testimony from Feldman who stated that he was wrongfully discharged without cause by Castillo. In response, United

attempted to introduce an affidavit purportedly signed by Castillo. The Court sustained Feldman's objections to the affidavit as containing attorney-client privileged information and that the affidavit was hearsay. While United also produced the testimony of a successor attorney to Cruances, Jorge Romani, Romani provided no information as to the circumstances surrounding Feldman's discharge. No other evidence was produced to support United's contention that Feldman had voluntarily withdrawn from the case.

The trial court entered an order denying Feldman's motion for entitlement to fees and costs. The court specifically found that United had not acted in bad faith in resolving Feldman's claim for fees; that Feldman had not been discharged but had voluntarily withdrawn; that Feldman was not entitled to attorney's fees; and that Feldman's recourse for fees was to make a claim against Castillo.

This Court reviews the trial court's order denial of the award of attorney's fees under an abuse of discretion standard. *Quigley v. Culbertson,* 279 So.3d 1260, 1261 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341a]. Such a decision must be based upon competent substantial evidence. *Id.*; *Diwakar v. Montecito Palm Beach Condominium Ass'n. Inc.,* 143 So.3d 958, 962 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1372b].

In reviewing the trial court's order, we must address three issues: first, whether the trial court's conclusion that Feldman voluntarily withdrew from his representation of Castillo was supported by competent admissible evidence; second whether Feldman's fee claim survived the notice of voluntary dismissal filed by Castillo in which it was stipulated that the parties would bear their own fees and costs; and third is what effect the contingency fee agreement between Feldman and Castillo has upon Feldman's attorney's fee claim.

The Voluntariness of Feldman's Withdrawal

The trial court's conclusion that Feldman withdrew from representation was unsupported by any competent evidence. The only evidence supporting the trial court's conclusion that Feldman's withdrawal was voluntary was the affidavit of Castillo. However, this affidavit was properly excluded by the trial court. *See Mitchell Brothers, Inc. v. Westfield Insurance Company, et. al.,* 24 So.3d 1269 (Fla. 1st DCA 2009) [35 Fla. L. Weekly D107b] (An affidavit is hearsay and cannot support an award of attorney's fees); *Roggemann v. Boston Safe Deposit and Trust Co.,* 670 So.2d 1073 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D706a] ("a trial court cannot rely on affidavits at the hearing to assess attorney's fees, since they are hearsay."). Without the affidavit, there is no competent evidence in the record to rebut the testimony of Feldman that he was wrongfully discharged. Thus, the trial court's finding of a voluntary withdrawal cannot be sustained.

Did Feldman's Alleged Entitlement to Fees Survive the Stipulation That the Parties Would Bear Their Own Fees and Costs?

An attorney's entitlement to fees in PIP cases is governed by Florida Statute §627.428(1) which provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Upon his discharge by Castillo, and prior to the settlement in this case by successor counsel, Feldman filed a notice of charging lien for fees and costs. Although not citing §627.428(1) in the notice, his entitlement to fees stems from this provision. The notice preserved his right to seek fees and costs from United and Castillo if United paid "any sums to resolve any of plaintiff's claims." The notice of voluntary dismissal, filed over five years later, did not extinguish Feldman's right to enforce the lien. *See Hannah v. Elder,* 545 So.2d 503, 504 (Fla. 4th DCA 1989) (filing of notice of lien in pending case perfected the claim and survived the notice of voluntary dismissal), citing *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom,* 428 So.2d 1383 (Fla. 1983). *See also Gaebe, Murphy, Mullen & Antonelli v. Bradt,* 704 So.2d 618, 619 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2506e].

Effect of Contingency Fee Agreement on Feldman's Claim

Feldman's retainer agreement with Castillo was on a contingency basis. The agreement states in pertinent part:

> If and only if I prevail and the Court awards an attorney fee pursuant to any applicable Florida Statute, Florida law, or contract, shall my attorney be entitled to a fee. . . .
>
> The lawyers from Mark J. Feldman, P.A., have agreed to represent me on a pure contingency basis and it is agreed that they will only recover a fee if the case is successful and a fee is awarded by the Court.

As discussed above, the only admissible evidence before the trial court supports the conclusion that Feldman was involuntarily discharged. As a result, Feldman may be entitled to a fee for his services against both United and Castillo even though the contingency specified in the retainer agreement had not occurred at the time of his withdrawal. *See Faro v. Romani,* 641 So.2d 69, 71 (Fla. 1994) (An attorney withdrawing prior to the contingency of an award may be entitled to a fee if the attorney's continued representation of the client would violate an ethical rule of the Florida Bar.[1] [2]

The uncontroverted evidence in the record establishes that Feldman was involuntarily discharged. His lien for fees and costs was timely filed and perfected, thus surviving the notice of voluntary dismissal and the lack of the occurrence of the contingency specified in the retainer agreement. As a result, the trial court's order denying Feldman's entitlement to attorney's fees must be **REVERSED.** This matter is remanded for the trial court to determine reasonable attorney's fees. *See Mitchell Brothers, Inc. v. Westfield Insurance Company, et. al.,* 24 So.3d 1269, 1270 (Fla. 1st DCA 2009) [35 Fla. L. Weekly D107b]. (WALSH and REBULL, JJ., concur.)

---

[1]Rule 4-1.16(a)(3) of the Rules Regulating the Florida Bar states:

Except as stated in subdivision (C), a lawyer shall not represent a client, or when representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

[2]*Faro* also supports the conclusion that the Feldman would be entitled to a fee award even though the award was pursuant to a settlement and not an award by the court.

* * *

Criminal law—Traffic infraction causing death—Personal jurisdiction—Prosecution for traffic infraction causing death is barred and motion to dismiss is granted where defendant was issued civil moving citation at time of crash, but no additional or amended citation or charging document was filed or served on defendant after state decided to prosecute him for traffic fatality—Appearance of defendant's attorney at pre-trial hearings did not waive defendant's opportunity to contest personal jurisdiction where attorney was present for jurisdictional purposes only after state orally amended charges—Petition for writ of prohibition is granted

JESUS LOPEZ, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Dade County. Case No. F19-16260. L.T. Case No. AAX5ICE. January 7, 2020. Counsel: Victor Vedmed, Law Offices of Victor Vedmed, P.A., Miami, for Petitioner.

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

(WILLIAM ALTFIELD, J.) Petitioner seeks a writ of prohibition

barring the lower court from continuing to exercise jurisdiction over him and to order the lower court to grant his Motion to Dismiss.

I. Facts

On January 19, 2019, a citation for a civil moving infraction was issued to the Petitioner. The citation was unsigned and specified a violation of Florida Statute 316.074 as the basis for the charge. The citation also specified that: (1) there was no injury to another person; (2) there was no serious bodily injury to another person; and (3) there was NO fatality. On or about February 13, 2019, the State Attorney decided to prosecute the Defendant for a traffic fatality. However, no additional, amended citation or charging document was filed by the State charging the Defendant with a fatality. Furthermore, no service was perfected or even attempted on Defendant.

Defendant's attorney filed a Motion to Dismiss for lack of jurisdiction. The state argued that the Motion to Dismiss was not timely, as the trial for the matter was calendared for the same date. The trial court denied the Motion to Dismiss on July 15, 2019. The trial court did not issue a written order.

II. Legal Analysis

Florida Statutes 318.14 and 318.19 require any person cited for a violation requiring a mandatory hearing or any other criminal violation listed in chapter 316 to sign and accept a citation indicating a promise to appear. Section 318.19, clearly specifies that any infraction which results in a crash that causes death to another requires a promise to appear, service and a signature.

If the cited individual refuses to sign the citation, promising to appear in court, the issuing officer is permitted to arrest the individual pursuant to Florida Statute 314.18(3), for a second-degree misdemeanor.

The State argues that the presence of Petitioner's attorney at hearings prior to the trial setting was a waiver of Defendant's opportunity to contest personal jurisdiction over him by the trial court. This Court disagrees.

Florida courts require substantial proof [of jurisdictional facts] before extending in personam jurisdiction. "A judgment entered without valid service is void for lack of personal jurisdiction and may be collaterally attacked at any time." *Dor Cha, Inc. v. Hollingsworth,* 29 Fla. Weekly D1502a (Fla. Dist. Ct. App. 2004). It is clear from an extensive review of Florida case law that a motion that seeks relief from a judgment that is void or voidable" "may be made at any time, even more than 1 year after the judgment was entered." *DeClaire v. Yohanan,* 453 So.2d 375, 379 (Fla. 1984); *Gonzalez v. Totalbank,* 472 So.2d 861, 854 n. 3 (Fla. 3d DCA 1985).

The Second District Court of Appeal held in *Shah v. Regions Bank,* Case No. 2D17-1225, 43 Fla. L. Weekly D1635a, (Fla. 2d July 20, 2018) that, "while it is true that Fla. R. Civ. Pro. 1.540(b)(4) states that a motion for relief from a void judgment must be filed within a reasonable time, there is no limitation on setting aside a void judgment." *citing M.L. Builders, Inc., v. Reserve Developers, LLP,* 769 So. 2d 1079, 1082 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2277a]; *Wiggins v. Tigrent, Inc.,* 147 So. 3d 76, 81 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1581a].

Defense counsel was present for jurisdictional purposes only after the State orally amended the charges against Defendant on February 13, 2019. Defendant would have been able to seek relief against a judgment issued on July 15, 2019 at anytime where the basis of the relief was a lack of personal jurisdiction, Here, Defendant moved to dismiss prior to the beginning of trial, before a judgment was issued against the Defendant.

In the instant prohibition proceedings, the State has failed to show cause why prosecution is not barred by the trial court's lack of personal jurisdiction, in essence, asking this Court, in its appellate capacity, to invoke the trial court's personal jurisdiction over Defendant, thus bypassing the requirements for service outlined in Florida Statute 318.14.

This Court concludes the State has not established that there is a specific period of time constituting a waiver of Defendant's ability to raise the issue of the trial court's personal jurisdiction over him. Furthermore, this Court concludes that the State has not established that there is an applicable waiver of statutory service requirements. As a result, prosecution in AAX5ICE is barred and Petitioner's Motion to Dismiss must be granted.

Based on the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Prohibition is GRANTED.

* * *

Liens—Mechanic's lien—Notice—Neither substantial compliance nor lack of prejudice will excuse deficiency in notice of mechanic's lien—Trial court correctly denied enforcement of lien where mechanic failed to expressly provide notice to lienholder of right to post bond

STRONGER COLLISION CENTER, LLC, Appellant, v. NORTH AMERICAN SPECIALTY INSURANCE COMPANY and VEHICLE SOLUTIONS, CORP., Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-295-AP-01. L.T. Case Nos. 2018-24166-SP-05 and 2019-1155-CC-05. April 21, 2020. An Appeal from the County Court for Miami-Dade County, Maria D. Ortiz, Judge. Counsel: Keith Chasin, Keith Chasin, P.A., for Appellant. Paul E. Wilson, for Appellees.

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

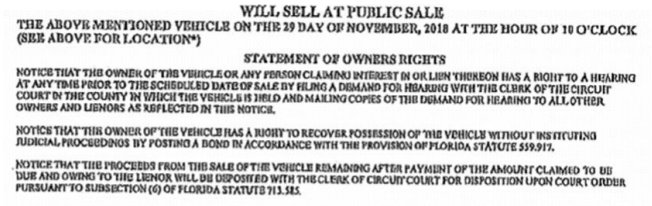
(WALSH, J.) Appellant, Stronger Collision Center, LLC, a mechanic, incurred damages related to its time and labor in fixing and storing an Audi vehicle. Appellant filed a mechanic's lien, naming the lienholder, Vehicle Solutions, Corp. (2019-1155-CC-05) (Lienholder), as well as the owner of the vehicle. The Lienholder, together with North American Specialty Insurance Company (2018-24166-SP-05) (Surety), posted a bond to recover the vehicle.

Appellant filed two actions against the Surety and Lienholder to recover against the mechanic's lien bond. Both the Lienholder and the Surety moved for summary judgment, and the trial court granted both motions. The issue in this consolidated appeal of both orders is whether the failure to strictly comply with the statutory requirements set forth in Section 713.585(1), Florida Statutes, rendered the mechanic's lien fatally deficient and unenforceable.

The standard of review from an order granting summary judgment is de novo. *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 697 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2072b], *citing Fayad v. Clarendon Nat'l Ins. Co*., 899 So. 2d 1082, 1084 (Fla. 2005) [30 Fla. L. Weekly S203a]; *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) [26 Fla. L. Weekly S465a]; *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

The mechanic's lien statute sets forth the precise required contents for a notice of lien. Specifically, Section 713.585(1)(o), Florida Statutes (2018) requires that the notice of lien must "[c]ontain notice that a lienholder, if any, has the right, as specified in subsection (5), to demand a hearing or to post a bond." The Lienholder and Surety argued below, and the trial court agreed that the notice of lien omitted this requirement and was therefore fatally deficient.

Appellant argues that while the notice failed to advise the lienholder of its right to post a bond, it did contain the following notices which would advise "any person" with an interest of their right to post a bond:



WILL SELL AT PUBLIC SALE
THE ABOVE MENTIONED VEHICLE ON THE 29 DAY OF NOVEMBER, 2018 AT THE HOUR OF 10 O'CLOCK (SEE ABOVE FOR LOCATION*)

STATEMENT OF OWNERS RIGHTS

NOTICE THAT THE OWNER OF THE VEHICLE OR ANY PERSON CLAIMING INTEREST IN OR LIEN THEREON HAS A RIGHT TO A HEARING AT ANY TIME PRIOR TO THE SCHEDULED DATE OF SALE BY FILING A DEMAND FOR HEARING WITH THE CLERK OF THE CIRCUIT COURT IN THE COUNTY IN WHICH THE VEHICLE IS HELD AND MAILING COPIES OF THE DEMAND FOR HEARING TO ALL OTHER OWNERS AND LIENORS AS REFLECTED IN THIS NOTICE.

NOTICE THAT THE OWNER OF THE VEHICLE HAS A RIGHT TO RECOVER POSSESSION OF THE VEHICLE WITHOUT INSTITUTING JUDICIAL PROCEEDINGS BY POSTING A BOND IN ACCORDANCE WITH THE PROVISION OF FLORIDA STATUTE 559.917.

NOTICE THAT THE PROCEEDS FROM THE SALE OF THE VEHICLE REMAINING AFTER PAYMENT OF THE AMOUNT CLAIMED TO BE DUE AND OWING TO THE LIENOR WILL BE DEPOSITED WITH THE CLERK OF CIRCUIT COURT FOR DISPOSITION UPON COURT ORDER PURSUANT TO SUBSECTION (6) OF FLORIDA STATUTE 713.585.

Additionally, Appellant points out that the Lienholder and Surety did, in fact, post a bond, and therefore, they suffered no prejudice as a result of the alleged notice deficiency.

Appellant points to the construction lien statute, section 713.08, which also provides the required contents of and form for providing notice of lien. The form is contained in section (3) of the statute and allows for enforcement by *substantial* compliance:

> (3) The claim of lien shall be sufficient if it is in substantially the following form, and includes the following warning:
>
> * * *
>
> However, the negligent inclusion or omission of any information in the claim of lien which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien.

Additionally, to prevent enforcement of the lien, the construction lien statute places a burden on a person adversely affected by the lien:

> (4)(a) The omission of any of the foregoing details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error.

In contrast, the mechanic's lien statute, section 713.585, Florida Statutes, contains no statutory provision allowing for enforcement by substantial compliance. Nor does the mechanic's lien statute require that a lienholder or other interested party demonstrate prejudice to avoid enforcement.

The mechanic's lien statute must be strictly construed. *Sheffield-Briggs Steel Prods., Inc. v. Ace Concrete Serv. Co.*, 63 So. 2d 924, 925 (Fla. 1953) ("Mechanics' liens are purely creatures of the statute. In order to acquire a lien or obtain priority over other lienors, the positive mandate of the statute must be observed"). Strict construction requires neither more nor less than what the statute requires. Accordingly, in *Home Electric of Dade County, Inc. v. Gonas*, 547 So. 2d 109, 111 (Fla. 1989), the Court enforced a lien where the lienor failed to provide a compliance date, because no such requirement was set forth by the statute. Because mechanics liens are strictly construed, neither substantial compliance nor lack of prejudice will excuse a deficiency:

> The fact that no prejudice has been nor can be shown is not the determining factor in this case; nor is it significant that Stresscon substantially complied with the mechanics' lien law. **The courts have permitted substantial compliance or adverse effect to be considered in determining the validity of a lien when there are specific statutory exceptions which permit their consideration**.

Stresscon v. Madiedo, 581 So. 2d 158 (Fla. 1991) (emphasis added) (citations omitted). In other words, unless the statute itself mentions them, "substantial compliance" and "prejudice" are legally irrelevant. Here, regardless of the Lienholder's lack of prejudice or the mechanic's substantial compliance with the statute, the lower court correctly denied enforcement of this lien for failure of the mechanic to expressly provide notice to the Lienholder of the right to post bond.

We affirm. (TRAWICK and REBULL, JJ., concur.)

* * *

Criminal law—Driving under the influence—Sentencing—Scrivener's error in written sentence reflecting that 12-month probation term would begin after 30-day period of incarceration, resulting in a sentence which exceeded statutory maximum sentence—Remand with instructions that written sentence conform to oral pronouncement

HUGO HERNANDEZ, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-386-AC-01. L.T. Case No. A101AUP. June 11, 2020. An Appeal from Miami-Dade County Court, Hon. Gordon Murray, Judge. Counsel: Carlos Martinez, Miami-Dade Public Defender and Deborah Prager, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Miami-Dade State Attorney and Stephanie Herbello, Assistant State Attorney, for Appellee.

CORRECTED OPINION ON MOTION FOR CLARIFICATION

(Before TRAWICK, WALSH and REBULL, JJ.)

(WALSH, J.) We hereby grant Appellant's Motion for Clarification, withdraw our opinion issued on April 21, 2020 and issue the following corrected opinion.

Hugo Hernandez appeals from conviction and sentence on misdemeanor charges of driving with a suspended license and driving under the influence of alcohol. While we affirm the Appellant's conviction, finding any alleged errors were either harmless or unpreserved, we reverse in part and remand for the trial court to correct a scrivener's error in the sentencing order. At sentencing, the transcript reflects that the trial court placed the Defendant on a 12-month period of probation during which he was to serve a 30-day period of incarceration as a condition of probation. However, the written order reflects that the 12-month probation term would commence at the *conclusion* of the jail term—which would result in a sentence exceeding the statutory maximum of one year.

> Where there is a discrepancy between the oral pronouncement and the written sentence, we should remand for the trial court to conform the written sentence to the oral pronouncement." *Frost v. State,* 769 So. 2d 443, 444 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2256b] (mem.) *(citing Willis v. State,* 656 So. 2d 261 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1489a]).

Parker v. State, 276 So.3d 108 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1755a]. Accordingly, Appellant's case is remanded with instructions that the written sentence for the count of driving under the influence be conformed to the oral pronouncement. Upon remand, Mr. Hernandez does not need to be present for the correction of the sentence, since the correction "is merely a ministerial act." *Frost,* 769 So. 2d at 444. (citations omitted).

In his motion for clarification, the Appellant argues that during the pendency of this appeal, he has completed his one-year probation term and therefore can no longer legally be required to serve his 30-day jail sentence. Because this Court is restricted to facts contained in the record on appeal and cannot take notice of whether the Appellant has, indeed, successfully completed his probation, this is a matter for the trial judge to address. *See Dep't of Transp. v. Baird,* 992 So. 2d 378, 382 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2386a] (appellate court may not consider matters outside the record on appeal). In all other respects, the judgment and sentence are affirmed and the motion for clarification is otherwise denied.

Affirmed in part, reversed in part and remanded. (REBULL and TRAWICK, JJ. CONCUR.)

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Trial court correctly found that deductible should have been applied to 100% of charges before reduction under statutory fee schedule—Reasonableness of charges—Summary judgment—Trial court erred in rejecting opposing expert affidavit filed by insurer on issue of reasonableness of charges and entering summary judgment on issue in medical provider's favor—Trial court improperly conducted *Daubert* analysis despite fact that provider did not timely challenge expert's compliance with section 90.702, and affidavit conformed to requirements for expert testimony

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. NEW MEDICAL GROUP, INC., a/a/o Silvia Contino, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 15-274 AP 01. L.T. Case No. 11-1881 SP (26). Second Corrected Opinion filed May 14, 2020. An appeal from the County Court in and for Miami-Dade County, Hon. Gloria Gonzalez-Meyer, County Court Judge. Counsel: Michael J. Neimand, House Counsel of United Automobile Insurance Company, for Appellant. Stuart L. Koenigsberg, A Able Advocates—Stuart L. Koenigsberg, P.A., for Appellee.

(Before WALSH, TRAWICK, and DE LA O, JJ.[1])

(TRAWICK, J.) The opinion issued on May 7, 2020 is withdrawn and the following opinion substituted in its place.

United Automobile Insurance Company ("United Auto") appeals a Final Judgment for Medical Benefits and Interest ("Final Judgment"), entered on July 28, 2015 in favor of New Medical Group, Inc. a/a/o Silvia Contino ("New Medical"), on the basis that the county court improperly granted summary judgment in favor of New Medical.

On January 26, 2009, United Auto's insured, Silvia Contino ("Ms. Contino"), was injured in an automobile accident, received medical treatment from and assigned her benefits to New Medical. Ms. Contino's United Auto Insurance Policy included a $1,000.00 deductible. United Auto reduced New Medical's bills pursuant to section 627.736 (5)(a)(2)(f), Florida Statutes (2009) and then applied Ms. Contino's $1,000.00 policy deductible. Afterward, New Medical filed a three-count complaint claiming improper application of the PIP policy deductible as well as breach of contract.

Both Parties moved for summary judgment regarding the application of the policy deductible. Additionally, New Medical moved for summary judgment on the issue of the reasonableness of the charges related to Ms. Contino's medical treatment. The trial court entered summary judgment in favor of New Medical on both issues. The trial court then entered Final Judgment in favor of New Medical.

The standard of review of a trial court's entry of a final summary judgment is *de novo*. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. "The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). We find that the trial court properly found that the deductible was incorrectly applied to reduced bills, but erred in granting summary judgment on the issue of reasonableness.

Application of the Deductible

After Final Judgment was entered below, the Florida Supreme Court addressed the question regarding the timing of the application of the deductible. In *Progressive Select Ins. Co. v. Florida Hospital Medical Center*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a] the Supreme Court held that "section 627.739(2) requires the deductible to be applied to the total medical charges prior to reduction under the reimbursement limitation in section 627.736(5)(a)1.b." *Id.* at 221. Accordingly, we find that the trial court was correct in finding that the deductible should have been applied to 100% of the face value of the charges before making any reductions.

Reasonableness

Section 627.736(5)(a), Florida Statutes (2018) provides that:

> 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.

New Medical had the burden of establishing that the charges for the services rendered were reasonable. *See State Farm Mut. Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1757a]; *see also Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. In support of its motion for summary judgment on reasonableness, New Medical relied on the deposition testimony of its corporate representative, Craig Dempsey ("Mr. Dempsey").[2]

A provider's medical bills along with testimony that the patient received the bills, present prima facie evidence of the reasonableness of its charges. *See, e.g., Walerowicz v. Armand-Hosang*, 248 So. 3d 140 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1165a] (testimony by lay witness associating treatment to bill was sufficient to establish reasonableness of the bills); *A.J. v. State*, 677 So. 2d 935 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1677e] (patient may testify as to the reasonableness of his own medical bills).

State Farm Mut. Auto. Ins. Co. v. Gables Insur. Co., 25 Fla. L. Weekly Supp. 857a (Fla. 11th Cir. Ct. 2017)) (citing *A.J. v. State*, 677 So. 2d 935, 937 (Fla 4th DCA 1996) [21 Fla. L. Weekly D1677e]) ("[A] medical bill constitutes the provider's opinion of a reasonable charge for the services."); *State Farm Mut. Auto. Ins. Co. v. Multicare Medical Group, Inc.*, 12 Fla. L. Weekly Supp. 33a (Fla. 11th Cir. Ct. Oct. 5, 2004) (Lay testimony from a fact witness with first-hand knowledge may be presented as to why the charge for the service was set at the rate at which it was billed.). Further, expert testimony is not a necessary predicate to admitting medical bills. *Canseco v. Cheeks,* 939 So. 2d 1122, 1123 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2485a]; *A.J.*, 677 So. 2d at 937-38. As discussed below, Mr. Dempsey's deposition testimony is sufficient to present a prima facie case with regard to reasonableness.

Florida Rule of Civil Procedure 1.510(e) requires that affidavits submitted to satisfy a movant's burden on summary judgment proceedings:

> must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in the affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Id.; see also State Farm Mut. Auto. Ins. Co. v. Pembroke Pines MRI, Inc., 171 So. 3d 814, 816-17 (Fla 4th DCA 2015) [40 Fla. L. Weekly D1879a] (citing *Castro v. Brazeau*, 873 So. 2d 516, 517 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1214b]).

Mr. Dempsey's testified that he had more than 30 years of medical billing experience, which included 17 years as the owner of two medical billing companies. He also testified regarding his background as a billing agent and consultant for over 180 chiropractors' clinics throughout the State. He then introduced the data he used to form the basis of his opinion as to the reasonableness of New Medical's

charges. Mr. Dempsey concluded that New Medical's fees were reasonable and well within the usual and customary rate related to the particular geographical area. *See Margate Pain and Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co.,* 25 Fla. L. Weekly Supp. 912a (Fla. 11th Cir. Ct. 2017) (finding similar testimony from Mr. Dempsey presented a prima facie showing of reasonableness). We likewise agree that Mr. Dempsey's testimony here was sufficient to establish a prima facie showing of reasonableness.

On the other hand, we disagree with the trial court's determination that Dr. Millheiser's affidavit was insufficient in countering New Medical's prima facie case. "Prima facie evidence has been defined as 'evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.' " *Castleman v. Office of Comptroller, Dept. of Banking and Finance, Div. of Securities and Investor Protection*, 538 So. 2d 1365, 1367 (Fla. 1st DCA 1989) (citation omitted). Once competent evidence is tendered, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue of material fact. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). In opposition to New Medical's summary judgment motion on the issue of reasonableness, United Auto filed the affidavit of Peter Millheiser, M.D.

Dr. Millheiser's affidavit stated in part that he reviewed Ms. Contino's, bills and records, HCFA billing forms, patient ledger treatment notes and evaluation reports; he has over 40 years of experience and knowledge of prices in the medical community for Miami-Dade County; he consults and evaluates various managed care guides, Medicare, Medicaid and workers compensation reimbursement schedules; he is familiar with the reimbursement schedules of various insurance carriers; throughout his years of medical experience he is familiar with managed care and has reviewed years of work for numerous insurance carriers; and, he is familiar with accepted reimbursements from PIP insurers, Medicare, Medicaid, Worker's Compensation, HMO health insurers, PPO insurers, self-insured's out-of-pocket / cash pay patients. Based upon his above experience, he opined that the amounts charged by New Medical for the treatment and services at issue are all unreasonable charges for 2009 and 2010, which are the years billed to Ms Contino.

New Medical's contention to the contrary notwithstanding, an insurer's failure to elect to use the fee schedule limitation in an insurer's policy, does not preclude it from having an opportunity to litigate the reasonableness of its bill under section 627.736(5)(a)1, Florida Statutes (2008). *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.*, 202 So. 3d 437, 438 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a]. Furthermore, we agree with our sister court that consideration need not be given to all factors listed in section 627.736(5)(a). "Based upon the clear wording of the above statutory provision, there is nothing in the statute that mandates that consideration be given to <u>every</u> factor when determining whether a service or treatment is reasonable. Rather, the statute provides that 'consideration may be given' to certain factors." (emphasis provided in original) *United Auto. Ins. Co. v. Hallandale Open MRI, a/a/o Antonette Williams,* 21 Fla. L. Weekly Supp. 399d (Fla. 17th Cir. Ct. Dec. 11, 2013).

Additionally, we find that the trial court erred in conducting an extensive *Daubert* analysis of Dr. Millheiser's testimony at the hearing on New Medical's motion for summary judgment. A *Daubert* challenge should not be addressed at a summary judgment hearing, unless the party making the challenge filed a motion setting forth the alleged defects in the expert's opinion. *Rojas v. Rodriguez*, 185 So. 3d 710, 712 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D423a]; *State Farm Mut. Auto. Ins. Co. v. A1A Mgmt. Servs., LLC d/b/a Roberto Rivera-Morales, M.D.,* (*a/a/o Farano Muselaire*), 25 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. 2017) ("*Farano Muselaire II*"). Here, the record does not show that New Medical timely challenged compliance with section 90.702, Florida Statutes. A *Daubert* objection must be timely made. *See Rojas,* 185 So. 3d at 712 (Fla. 3d DCA 2016). Therefore, we find improper the county court's rejection of Dr. Millheiser's affidavit based on its extensive *Daubert* analysis and its conformity to the requirements of expert testimony.

Trial courts should exercise caution when granting summary judgment on the medical charges' reasonableness because reasonableness "is generally a factual issue ripe for determination by a jury." *State Farm Mut. Auto. Ins. Co. v. Florida Wellness & Rehabilitation Center, Inc.*, 25 Fla. L. Weekly Supp. 5a (Fla. 11th Cir. Ct. 2017) (citing *State Farm Mut. Auto. Ins. Co. v. Sunset Chiropractic & Wellness*, 24 Fla. L. Weekly Supp. 787a (Fla. 11th Cir. Ct. 2017)). When a record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party, and summary judgment must be denied. *See Dellatorre v. Buca*, 211 So. 3d 272, 273 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D289c]; *Rakusin Law Firm v. Estate of Dennis*, 27 So. 3d 166, 167 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D296a]. We find that the Affidavit of Dr. Millheiser raised genuine issues of material fact which precluded the entry of summary judgment and should not have been rejected. *See State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Yuderis Rego*, 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20. 2019); *United Automobile Insurance Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo*, Case No. 2017-326-AP-01 (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Automobile Insurance Co., Appellant, v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo*, 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. App. July 30, 2019); *United Automobile Insurance Co., Appellant, v. Miami Dade County MRI, Corp. a/a/o Javier Rodriguez*, 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. July 25, 2019); *United Automobile Insurance Co., Appellant, v. Miami Dade County MRI, Corp. a/a/o Rene Dechard*, 27 Fla. L. Weekly Supp. 226a (Fla. 11th Cir. Ct., August 12, 2019); *United Automobile Insurance Co., Appellant, v. Millennium Radiology, LLC a/a/o Javier Rodriguez*, 25 Fla. L. Weekly Supp. 911b (Fla. 11th Cir. Ct., July 19, 2019). Based on the above analysis, the Final Judgment is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion. Appellant's motion for appellate attorney's fees is conditionally granted upon satisfying its proposal for settlement and the trial court's determination of the sufficiency and enforceability of the proposal for settlement. Appellee's motion for appellate attorney's fees is hereby granted, limited to the work on the issue on which it prevailed. The case is remanded to the trial court to determine the amount of a reasonable fee. (WALSH and DE LA O, JJ. concur.)

---

[1]Judge De La O did not participate in the oral argument heard by this Court.

[2]Mr. Dempsy, as corporate representative for New Medical and acting on its behalf, is not required to state the source of his knowledge. *See Beverage Canners, Inc. v. E.D. Green Corp.*, 291 So. 2d 193, 195 (Fla. 1974). The court may presume the basis of his personal knowledge stems from his job duties and position as the corporate representative. *Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14, 15-16 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D182a]; *Alvarez v. Florida Ins. Guar. Ass'n, Inc.*, 661 So. 2d 1230, 1232 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2214a]; *see Deshazior v. Sch. Bd. of Miami-Dade County*, 217 So. 3d 151 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D725a]. Regardless, Mr. Dempsey's deposition provided a detailed account of the source of his knowledge.

* * *

MIN WANG, Appellant, v. GARY NEMI, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-203-AP-01. L.T. Case No. 2018-16929 CC 05. May 7, 2020.

ORDER AWARDING ATTORNEY'S FEES AND COSTS

Appellee's Motion for Award of Attorney's Fees and Costs on Appeal is hereby, GRANTED. This case is remanded to the lower court to determine the amount of a reasonable fee. (DARYL E. TRAWICK, LISA S. WALSH AND RAMIRO C. ARECES, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Where deputies learned almost immediately after stopping licensee for reckless driving that he had likely been involved in hit-and-run accident on interstate highway, deputies had probable cause for arrest, and detention while awaiting arrival of trooper to conduct accident investigation was lawful—Trooper who observed that licensee smelled of alcohol, was unable to stand without swaying, and drove recklessly had reasonable suspicion justifying request that licensee submit to breath test

MICHAEL DEVERE LESTER, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-11159, Division A. April 20, 2020. Counsel: J. Kevin Hayslett, Clearwater, for Petitioner. Christie S. Utt, General Counsel, and April M. Haile, Assistant General Counsel, DHSMV, Miami, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Petition for Writ of Certiorari filed October 31, 2019, and perfected with an amended petition filed November 7, 2019. The petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. He contends that the length of his detention before being formally arrested invalidated the arrest and subsequent request that he submit to a breath test. The court has reviewed the petition, response, and reply, along with appendices and applicable law. Having done so, the court determines that where law enforcement personally observed Petitioner driving recklessly and learned almost immediately after the stop that Petitioner had likely been involved in a hit-and-run accident, probable cause for arrest developed significantly more quickly than Petitioner contends. For that reason, the detention, arrest, and resulting request that Petitioner submit to a breath test were lawful, and the suspension will be upheld. The petition is, therefore, denied.

In proceedings to determine whether to uphold an administrative suspension of a person's driving privilege for driving under the influence (DUI), the hearing officer is to determine whether three elements have been established by a preponderance of the evidence: 1) whether law enforcement had probable cause to believe that the person whose license was suspended was in actual physical control of a motor vehicle in this state while under the influence of drugs or alcohol; 2) whether the person whose license was suspended refused to submit to a test of his or her blood alcohol level after being requested to do so by law enforcement; and 3) whether the person was advised that refusal to submit to a test would result in the suspension of his or her driving privileges for one year, or, in the case of a second or subsequent refusal, 18 months. *See* §322.2615(7), Florida Statutes. In turn, this court reviews the administrative decision upholding the suspension to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). In this case, Petitioner does not assert that he was denied due process. Rather, he contends the hearing officer departed from the essential requirements of law in concluding that the length of the detention after the traffic stop was reasonable. Because Petitioner contends that the alleged departure invalidated his refusal of a breath test, he adds there is no competent, substantial evidence to uphold the suspension.

On August 22, 2019, around 1:00 p.m. a Be-on-the-Look-Out (BOLO) advisory was issued alerting law enforcement of a reckless driver in a white pickup truck traveling on Interstate 75. At 1:05 p.m. Cpl. Waytovich of the Hillsborough County Sheriff's Office stopped Petitioner, who appeared to have been the subject of the BOLO, on I-75. Consistent with the BOLO, Cpl. Waytovich observed Petitioner in a white pickup truck driving in a reckless manner. Petitioner's truck weaved back and forth on the interstate, crossed lane markers several times, such that motorists were attempting to remain behind him to avoid him, even as Petitioner was traveling well below the speed limit. On seeing law enforcement, several motorists gestured toward Petitioner's vehicle to draw law enforcement's attention to Petitioner's driving. After the stop, and noting a strong odor of alcohol about Petitioner, Cpl. Waytovich called for a deputy to investigate whether Petitioner had been driving under the influence. While waiting for back up, Cpl. Waytovich asked Petitioner if he had consumed alcohol, which he denied. Dep. Nguyen arrived a few minutes later. The DUI investigation was delayed, however, when the victim of a hit-and-run, and a witness to it appeared, advising Dep. Nguyen that Petitioner's vehicle had just side-swiped the victim's semi-trailer and driven away. This, of course, altered the nature and course of the investigation.

Deputy Nguyen preliminarily determined that damage to both vehicles supported the victim and witness's accounts that an accident occurred and that Petitioner's vehicle was likely involved (the witness had videotaped the incident with a dash cam). Because the accident occurred on the interstate, Cpl. Waytovich contacted the Florida Highway Patrol (FHP) to perform the accident investigation. In conjunction with the accident investigation, FHP undertook the DUI investigation, in accordance with department policy. Both Cpl. Waytovich and Dep. Nguyen observed Petitioner swaying and perspiring profusely. Dep. Nguyen indicated Petitioner had some difficulty maintaining his balance. Petitioner was put in the back of Dep. Nguyen's patrol car for his welfare and handcuffed for the officers' safety because Petitioner had not been searched for weapons. He remained there until Tpr. Belen of the Florida Highway Patrol completed the accident investigation about 90 minutes later. Then Tpr. Belen began the DUI investigation.

For the DUI investigation Petitioner was moved to a nearby location safer than on the side of the interstate. Petitioner consented to perform field sobriety tests, which he performed poorly. He was subsequently arrested for DUI at 3:25 p.m. and read implied consent. He refused the breath test, resulting in the suspension of his driving privilege that he now challenges.

Petitioner contends that he was unlawfully detained in handcuffs while locked in the back seat of Dep. Nyugen's cruiser from 1:30 p.m. to 3:00 p.m., when Petitioner was not under arrest, was not a flight risk, and was not an officer safety risk. He adds that the detention was illegal such that it rendered the actual arrest unlawful and the breath test request inadmissible. Based on these arguments, he contends that the hearing officer's decision upholding the suspension departs from the essential requirements of law.

Petitioner directs this court to a number of cases in support of his contention that the suspension should be set aside based on the length of his detention, and the court has reviewed them all. Undoubtedly, any officer present could have performed the necessary investigations such that the length of the detention might have been reduced. Although the court agrees it is possible that the matter might have been handled more efficiently than it was, the law does not require quashing the administrative decision in this case.

With regard to the circumstances in which a breath test may be requested, §316.1932(1)(a), Florida Statutes, says:

316.1932 Tests for alcohol, chemical substances, or controlled substances; implied consent; refusal.—

(1)(a)1.a. Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test. . . of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath *if the person is lawfully arrested for* ***any offense*** *allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.* The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has 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. . . .The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended . . . .

(Emphasis added.)

Section 316.1932(1)(a), deems a driver to have consented to a breath test if the person is lawfully arrested for any offense (not necessarily DUI) allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcohol. In addition, the request that a driver submit to a breath test must be incidental to a lawful arrest, based on law enforcement's reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle while under the influence.

Both reckless driving and leaving the scene of an accident with property damage are criminal offenses. See §§316.192 and 316.061(1), Fla. Stat.[1] If there is a valid charge for which a person could have been arrested, probable cause exists. *Daniel v. Village of Royal Palm Beach,* 889 So. 2d 988, 99 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D2a]. In addition to DUI, Petitioner was ultimately cited for leaving the scene of an accident.

A law enforcement officer may detain a citizen temporarily where the officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. §901.151, Florida Statutes. Petitioner is correct that when a detention is invalid, all that flows from it is illegal. *Ottney v. State,* 571 So.2d 20, 21 (Fla. 2nd DCA 1990). Determining whether law enforcement's actions were reasonable as set forth in *Goss v. State,* 744 So. 2d 1167, 1168 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2509b], requires a two-fold inquiry—whether the action was justified at the outset and whether its scope was reasonably related to the circumstances which justified the stop in the first place. *Id. citing Reynolds v. State,* 592 So.2d 1082, 1084 (Fla.1992). Where law enforcement observed Petitioner driving recklessly the stop was justified. Petitioner's likely involvement in a hit-and-run justified further detention. There was no unreasonable delay in bringing about the ensuing investigation. The circumstances present here are markedly different from scenarios presented in case law Petitioner relies on, which include a lengthy detention following a stop made on the basis of a vague BOLO related to a noncriminal domestic dispute,[2] one involving a noncriminal failure to maintain a single lane,[3] and one involving an expired tag and window tint violation.[4] Turning the investigation over to FHP was reasonable because FHP handles accident investigations occurring on interstate highways. *Saturnino-Boudet v. State,* 682 So. 2d 188, 192 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2173j] (40-minute delay while waiting for canine unit where officers had founded suspicion of drug activity held to be reasonable).

This court is not persuaded to quash the administrative suspension because Tpr. Belen testified that he had no probable cause to arrest Petitioner for DUI before the FSTs. An officer's subjective belief regarding the existence or non-existence of probable cause for a warrantless arrest is neither dispositive of, nor generally relevant to, this issue. *Hawxshurst v. State,* 159 So. 3d 1012, 1014 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D756a] (*internal citations* omitted). If Tpr. Belen had even a reasonable suspicion that Petitioner was DUI, together with the reckless driving and hit-and-run, the request the Petitioner submit to a breath test was lawful. §316.1932(1)(a), Fla. Stat. Where Petitioner smelled of alcohol, was unable to stand without swaying, and was observed driving recklessly, Tpr. Belen had reasonable suspicion that Petitioner was DUI. Petitioner's performance on FSTs served to provide the probable cause necessary to charge him with DUI. Since there was no departure from the requirements of §316.1932(1)(a), Florida Statutes, the detention, resulting arrest, and breath test request were lawful.

The petition is DENIED.

---

[1] *See also* §318.17(4), Florida Statutes, which expressly disallows the disposition of a reckless driving charge as a civil infraction.

[2] *Freeman v. DHSMV,* 22 FLWS 875a (Fla. 7th Cir.Ct.App. for Volusia Co. 2014) [22 Fla. L. Weekly Supp. 875a]

[3] *McDonald v. DHSMV,* 23 FLWS 71a (Fla. 7th Cir.Ct.App. for Volusia Co. 2015) [23 Fla. L. Weekly Supp. 71a]

[4] *Williams v. State,* 869 So. 2d 750 (Fla. 5DCA 2004) [29 Fla. L. Weekly D879a]

* * *

Licensing—Driver's license—Revocation—Habitual traffic offender—Where record does not demonstrate that licensee raised issue of authenticity of information in driving record with Department of Highway Safety and Motor Vehicles, issue was not preserved for appellate review—Licensee who contends that driving record from other states is inaccurate is required to seek recourse through National Driver Register, not through petition for writ of certiorari following license revocation—Neither statute of limitations nor laches bars license revocation—Petition for writ of certiorari is denied

DANIEL SAGE MCKINNON, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-12008, Division K. April 1, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ARKIN, J.) THIS MATTER is before the Court on Daniel McKinnon's Petition for Writ of Certiorari filed November 22, 2019. This court has jurisdiction. Rule 9.030(c)(2), Fla. R. App. P.; §322.31, Fla. Stat. The administrative decision is reviewed to determine whether Petitioner received due process, whether competent, substantial evidence supports it, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). Because Petitioner did not follow the steps to correct any unspecified alleged errors in his driving record, or preserve the evidentiary issue for review, competent substantial evidence supports the administrative revocation of Petitioner's license.[1] In addition, a statute of limitations does not bar the administrative action. Therefore, the petition must be denied.

Effective November 13, 2019, the Department revoked Petitioner's driving privilege for five years as a habitual traffic offender. The driver record contains offense dates, conviction dates, the reporting states, and the number of points assessed on the driver record for a number of offenses, 15 of which are speeding. The earliest conviction relevant to this court's analysis occurred December 1, 2010, and the latest conviction occurred on August 14, 2015. Petitioner had acquired 15 speeding violations in five states. According to his driving record, Petitioner previously held a Louisiana driver license, but was issued a Florida driver license on October 5, 2018.

Additionally, the Department's records include an abstract of the driver record showing the various reporting states that submitted reports of conviction in accordance with the Driver License Compact codified in §322.44, Florida Statutes.

According to his certified driver record, Petitioner accumulated 15 speeding violations in a five-year period (December 1, 2010 through August 14, 2015). Consequently, the Department issued a notice of a five-year revocation when the Petitioner's driver record was updated on October 10, 2019. Petitioner summarily challenges every speeding conviction on Mr. McKinnon's driver record asserting that because his driving record does not show county, citation number, or case number for each infraction there is insufficient evidence for the revocation.

Regarding the authenticity of the information provided by other states, the Department is a member of the Driver License Compact. The Driver License Compact is an agreement among the states providing that a conviction in one state will be reported to the drivers home state, which may result in suspension or revocation of a driving privilege in the driver's home state. Florida has codified the compact. § 322.44, Fla. Stat. The Compact is an important tool since the Department does not monitor convictions of its residents incurred in 49 other states and, without it the Department would never become aware of such convictions. Without the Compact, a driver could obtain a license in another state if one state permanently revokes his license.

The driving record itself, along with all abstracts of court records of convictions received by the Department, are admissible in evidence. § 322.201, Fla. Stat. In the case of a judicial proceeding, if a genuine issue as to the authenticity of such information is raised by a party or by the court, the [trial] court may require that a record certified by the department be submitted for admission into evidence.[2] Because nothing in the record shows that Petitioner raised this issue with the Department, this court is unable to address it on review. *Dep't of Highway Safety & Motor Vehicles v. Lankford,* 956 So. 2d 527, 527-28 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a]. Moreover, to the extent the driving record is alleged to be inaccurate, the Petitioner needs to show some evidence (such as a certified court record showing no conviction occurred after the citation was issued) that would "show cause why his or her license should not be revoked." §322.27(5)(a), Fla. Stat. The Department was entitled to rely upon the reports of convictions by other states under the Driver License Compact, and the reporting state is under no duty to submit certified court documents to the home state to prove the truth of its conviction reports. § 322.201, Fla. Stat.

The Compact's Article IV mandates that when a conviction is reported by a licensing authority of another state, the licensing authority of the home state is required to give effect to the conduct reported as if the conduct had occurred in the home state. § 322.44, Fla. Stat. Under the Compact, a "report shall not be transmitted by the chief driver licensing official of a participating State, regarding an individual, unless that individual . . . has been convicted of a motor vehicle related offense as represented by the codes in appendix A, part II, of this part." 23 C.F.R. § 1327.5(a)(2). In other words, the law places a duty on officials to transfer *accurate* records.

Petitioner became a licensed Florida driver on October 5, 2018, and, therefore, Florida is the home state for purposes of the Driver License Compact. §322.44, Fla. Stat. At different points in time, Arkansas, Louisiana, Georgia, and Ohio have all served as the reporting state by submitting conviction reports to the National Driver Register. By issuing their reports, the chief driver licensing official of those states informed the home state (Florida) of Petitioner's speeding convictions. To the extent the Petitioner is attempting to show that the reports of the states on the National Driver Register are inaccurate, his recourse is provided under federal law:

> Individuals seeking to correct an NDR-maintained record should address their request to the chief of the National Driver Register. When any information contained in the Register is confirmed by the State of Record to be in error, the NDR will correct the record accordingly and advise all previous recipients of the information that a correction has been made.

23 C.F.R. § 1327.6(j)(4). A petition for writ of certiorari in circuit court following a revocation is not the appropriate venue to attack the validity of the prior convictions from a reporting state that triggered the administrative action in the driver's home state.

The five-year revocation of the Petitioner's license was mandated by §322.27(5)(a), Florida Statutes, which provides that the Department shall revoke the license of anyone designated a habitual traffic offender. A habitual traffic offender includes a person who, within a five-year period, accumulates fifteen convictions for moving traffic offenses for which points may be assessed. § 322.264(2), Fla. Stat. A conviction in another state will count as a violation of such prohibition. *Id.* Speeding violations qualify as moving traffic offenses. § 322.27(3)(d)5, Fla. Stat.[3]

Petitioner also contends that the Department's revocation is barred because enforcement is barred by the statute of limitations or the doctrine of laches. Florida's Statute of Limitations under F.S. 95.11 (2018) provides:

> Actions other than for recovery of real property shall be commenced as follows:. . .
> (3) WITHIN FOUR YEARS.—
> (p) Any action not specifically provided for in these statutes.

Petitioner argues that because the DHSMV's action of ordering a five-year revocation for "Habitual Traffic Offender" became effective on November 13, 2019, "this legal or equitable action was not commenced within four years of the date of the alleged fifteen incidents occurring between 12/01/2010 and 08/14/2015."

The court is not persuaded that the statute of limitations or laches bars the Department from revoking his license. All the "actions" listed under §95.11(3) involve judicial, not administrative, proceedings. There is no prescribed time limitation or period in which the Department may take action to suspend or revoke the driver license of an individual. *Dep't of Highway Safety and Motor Vehicles v. Hagar,* 581 So. 2d 214, 217 (Fla. 5th DCA 1991). Administrative action is not a civil action. *Sarasota County v. Nat'l City Bank of Cleveland, Ohio,* 902 So. 2d 233, 234-35 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1244b]. In the absence of specific legislative authority, civil or criminal statutes of limitations are inapplicable to administrative license revocation proceedings. *Donaldson v. Dep't of Health & Rehabilitative Services,* 425 So. 2d 145, 147 (Fla. 1st DCA 1983); *Landes v. Dep't of Professional Regulation,* 441 So. 2d 686, 686 (Fla. 2d DCA 1983).

The only time limitation applicable to this proceeding appears in §322.264(2): the 15 moving violations qualifying a person for license revocation as a habitual offender must be acquired within five years' time. Here, the record shows Petitioner's first qualifying offense occurred on December 1, 2010. The 15th offense occurred July 15, 2015. Petitioner was issued his current Florida driver license October 5, 2018. His Florida driving record was updated to include all 15 convictions a year later on October 10, 2019. The Department's revocation action occurred shortly thereafter on October 24, 2019. To the extent there was any delay in enforcement, it was one year from the time he obtained a Florida license, not four (dating from his last offense) and certainly not nine (dating from the first qualifying offense), as Petitioner claims.

The Petition is DENIED on the date imprinted with the Judge's signature. The Department is directed to review Petitioner's driving record with regard to the offense dated July 15, 2015, to the extent any

duplication occurred.

[1]Petitioner specified one error on the record that was reasonably clear to the court even without Petitioner's bringing it to the court's attention. The erroneous information was not considered in the administrative action taken against Petitioner. The Department is directed to review the record, and if necessary, correct the error referred to in Petitioner's reply brief.

[2]A court acting in its appellate capacity may not ask for additional evidence. *Vichich v. Dept. of Highway Safety and Motor Vehicles,* 799 So.2d 1069, 1073 [(Fla. 2d DCA 2001) 26 Fla. L. Weekly D2290a] (circuit court in [certiorari] performs a "review"; it does not sit as a trial court to consider new evidence or make additional findings.)

[3]Only the number of offenses is relevant to the court's analysis, not their severity.

* * *

ROBERT HICKS, Appellant, v. EDWARD G. KEEBLER and JEFFREY PEARSON, as co-personal Representatives of the Estate of JAMES STEPHENS GEORGE BOGGS, Appellees. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 19-CA-001420, Division X. L.T. Case No. 17-CC-044613. April 22, 2020. Counsel: Denis A. Cohrs, The Cohrs Law Group, P.A., Clearwater, for Appellant. Judith S. Lambert and Eric W. Smith, Lambert Law Offices, P.L., Brandon, for Appellees.

APPELLATE OPINION

The decision of the county court is AFFIRMED on the date imprinted with the Judge's signature. (RICHARD A. NIELSEN, C.J., BATTLES, J., Concurs. RICE, J., concurring in part and dissenting in part, with opinion.

(RICE, J.) I agree with the majority's decision to affirm the trial court as it relates to Count 3 (Specific Performance) of Plaintiff/Appellant, Robert Hicks ("Hicks"), Amended Verified Complaint. However, I disagree with the majority's decision to affirm as it relates to Count 1 (Breach of Contract) and Count 2 (Return of Deposit). Because (1) the trial court committed prejudicial error in concluding Hicks' claims "were barred as a matter of law due to the expiration of the statute of limitations;" (2) genuine issues of material facts exist that preclude the entry of summary judgment in favor of Defendants/Edward G. Keebler and Jeffrey D. Person, as Co-Personal Representatives of the Estate of James Stephen George Boggs (the "Estate"), as to Count 1 and Count 2; and (3) no other legal grounds exist to support the entry of summary judgment in the Estate's favor as to Count 1 and Count 2, I dissent. The facts giving rise to the instant appeal and the detailed reasons for my dissent are set forth below in this opinion.

Factual and Procedural History

The facts in this case are largely undisputed. Prior to December 1999, Hicks became acquainted with an American artist, James S.G. Boggs ("Boggs"). On or about December 29, 1999, Hicks indicated his intent to purchase certain artwork from Boggs through Boggs' agent, a gallery known as Gallery 145 or the Szilage Gallery at 45 (the "Gallery"). He memorialized his intent to purchase certain artwork, which had yet to be created, in a letter agreement by and between him, the Gallery, and Boggs ("Agreement"). The Agreement was addressed to Ms. Tiffani Szilage ("Szilage") c/o Szilage Gallery at 145 and was in response to a written proposal he earlier had received from the Gallery (the "Purchase Invoice").

The first paragraph of the Agreement reflects that Hicks had had several conversations with Boggs and Rebecca Brice, the Gallery's Administrative Assistant ("Brice"); that Hicks was purchasing a " 'complete set of bills' by Boggs (referred to as the 'Justice Series')" (the "Artwork"); and that the Artwork would be "***delivered at some unspecified future date***." (Emphasis added) The second paragraph of the Agreement reflects the complete set will consist of at least six separate bills; the total amount agreed to be paid was $12,000; Hicks was tendering to "**Szilage, as agent for, or on behalf of Boggs**" the sum of $6,000 as a 50% deposit on the Artwork; and the balance would be due upon delivery. (Emphasis added.) The fourth paragraph of the Agreement reflects that Hicks was to receive a purchase invoice when he tendered the deposit check; that Szilage was to obtain Boggs' signature on the Agreement; and that Hicks looked forward to a "mutually satisfying artistic and business relationship with you, your gallery, and Boggs." The Agreement contains the signatures of Hicks, a representative of the Gallery (which appears to be that of Brice), and Boggs. The date of "12/29/99" is hand-written next to Hicks' signature.

Pursuant to the Agreement's terms, Hicks delivered a check dated December 30, 1999, in the amount of $6,000 made out to the Gallery. The check was endorsed and deposited on December 31, 1999. Hicks thereafter received a copy of the Purchase Invoice with the initialed and hand-written language "PAID 12/30/99 Ck. #4106" added next to the language "Deposit Received $6,000.00."

Boggs died in January 2017. At no time prior to his death did Boggs deliver the Artwork to Hicks or communicate to Hicks that he did not intend to create and deliver the Artwork to Hicks. Hicks thereafter filed a timely claim against Boggs' estate (also, the "Estate"). The Estate's representatives objected to the claim. As required by section 733.705(5), Florida Statutes, Hicks filed the underlying independent action on November 8, 2017.

On February 12, 2018, Hicks filed his Amended Verified Complaint ("Amended Complaint") in which he alleged the following three claims against the Estate, by and through the Co-Personal Representatives: (1) Breach of Contract ("Count 1"); (2) Return of Deposit ("Count 2"); and (3) Specific Performance ("Count 3"). The Agreement and Purchase Invoice were attached as exhibits to the Amended Complaint. In response, the Estate filed an answer and affirmative defenses ("Answer and Affirmative Defenses"). In its Answer and Affirmative Defenses, the Estate denied Hicks' claims and raised the following four affirmative defenses: (1) Failure to State a Cause of Action—Expiration of Statute of Limitations; (2) Failure to State a Cause of Action—Failure to Demonstrate a Valid Contract between Plaintiff and Decedent, James Stephen George Boggs; (3) Failure to State a Cause of Action—Failure to Establish Payment and Receipt of Deposit by Decedent, James Stephen George Boggs; and (4) Failure to State a Cause of Action—Impossibility of Performance.

After Hicks completed his discovery, the Estate filed on June 14, 2018, its motion for summary judgment as to all counts of the Amended Complaint ("Estate's Summary Judgment Motion"). As summary judgment evidence in support of its motion, the Estate relied solely on the Amended Complaint and the exhibits attached thereto; the Estate's Answer and Affirmative Defenses; the Estate's responses and objections to Hicks' first request for production dated April 20, 2018; and the Estate's verified answers and objections to Hicks' first set of interrogatories dated April 20, 2018. The thrust of the Estate's argument as to Count 1 was that no evidence existed to demonstrate the parties entered in a valid contract and, if the court found a valid and enforceable contract, then Hicks' claim for breach of contract was barred by the statute of limitations.[1] The thrust of the Estate's argument as to Count 2 was that the exhibits attached to the Amended Complaint failed to demonstrate that the $6,000 deposit was ever "submitted, paid, transferred, or otherwise exchanged" with Boggs. Rather, the exhibits merely reflected that the deposit was being delivered to a third party, Szilage. The Estate likewise argued that Count 2 was barred by the statute of limitations. The thrust of the Estate's argument as to Count 3 was that the claim was barred by the statute of limitations and the doctrine of impossibility of performance. Nowhere in the Answer and Affirmative Defenses or the Estate's Summary Judgment Motion did the Estate allege or argue that Hicks' claims were barred by the doctrines of laches, waiver, or estoppel; that either Hicks or Boggs had abandoned the Agreement; or that Szilage,

Brice, or the Gallery had no authority to act as an actual or apparent agent for Boggs.

In opposition, Hicks filed an Affidavit in Opposition to Motion for Summary Judgement on October 10, 2018 ("Affidavit in Opposition"). In the Affidavit in Opposition, Hicks stated he is an avid art collector and had become personally acquainted with Boggs. He claimed that in the latter part of 1999, he engaged in multiple discussions with Boggs for the creation of the Artwork. These discussions resulted in an agreement by and between Hicks and Boggs for the commissioning and purchase by Hicks of the Artwork. Hicks asserted it is common in the art world for the date for delivery to be left to the artist, and hence, he and Boggs left it clear that the Artwork would be delivered at some future date. He maintained that during the latter part of 1999, Boggs owned or was affiliated with and was represented by the Gallery; that based on his personal knowledge, it is common practice for artists to arrange for galleries to act as conduits for the retail sale of the artist's work; and that Boggs adopted that practice. Hicks further averred that while working directly with Boggs, Boggs requested and directed Hicks to communicate with Brice and Szilage, as representatives of the Gallery and as his agents, regarding the construction of an agreement for the creation, delivery, and purchase of the Artwork. He asserted the Purchase Invoice originally was created by the Gallery and then modified with the handwritten notation and initials by Brice after her receipt of Hicks' $6,000 deposit check. Hicks additionally stated that on or about December 29, 1999, Hicks personally met with Brice and Boggs, at which time Hicks presented the Agreement to them both for discussion, and he personally witnessed Brice and Boggs execute the Agreement. Hicks executed the Agreement contemporaneously and noted the date next to his signature. Hicks confirmed he delivered the $6,000 check to Brice, in accordance with the Agreement, who accepted it on Boggs' behalf. Lastly, Hicks maintained it was his belief that the commissioned Artwork would be delivered at any time after the execution of the Agreement, up through the date of Boggs' death, and at no time after December 1999 did Boggs advise Hicks of an intent not to create and deliver the Artwork to Hicks.

The hearing on the Estate's Summary Judgment Motion was held on October 16, 2018. No transcript of that hearing is available. The trial court rendered an Order Granting Defendants' Motion for Final Summary Judgment as a Matter of Law on October 23, 2018, and then a second, identical Order Granting Defendants' Motion for Final Summary Judgment as a Matter of Law on October 25, 2019. Both orders provide, in relevant part, as follows:

> [T]he court finds that there is no triable issue of any material fact and that Defendants' Motion for Final Summary Judgment is GRANTED and that judgment is entered . . . against Plaintiff Robert Hicks on [Hicks'] three (3) count complaint for breach of contract, return of deposit, and specific performance**, which were barred as a matter of law due to the expiration of the statute of limitations**, **pursuant to sec. 95.11**, Florida Statutes and Florida Rules of Civil Procedure 1.510. (emphasis added)

Hicks thereafter filed a Motion for Rehearing on November 1, 2018, in which he challenged the basis for entry of the summary judgment in view of the fact there was no evidence in the record of any date from which the statute of limitations could have commenced or any date on which the statute of limitations expired. The Estate filed a response on November 5, 2018, in which it conceded that the primary issue at the summary judgment hearing was the applicability of the statute of limitations to a contract silent as to the time and date of performance. The Estate argued that "[t]he reasonableness for performance is a question of law to be decided by the Court and not a question of fact to preclude entry of summary judgment." The Estate further argued that '[t]he reasonableness [of time] for . . . Plaintiff to demand the work and issue a payment is a question of law that the Court previously considered when analyzing the applicability of the statute of limitations to bar each and every count of [Hicks] Complaint." The Estate likewise filed a motion for entry of final judgment on November 2, 2018. The trial court rendered an Order Granting Defendants' Motion for Entry of Final Judgment on November 19, 2018 ("Final Judgment"). It is from this Final Judgment in the Estate's favor that Hicks appeals.

After the entry of the Final Judgment, and retirement of the trial judge who presided over the case, a hearing was held on January 9, 2019, on Hicks' Motion for Rehearing and the Estate's response thereto. Hicks again argued at the hearing there was no evidence in the record of any date from which the statute of limitations could have commenced or any date on which the statute of limitations expired. He emphasized there was no evidence in the record of a breach of the contract from which the trial court could find that the statute of limitations had begun to accrue, let alone had expired, and that the contract expressly provided that "performance to be an unspecified future date." The Estate reiterated its view that when a contract fails to specify a period of duration, the contract's duration will be for a reasonable amount of time and that the time for performance is a question of law for the judge to determine. The Estate argued that since a significant number of years had elapsed since the entry of the Agreement, the trial court was correct in ruling that it no longer was reasonable for Hicks to enforce the Agreement, and thus, the statute of limitations had run. In rebuttal, Hicks maintained that the question as to the reasonableness of the duration of the contract was one of fact for the jury and not one of law for the trial court. He urged that what constitutes a reasonable time for performance depends on the circumstances of the case and the parties' intentions and expectations, and that the court cannot substitute its judgment for that of the parties'. Because no breach of the Agreement had occurred and the question as to a reasonable time for performance was one for the jury, Hicks reasoned that genuine issues of fact precluded summary judgment in favor of the Estate. Notwithstanding Hicks' arguments, the successor judge reserved ruling and subsequently rendered an Order Denying Plaintiff's Motion for Rehearing on January 16, 2019, without an explanation of the basis of its ruling.

Analysis

Hicks raises four issues on appeal, only two of which I believe have merit.

1. Whether the trial court departed from the essential requirements of law in granting the Estate's Summary Judgment Motion to the extent it determined there was no formation of a contract.

2. Whether the trial court departed from the essential requirements of law in granting the Estate's Summary Judgment Motion to the extent it determined enforcement of the Agreement was barred by section 95.11, Florida Statutes.

Issue #1 - Whether the Agreement Constitutes a Valid Contract.

An offer, acceptance, consideration, and the specification of essential terms are all that are necessary to establish the formation of a contract. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004) [29 Fla. L. Weekly S53a]. For an acceptance of an offer to result in a contract, such acceptance must be absolute and unconditional; identical to the terms of the offer; and in the mode, at the place, and within the time expressly or impliedly required by the offer. *Kendel v. Pontious*, 261 So. 2d 167, 169 (Fla. 1972). In ascertaining whether a valid contract exists, a court additionally must determine whether "there has actually been a meeting of the minds of the parties upon definite terms and conditions which include the essential elements of a valid contract." *Leopold v. Kimball Hill Homes Fla., Inc.*, 842 So. 2d 133, 136 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D400a] (citing

Mehler v. Huston, 57 So. 2d 836, 837 (Fla.1952)). To determine whether a meeting of the minds has occurred, courts look not to " 'the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.' " *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp*., 302 So. 2d 404, 407 (Fla.1974) (quoting *Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla. 1957).

As to the essential terms of a contract, courts have found those terms to include quality, quantity, and price. *Jacksonville Port Auth., City of Jacksonville v. W.R. Johnson Enters., Inc.*, 624 So. 2d 313, 315 (Fla. 1st DCA 1993) ("Failure to sufficiently determine quality, quantity, or price may preclude the finding of an enforceable agreement."). However, no definitive list of essential terms exists. *See All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438, 446 (Fla. 3DCA 2019), *reh'g denied* (June 6, 2019) [44 Fla. L. Weekly D1036a]. Essential terms will vary according to the nature and complexity of each transaction and will be evaluated on a case-by-case basis. *Id. See also*, *Giovo v. McDonald*, 791 So. 2d 38, 40 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1378b] ("Certainly, what is an "essential term" of a contract differs according to circumstances."). Courts generally have found, however, that the time for performance of a contract is not an essential term. *See, e.g., De Cespedes v. Bolanos*, 711 So. 2d 216, 218 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1254a] ("The absence of a general time of performance, however, is not fatal to the enforceability of [a] contract."); *First Mortg. Corp. of Stuart v. deGive*, 177 So. 2d 741, 748 (Fla. 2d DCA 1965) ("When a time for performance is not specified . . . and time is not of the essence, it is sufficient if performance takes place within what is under the circumstances a reasonable time.") (citation omitted) Courts likewise have found that the fact that certain non-essential terms remain open is not fatal to the establishment of a valid contract. *See W.R. Townsend Contracting, Inc.*, 728 So. 2d at 301; *Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co*., 773 So. 2d 96, 97 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2680a].

Based on a review of the record, it appears that all the necessary requirements for a valid agreement between Hicks and Boggs have been met. Their Agreement specifies the parties to the agreement (Hicks, the Gallery, and Boggs); the specific art to be created by Boggs (a complete set of bills referred to as the "Justice Series"); and the price to be paid by Hicks ($12,000, with a $6,000 deposit due upon signing and the balance due upon completion and delivery of the Artwork to Hicks). The Agreement is signed by Hicks, Boggs, and the Gallery, as Boggs' agent. There is no indication on the face of the Agreement or in the record that Boggs' signature on the Agreement was conditioned on any matter not expressly referenced in the agreement. The Agreement expressly and unambiguously provides that Hicks was tendering to "***Szilage, as agent for or on behalf of Boggs,***" the sum of $6,000. (emphasis added) The Agreement clearly reflects that "Szilage"[2] was serving as his actual agent, Boggs' signature thereon therefore signifies his confirmation and acceptance of that statement of relationship. *All Florida Sur. Co. v. Coker*, 88 So. 2d 508, 511 (Fla. 1956) (quoting Contracts, 12 Am.Jur., 628, Sec. 137) (" 'To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.' "). Payment to Szilage, his actual agent, was payment to Boggs.[3] *See Banco Santander Puerto Rico v. Select Title Serv., Inc.,* 692 So. 2d 950, 952 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D951b] (ruling that payment made to actual agent while agent was acting within the scope of agent's authority constituted payment to principal and finding no requirement that agent be named in action). *See also, Comerica Bank v. Mann*, 13 F. Supp. 3d 1262, 1285 (N.D. Ga. 2013) ("Where there exists any evidence from which a [trier of fact] could conclude that the acts in question were committed by an agent within the scope of his employment, the questions of agency and scope are to be resolved by the [trier of fact].")

Thus, to the extent the trial court determined there was no formation of a contract, such determination is erroneous and any ruling based on this determination likewise is erroneous and prejudicial error.

Issue #2 - Whether Enforcement of the Agreement is Barred by the Statute of Limitations.

No Evidence of Outright Breach of Agreement Before Boggs' Death.

When a valid, written contract exists, an action founded on the contract must be brought within five years. § 95.11(2)(b), *Fla. Stat*. The statute of limitations for such action is not triggered until the last element establishing the cause of action occurs. *Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.,* 941 So. 2d 576, 577 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1152a]. Generally, a cause of action for breach of contract accrues and the statute of limitations begins to run from the date of the breach of such contract. *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) [21 Fla. L. Weekly S335a].

A review of the record in this case reveals no evidence of an outright breach of the Agreement prior to Boggs' death. The Agreement specifically provides that the Artwork would be "***delivered at some unspecified future date***." (Emphasis added.) Thus, the parties intentionally agreed that Boggs had no particular deadline or fixed date by which he was to have completed his performance under the Agreement. When Boggs died in January 2017, he obviously became unable to complete and deliver the Artwork to Hicks. Boggs' inability to perform resulted in his de facto breach of the Agreement. Therefore, the statute of limitations on Hicks' action for breach of the Agreement and for return of his $6,000 deposit accrued and began to run on the date of Boggs' death in January 2017. *See Lexon Ins. Co. v. City of Cape Coral,* 238 So. 3d 356, 360 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2521a] (ruling that statute of limitations begins to run when a project is abandoned).[4]

Hicks filed the underlying action on November 18, 2017, just 10 months after Boggs' death. Because no outright breach of the Agreement existed prior to Boggs' death and because the five-year statute of limitations set forth in section 95.11(2)(b), Florida Statutes, could not have accrued or begun to run prior to Boggs' death in January 2017, the underlying breach of contract and return of deposit action was timely filed by Hicks. Absent any record evidence of an outright breach of the Agreement before Boggs' death in January 2017, it was prejudicial error for the trial court to rule as a matter of law that Hicks' breach of contract and return of deposit claims were barred by the five-year statute of limitations set forth in section 95.11(2)(b), Florida Statutes.

Apparent Finding of Breach Based on Boggs' Failure to Perform Agreement Within Reasonable Period of Time.

Yet, the trial court nevertheless ruled in both orders granting the Estate's Summary Judgment Motion that Hicks' claims "were barred as a matter of law due to the expiration of the statute of limitations." Unfortunately, no transcript from the hearing on the Estate's Summary Judgment Motion exists from which this Court may ascertain the underlying rationale for the trial court's ruling, if in fact one exists. A review, however, of the hearing transcript on Hicks' Motion for Rehearing, which is a part of the record in this case, is instructive.

At that hearing, the Estate argued that the predecessor judge's[5]

ruling was correct because the law will imply that performance be within a reasonable time when a contract fails to specify a time for performance and the reasonableness of that time for performance is a question of law for the judge to determine. Accordingly, the Estate contended that the predecessor judge did not err in ruling it no longer was reasonable for Hicks to seek to enforce the Agreement almost 20 years after its inception. The Estate also maintained "the statute of limitations does apply because the contract is silent as to time for performance."[6] At no time did the Estate argue that any other one of its four defenses (i.e., failure to demonstrate a valid contract; failure to establish payment and receipt of the deposit by Boggs; and impossibility of performance) supported summary judgment in its favor.[7] It therefore appears that the predecessor judge simply accepted the Estate's statute of limitations argument; rejected Hicks' argument that the determination was a question of fact based on the facts and circumstances of the case; and granted summary judgment solely on the basis that the statute of limitations had expired due to Hicks' lengthy delay in seeking performance from Boggs under the Agreement. In doing so, the predecessor judge (and the successor judge in failing to grant Hicks' Motion for Rehearing) failed to follow applicable Florida law governing the determination of what constitutes a "reasonable time to perform" under a contract containing no express time for performance.

Reasonable Time for Performance—A Fact Intensive Inquiry.

As a preliminary matter, clear and unambiguous contracts should be construed as written, and a court can give them no other meaning. *All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1036a], *reh'g denied* (June 6, 2019) ("It is axiomatic that the clear and unambiguous words of a contract are the best evidence of the intent of the parties."). When a contract fails to "expressly fix the time for performance of its terms, the law will imply a reasonable time." *De Cespedes v. Bolanos*, 711 So. 2d 216, 218 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1254a] (quoting *Denson v. Stack*, 997 F.2d 1356, 1361 (11th Cir. 1993). *See also*, *Fla. Power & Light Co. v. Atl., Gulf & Pac. Co.*, 38 F.2d 948, 949 (5th Cir. 1930) (ruling that where no time is fixed for the performance of a contract, the law will imply a reasonable time, if it is necessary to do so in order to give effect to the intention of the parties); *Doolittle v. Fruehauf Corp*., 332 So. 2d 107, 109-10 (Fla. 1st DCA 1976) ("When there is no time set for the performance of a certain act, it is interpreted to mean that the act must be done within a reasonable time."). Specifically, the law will require that the "party charged with the performance of such a contract . . . act in a reasonable manner and within a reasonable period of time." *Fraley v. Clinix Med. Info. Servs., LLC*, No. 2:17-cv-655-FtM-99MRM, 2018 WL 1907645, *3 (M.D. Fla. September 23, 2018); *Fleming v. Burbach Radio, Inc.*, 377 So. 2d 723, 724 (Fla. 4th DCA 1979); *Tyner v. Woodruff*, 206 So. 2d 684, 686 (Fla. 4th DCA 1968). What constitutes a reasonable time within which an act is to be performed " '**depends on the subject matter of the contract, the situation of the parties, their intention and what they contemplated at the time the contract was made, and the circumstances attending the performance**.' " *Sound City, Inc. v. Kessler*, 316 So. 2d 315, 317 (Fla. 1st DCA 1975) (quoting 17 Am.Jur 2d Contracts, ss 329-330, pp.764-766) (emphasis added). *See Doolittle*, 332 So. 2d at 109-10 (ruling that what is a reasonable time is to be determined by the surrounding circumstances); *Gentry v. Smith*, 487 F.2d 571, 575-76 (Fla. 5th DCA 1973) (ruling that "what constitutes a reasonable time for performance will depend on the factual context of the contract and the circumstances of the parties to it, as viewed by the trial court"); *Tyner v. Woodruff*, 206 So. 2d 684, 686 (Fla. 4th DCA 1968) ("What constitutes a reasonable time . . . depends on the circumstances at the time"). *See also, City of Homestead v. Beard*, 600 So. 2d 450, 453 (Fla. 1992) (opining that intent of the parties be determined by examining surrounding circumstances and by reasonably construing agreement as a whole).

Thus, the determination of what constitutes a reasonable time for performance appears more properly to be a question of fact than a question of law because of the fact-intensive nature of the determination. Indeed, courts expressly have ruled that the issue of reasonableness is an issue for the jury. *See, e.g.*, *Fraley*, No. 2:17-cv-655-FtM-99MRM, 2018 WL 1907645, *3 ("Both reasonableness and good faith are issues for a jury."); *Singer v. W. Publ'g Corp.,* 310 F. Supp. 2d 1246, 1253 (S.D. Fla. 2004) ("The question of reasonable time for the performance of contract obligations is generally reserved for the fact finder.") (citing *Henry v. Hutchins,* 146 Minn. 381, 178 N.W. 807, 809 (1920)). *Cf. Sims v. Am. Hardware Mut. Ins. Co.*, 429 So. 2d 21, 22 (Fla. 2d DCA 1982) ("Florida courts have uniformly held [in insurance contract notice cases] that the determination of what is a reasonable time depends on the circumstances and is ordinarily a question of fact for the jury or fact-finder."). Recognizing the fact-intensive nature of the determination, many courts have found it improper to grant summary judgment in cases where the reasonableness of time to perform was the central issue in the case. *See, e.g.*, *Federal Dep. Ins. Corp. v. Amos*, No. 3:12cv548-MCR/EMT, 2015 WL 12425992, *5 (N.D. Fla. March 23, 2015) (denying summary judgment in case where contract failed to expressly fix time for certain payments by party); *American Color Graphics, Inc. v. Eckerd Corp.*, No. 8:05-cv-1512-T-TBM, 2008 WL 2914982, *6 (M.D. Fla. July 25, 2008) (denying summary judgment because numerous disputes existed as to parties' intention as to reasonableness of time for termination of contract where contract failed to provide deadline); *Joseph v. Okeelanta Corp.*, 656 So. 2d 1316, 1320 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1170a] (reversing trial court's granting of summary judgment on statute of limitations grounds where obligation to pay and breach of contract could not have occurred until a reasonable time transpired after occurrence of certain act; thus material fact as to reasonable time and date of breach precluded summary judgment); *Tyner,* 206 So. 2d at 687 (reversing summary judgment where record was void of sufficient facts and circumstances to permit trial court to determine what constitutes a reasonable time for performance).

And while the Estate has cited in its brief here and in arguments below to one appellate decision affirming a trial court's granting of summary judgment on the issue of reasonable time to perform, *Hatcher v. Miller*, 427 So. 2d 1039 (Fla. 1st DCA 1983),[8] the case is of little guidance because the court's ruling is stated summarily and without reference to any supporting legal authority. In *Hatcher*, suit was brought by Hatcher's former attorney to collect legal fees that Hatcher admitted he owed. The dispute in the case centered on Hatcher's defense that while the money admittedly was owed, the parties had agreed that payment would not be due until some indefinite time in the future. 427 So. 2d at 1040. Hatcher's former attorney ultimately moved for and obtained summary judgment for a portion of the fees. *Id*. at 1040. In affirming the trial court's decision, the *Hatcher* court simply ruled that the "trial court did not err in granting summary judgment" and provided no reason and cited to no case to support its conclusion. *Id.*

Critical distinctions exist, however, between the facts in *Hatcher* and this case that render the *Hatcher* court's ruling inapplicable here. In *Hatcher*, it was the plaintiff, not the defendant (as the case here), who was seeking a determination as to a reasonable time for performance and that determination was being sought so that the plaintiff could be paid a debt admittedly owed, not to avoid an obligation under a contract altogether (as the case here). *See id*. Specifically, in *Hatcher*, the reasonableness determination was being used "offen-

sively," to allow the plaintiff to *recover payment* for his *completed performance* under a contract from a defendant who was refusing to pay. Here, the determination is being used "defensively" by the Estate to *relieve it from an obligation to perform and make payment.* It is important to note it is Boggs' performance under the Agreement that is at issue in this case, not Hicks'. Hicks had performed his part of the contract that was due, and as the non-breaching party, was simply seeking the return of his $6,000 deposit because Boggs' performance under the Agreement had been rendered impossible by his death. Additionally, the policy consideration in *Hatcher* of affording relief to an aggrieved party so that party could *fulfill* his contractual expectations and *attain* the benefits of his bargain will not be advanced by the application of the *Hatcher* court's ruling to this case. Lastly, applying *Hatcher* to allow the Estate to *use Boggs' failure to perform* in a reasonable period of time as a sword to deprive Hicks of the benefit of his bargain without a trial, when Boggs received the full benefit of his (i.e., the ability to deliver the Artwork on his own timeline), would work an injustice in this case.

Because I believe the determination of what constitutes a reasonable time for performance is a question of fact for the jury or the court as fact-finder, the trial court committed prejudicial error in granting the Estate's Summary Judgment Motion and deprived Hicks of his valuable right to a trial. Assuming, however, the determination is one of law, reversal nevertheless is warranted because the trial court failed to properly apply the law regarding the determination of a reasonable time to perform; failed to recognize genuine issues of material fact existed as to what constituted a reasonable period of time to perform; and failed to adhere to the correct legal standard in granting summary judgment.

Trial Court's Failure to Apply Law Correctly and Recognize Genuine Issues of Material Fact Precluded Summary Judgment.

Summary judgment is proper only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Snyder v. Cheezum Dev. Corp.*, 373 So. 2d 719 (Fla. 2d DCA 1979). *See also, Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC*, 75 So. 3d 865, 869 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2764c] ("The party moving for summary judgment has the burden to establish *irrefutably* that the nonmoving party *cannot* prevail were a trial to be held."). Moreover, when the expiration of the statute of limitations is the basis of a summary judgment motion, the defendant has the additional burden of showing conclusively that the statute of limitations had expired before the filing of the plaintiff's complaint. *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013) [39 Fla. L. Weekly D4a] (quoting *Green v. Adams*, 343 So.2d 636, 637 (Fla. 4th DCA 1977)). On review, the "appellate court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party; if the slightest doubt exists, summary judgment must be reversed." *Id*. at 909. Reversal of the trial court is required here for several reasons.

First, it was the Estate's burden as the moving party to demonstrate the nonexistence of any genuine issue of material fact. Hicks was under no obligation to "prove" anything at summary judgment. *Land Dev. Servs., Inc.,* 75 So. 3d at 869) ("Because summary judgment is not a substitute for trial, when a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove its cause of action."). The Estate presented no summary judgment evidence, other than documents reflecting the mere passage of time, to support the trial court's finding as a matter of law that a reasonable time for Boggs' performance under the Agreement was 13 years.[9] In contrast, Hicks presented specific, detailed facts in his Affidavit in Opposition to justify Boggs' lengthy delay in performance under the Agreement and contradict the Estate's argument that the mere passage of time was a sufficient basis for granting summary judgment. Hicks argued below and in his brief that the parties intentionally included language in their Agreement allowing Boggs all the time he needed or wanted to deliver the Artwork. In his affidavit, Hicks asserted it is common in the art world for the date of delivery to be left to the artist. He further asserted it was his understanding and belief that the Artwork would be delivered at any time after the execution of the Agreement up through the date of Boggs' death. The Estate failed to file any affidavit in opposition and chose merely to rely on the pleadings, their sworn responses to Hicks' first set of interrogatories, and their responses to Hicks' first request for production. *See also State Farm Mut. Auto. Ins. Co. v. Figler Family Chiropractic, P.A.*, 189 So. 3d 970, 974 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D805b] ([I]f the movant or opposing party, at the hearing on the motion, tries to rely on record evidence in the court file that is not identified in advance of the hearing as being in support of, or in opposition to, the motion, the motion or defense to the motion should properly be denied."). Nothing in these documents contradicts these assertions in Hicks' affidavit.

A significant amount of time no doubt passed between the formation of the parties' agreement and the time when performance became impossible—nearly 18 years. The mere passage of time, however, was only one circumstance of many presented to the trial court on summary judgment. Hicks established through his affidavit the existence of genuine issues of material fact regarding the reasonableness of a 13-year or larger period for Boggs' performance. Accordingly, by passing on the merits of those circumstances presented by Hicks, or ignoring or rejecting them altogether, the trial court engaged in an impermissible weighing of the credibility of the summary judgment evidence. Additionally, reliance on the mere passage of time is an insufficient factual basis to justify the trial court's ruling because time clearly was "not of the essence" in this contract. The Agreement failed to include a "time is of the essence provision." To the contrary, it expressly provided that the Artwork would be "**delivered at some unspecified date**." (Emphasis added) Arbitrarily quantifying some period of time for Boggs' performance and a date by which Boggs should have delivered the Artwork to Hicks—when the intention of the parties clearly reflected no exact date for performance and the record reflects that Hicks' was content to wait for delivery—was improper and prejudicial error.

Second, the trial court failed to apply the law governing the determination of a reasonable time for performance properly. Irrespective of whether the question of reasonableness is one of fact or one of law, appellate courts are uniform in agreeing that the determination must be based on an analysis of the facts and circumstances in the case. To properly decide the issue of "reasonableness," a trial court accordingly must determine, based on a review of the facts and circumstances in the record, the following: (1) what period of time constitutes a reasonable period of time for performance under the contract; and (2) the date on which performance would have been due. Only after this date has been determined can a trial court then perform the arithmetic calculation of the limitations period to ultimately determine whether a party's breach of contract action is barred by the applicable five-year statute of limitations period set forth in section 95.11(2)(b), Florida Statutes.

Thus, to have properly decided the issue of "reasonableness" in this case, the trial court would have had to *first,* determine what period of time was a reasonable period of time for Boggs' performance under the Agreement (i.e., one year, five years, ten years, fifteen years, etc.); *second,* determine the date on which Boggs' performance would have been due (i.e., the date of Boggs' breach of the Agreement and the date from which the statute of limitations would have begun to accrue); and *third,* determine the date on which the five-year statute

of limitations would have expired. Once it determined the date of Boggs' breach of the Agreement, then it could perform the arithmetic calculation of the five-year limitations period to determine whether Hicks' action for breach of contract and return of deposit was timely filed. The record fails to reflect that the trial court actually performed this analysis. At no time during the hearing on Hicks' Motion for Rehearing did the Estate ever argue that the trial court had done so or reiterate any fact or circumstance, other than the mere passage of time, to support the predecessor judge's ruling that the statute of limitations had expired. Thus, the only way in which the trial court could have concluded on the record of this case that Hicks' action against the Estate was barred by the five-year statute of limitations, was for it to have concluded based on its own internal sense of fairness that a reasonable period of time for Boggs to have performed under the Letter Agreement was, at the most, 13 years. This was improper and prejudicial error.

Third, any argument that Hicks should have sought to enforce his rights sooner overlooks the legal status of the parties and their rights and remedies prior to Boggs' death. Having paid the $6,000 deposit as provided in the Agreement, Hicks had no contractual obligation to do anything further until delivery of the Artwork. Thus, the ball figuratively was in Boggs' court. Having received payment, Boggs was obligated to create and deliver the Artwork to Hicks. However, the parties specifically had agreed that Boggs could deliver the Artwork to Hicks at "some unspecified date" in the future. Until Boggs' repudiated or otherwise breached the Agreement or communicated his intent to abandon his performance obligation under the Agreement, Hicks had no legal right to sue for damages because Boggs continued to have the right and ability to perform his obligations under the Agreement up to the date of his death. Of course, if Hicks felt insecure or was concerned about Boggs' ability to deliver the Artwork, he could have made demand on Boggs to deliver the Artwork and, as time was not of the essence for this Agreement, provide Boggs a "reasonable" time to perform thereafter.[10] *See In re Mona Lisa at Celebration, LLC*, 472 B.R. 582, 642 (Bankr. M.D. Fla. 2012), *aff'd*, 495 B.R. 535 (M.D. Fla. 2013). Hicks additionally could have filed an action for declaratory relief, to have a court establish a reasonable time for delivery of the Artwork.[11] But Hicks argued to the trial court that he was content to wait for Boggs' performance. If Hicks did not believe he had been damaged by Boggs' delay, the trial court could not then substitute its judgment for that of Hicks'. In addition, any argument that the Estate somehow was prejudiced is unpersuasive as it stands in the shoes of Boggs, who again was the willing beneficiary of the delay. By entering summary judgment for the Estate, the trial court essentially agreed with the Estate that Hicks should have made demand on Boggs sooner, that is - "he should have sued us sooner" - and that he waited too long to enforce his rights. "A statute of limitations serves to require that a plaintiff with a **known cause of action** prosecute that claim diligently and within a predictable time that will allow for finality of claims prior to the potential loss of available evidence over time." *Nat'l Auto Serv. Centers, Inc. v. F/R 550, LLC*, 192 So. 3d 498, 510 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D777a] (emphasis added). This is not a situation, however, where Boggs breached the Agreement and then Hicks stood by silently for years doing nothing. Further, the Estate has presented no case law[12] supporting the legal proposition that in the absence of a breach of an agreement, where the contract specifically provides that performance is for some unspecified date, a contract simply "expires" and is rendered unenforceable as a matter of law.[13] The Estate failed to plead the defense of laches or abandonment, and Hicks certainly did not acquiesce to those theories being raised for the first time at summary judgment or thereafter. As it appears from the trial court's decision that Hicks was being penalized for not having sued Boggs sooner, this Court should not add insult to injury and reward the Estate's failure to timely raise potentially available defenses and failure to satisfy its burden by a summary affirmance of the trial court's decision.

Lastly, the Estate failed to demonstrate any other legal basis upon which it would be entitled to judgment as a matter of law.[14]

In the end, it was the Estate's burden to demonstrate the non-existence of any genuine issue of material fact and its entitlement to judgment as a matter of law and it failed to do so. There was no evidence in the record to suggest that Boggs ever repudiated his obligation under the Agreement or returned the deposit to Hicks. There was no evidence that Boggs breached the contract at any time prior to this death on January 2017. The statute of limitations on Hicks' action for breach of contract and return of deposit could not have begun to run until Boggs' death in January 2017. The summary judgment evidence as to what constituted a reasonable time for performance under the Agreement was in conflict. The trial court failed to properly apply the law to the facts and circumstances presented by the parties and adhere to the strict standard on summary judgment. Accordingly, the trial court's decision to grant summary judgment in favor of the Estate was prejudicial error and deprived Hicks of valuable substantive and procedural rights.

Tipsy Coachman Doctrine Inapplicable.

Based on a careful review of the record, there likewise are no other grounds or legal bases on which to affirm the trial court. While a trial court's ruling may be affirmed on other grounds not expressly articulated by the trial court, such grounds must appear in the record. Here, none exist. The Estate merely alleged, argued, and prevailed on the defense of statute of limitations and the reasonableness of the time for performance. It failed to plead laches, waiver, estoppel, abandonment, or any other equitable defense. Appellate courts must render their decisions based on the record before them and cannot attribute to a trial court an analysis that was not performed, or not performed properly, or supply to a defendant a defense that was never plead. *See Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 869 (Fla. 4th DCA 2012) ("The tipsy coachman doctrine does not permit a reviewing court to reverse on an unpreserved and unargued basis."); *Dep't of Envtl. Regulation v. Montco Research Prods., Inc.*, 489 So.2d 771, 773 (Fla. 5th DCA 1986) ("[A] determination by the trial court on an issue which is neither raised by the pleadings [n]or on which the parties have been given notice or an opportunity to be heard is violative of due process and is a departure from the essential requirements of law.").

Conclusion

Summary judgment is a drastic remedy that courts should grant only where the moving party shows conclusively the non-existence of any material issue of fact and that it is entitled to summary judgment as a matter of law. Because (1) the trial court's ruling that Hicks' claims for breach of contract and return of deposit "were barred as a matter of law due to the expiration of the statute of limitations" was based on an erroneous view of the law; or if not on an erroneous view, on its failure to apply the law correctly; (2) the trial court committed prejudicial error in concluding that no genuine issues of material fact regarding a reasonable time for Boggs to perform under the Agreement existed; (3) no other legal grounds exist to support the trial court's decision; and (4) entry of the Final Judgment deprived Hicks of valuable substantive and procedural rights, I would REVERSE and REMAND for further proceedings.

---

[1]Interestingly, the Estate argued as a basis for summary judgment on page 2 of its motion that "the Court must enter summary judgment as to all counts of Plaintiff's complaint due to the **tolling** of the statute of limitation," not **expiration** or **running of** the statute of limitation in section 95.11. (emphasis added)

[2]The Agreement is addressed to "Ms. Szilage" and contains multiple references to

"**Szilage** Gallery." **Szilage** and **Szilage** Gallery appear to be used interchangeably.

[3]Consequently, any argument that Boggs failed to receive payment is legally unfounded and, in any event, irrelevant because the summary judgment was based on the Estate's first defense of expiration of statute of limitations, not on its third "defense" of failure to establish payment and receipt by Boggs.

[4]This should not be read to say that abandonment could not have occurred sooner, only that it was undeniable upon Boggs' death based on the record of this case.

[5]As mentioned earlier in the Factual and Procedural History section, the county judge who presided over the Estate's Summary Judgment Motion and rendered the orders granting the motion retired prior to the hearing on Hicks' Motion for Rehearing and a successor judge heard Hicks' motion.

[6]In doing so, the Estate misstated the law on the application of the statute of limitations. "A statute of limitations applies and begins to run upon the **accrual** of a cause of action." *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992) (emphasis added).

[7]Besides, the predecessor judge's reliance on any unpled defense or legal theory would have been clear error. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988) (reversing trial court's decision to permit defendant to advance and prevail on unpled claims).

[8]The other cases cited by the Estate differ procedurally from that of the instant case. The cases all involved appeals from final judgments after a trial on the merits, not motions for summary judgment with its higher burden on the moving party. *See, e.g., Denson v. Stack*, 997 F.2d 1356 (11th Cir. 1993); *Greenwood v. Rotfort*, 158 Fla. 197, 28 So. 2d 825 (Fla. 1946); *Doolittle v. Fruehauf Corp*., 332 So. 2d 107 (Fla. 1st DCA 1976).

[9]The initial complaint in this case was filed on November 8, 2017, five years and one day before that date is November 7, 2012, and the Letter Agreement was entered on December 29, 1999. Had the date of Boggs' breach occurred after November 7, 2012, Hicks' action would have been timely filed.

[10]And whether Boggs would have timely delivered the Artwork after demand is shear speculation in any event.

[11]For that matter, if Boggs' felt prejudiced by the lack of certainty in the date for his performance, he too could have filed a declaratory action.

[12]Nor am I aware of any.

[13]In deciding to affirm the trial court, the majority appears to be imposing on Hicks a requirement to sue within a reasonable period of time in the absence of a breach of contract and that simply is not the law. Further, I am unaware of any statute or case law establishing a statute of repose for a breach of contract action such as the one at issue in this case.

[14]Although the Estate did attempt to argue that the Agreement was abandoned, a theory it never plead. In any event, it would be unreasonable to assume Hicks abandoned the Agreement after having paid Boggs $6,000, no insignificant amount.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Where officer observed licensee make wide turn, travel straddling two lanes, and drift to right traveling on lane marker, stop was justified—No merit to argument that licensee who is Virginia resident did not impliedly consent to breath test in Florida—Implied consent statute is applicable to anyone driving in Florida, and nonresidents are subject to suspension and revocation of their driving privileges in same manner as Florida residents

KEVIN KILEY, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 11-CA-7136, Division K. April 15, 2020. Counsel: Eilam Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ARKIN, J.) This case is before the court to review the administrative suspension of Petitioner's driving privilege in the State of Florida based on his refusal to submit to a breath test at the request of law enforcement. At the time of the stop, Petitioner held a Virginia driver's license. Petitioner raises two issues. The first is that his detention and eventual arrest was not the result of a valid stop. The second is that Petitioner, as a Virginia resident, did not impliedly consent to a breath test in Florida, and law enforcement did not take into account Virginia's implied consent law in reading Florida's implied consent to Petitioner.

With regard to the first issue, the record shows that where law enforcement observed Petitioner make a wide left turn, proceed to travel straddling two lanes, drifting to the right traveling on the left lane marker at around 4:30 a.m., the stop was justified. Further evidence of impairment was obtained during the stop when Petitioner performed poorly on field sobriety exercises. On this issue, the petition is DENIED. *State, Dept. of Highway Safety and Motor Vehicles v. Maggert,* 941 So. 2d 431, 432 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2530a] (probable cause that motorist was impaired existed, despite the absence of a statement in arrest report indicating that police officer initiated stop for suspicion of DUI, where officer observed the vehicle weaving in and out of its lane); *State, Dept. of Highway Safety and Motor Vehicles v. Deshong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992)(to effect a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity. . .driving need not rise to level of infraction to justify stop for DUI. . .probable cause needed to arrest or to suspend a license for DUI may be based upon evidence obtained during standard procedures following a valid traffic stop.)

The second issue is likewise DENIED. *See* §316.1932(1)(a)1.a., Fla. Stat. (2011)(implied consent applicable to anyone driving in Florida); §322.23(1), Fla. Stat. (2011)(nonresidents subject to suspension and revocation of driving privileges in same manner as residents).

The petition is DENIED on the date imprinted with the Judge's signature.

* * *

Real property—Homeowners association—Assessment lien—Foreclosure—Vacation of sale—Where trial court retained jurisdiction to enter further orders in initial foreclosure judgment, and homeowners agreed in subsequent stipulated agreement that court could enter new final judgment without notice if they defaulted on payments to homeowners association, trial court had jurisdiction to enter "amended" judgment of foreclosure—Order approving second stipulated agreement between association and homeowners after amended foreclosure judgment and foreclosure sale was void where order was entered without notice to third-party purchaser of property—Orders issued subsequent to void order are set aside

TRUSTBIZ, LLC, as Trustee Only, Under the 16-560 Land Trust, Appellant, v. RIVERCREST COMMUNITY ASSOCIATION, INC., Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 18-CA-22, Division X. L.T. Case No. 14-CC-3186. On review of a nonfinal order of the County Court for Hillsborough County. The Honorable Joelle Ann Ober, County Court Judge. Counsel: Matthew D. Wolf, Ivanov & Wolf, PLLC, Tampa, for Appellant. Charles E. Glausier and Steven H. Mezer, Tampa, for Appellee Rivercrest Community Association, Inc. Ryan C. Torrens, Tampa, and Kimberly Worling, Orlando, for Appellees Luis Lopez and Tina Lopez.

OPINION

(BARBAS, J.) This case is before the court to challenge several orders of the county court which vacate a foreclosure judgment and the subsequent sale to a third-party purchaser. The original parties in the underlying foreclosure action, Rivercrest Community Association ("Rivercrest") and homeowners Luis Lopez and Tina Leonelli Lopez, settled their differences, but only *after* the foreclosure sale. A third party, Appellant Trustbiz, LLC, acquired the property at the foreclosure sale. The court approved the stipulation the day after it was submitted without holding a hearing or affording Appellant with an opportunity to object. This denied Appellant due process. At a later hearing the trial court erroneously denied Appellant relief. Accordingly, the amended final judgment of foreclosure, the order denying objection to the foreclosure sale, and the order directing clerk to issue certificate of title are reinstated. The orders ratifying (second) stipulation, denying motion for issuance of certificate of title and writ of possession, and subsequent voluntary dismissal are set aside.

This case dates back to 2014. The Lopezes owned a home in the community administered by Rivercrest Community Association.

They became delinquent in paying assessments. Rivercrest began foreclosure proceedings when other methods of collection were unsuccessful, and, in October, 2014, Rivercrest obtained a final foreclosure judgment against them. The court retained jurisdiction in the judgment to enter further orders. A sale was scheduled for December 5, 2014, but it was cancelled after the Lopezes and Rivercrest entered into a stipulated agreement (the first agreement). Under the terms of the first agreement, the Lopezes would make specified payments to Rivercrest until the debt was paid. If they defaulted, they expressly agreed that Rivercrest could pursue entry of a new final judgment without notice. In March, 2016, when the Lopezes defaulted, Rivercrest moved to enforce the first agreement, filing an ex parte motion for entry of a self-styled *amended* final judgment of foreclosure. The court entered this amended judgment of foreclosure April 19, 2016. A sale date was reset for and held May 20, 2016.

Appellant Trustbiz, LLC, was the successful bidder at the sale. The Clerk issued a certificate of *sale* to Appellant. Seven (timely) days later on May 27, 2016, the Lopezes filed an objection and motion to vacate the sale, arguing that that the amended judgment upon which it had been held was unauthorized under Rule 1.530(b), because the time for rehearing had passed. Based on this alleged error, one which the Lopezes consented to, the Lopezes claimed the sale was invalid. Rivercrest filed an ex parte motion for order *denying* objection to the sale and issuance of certificate of title to Trustbiz. On February 17, 2017, the trial judge entered an order denying the Lopezes' objection and motion to vacate the sale. The order also authorized the Clerk to issue the certificate of title.

At this point things get a little messy. On February 27, 2017, before the certificate of title had been issued, the Lopezes filed an emergency motion to stay further proceedings pending resolution of their motion to vacate the amended final judgment. That same day Appellant countered, filing an emergency motion for issuance of title and for writ of possession. These motions were not immediately set for hearing. While they were pending, Rivercrest and the Lopezes went back to mediation.

At mediation Rivercrest and the Lopezes reached an agreement—the *second* agreement. Appellant was not a party to and did not approve the second agreement. Key terms in the second agreement were 1) that the court had lacked jurisdiction to enter an amended final judgment; 2) therefore, the resulting sale was invalid and should be vacated; 3) the Lopezes' motion to vacate amended final judgment of foreclosure and to set aside sale (previously denied) should be granted; 4) the second joint stipulation for settlement should be approved with the court retaining jurisdiction to enforce any provisions under it. On May 30, 2017, Rivercrest filed the stipulation with the court, along with a proposed order approving the stipulation. The next day, without holding a hearing, the judge entered an order approving the stipulation. Notably, the judge was not specifically asked to, nor did she ever, enter an order vacating the amended final judgment.

On August 30, 2017, the judge heard Appellant's still pending emergency motion for issuance of title and motion for writ of possession, as well as the Lopezes' still-pending motion to vacate amended final judgment and sale. Although they were notified of the hearing, neither the Lopezes nor Rivercrest appeared for it. The court did not make any rulings at the hearing. On November 30, 2017, on Appellant's request for a ruling on the motion to vacate, the court entered an order declaring the matter resolved by the second stipulation, thereby determining that Appellant's motion for a ruling was moot. Consistent with the impression that the matter was settled, the judge also denied Appellant's motion for issuance of title and for writ of possession and its motion to strike the Lopezes' objection and their motion to vacate sale.[1] Thereafter, Rivercrest filed a voluntary dismissal on December 15, 2017. This timely appeal followed.

This appeal requests review of the trial court's November 30, 2017, order denying Appellant's emergency motion for issuance of title and motion for writ of possession and the order determining that the Lopezes' motion to vacate the amended (second) final judgment is moot. In addition, Appellant maintains that the trial court erred in its interlocutory order approving the joint stipulation entered into by Rivercrest and the Lopezes without providing Appellant an opportunity to be heard. Appellant contends that the trial court's May 31, 2017, approval of the second stipulation allowed Rivercrest and the Lopezes to conspire to strip Appellant of its legally cognizable right to the property without due process. A claim that a party has been denied procedural due process is reviewed de novo. *Residential Mortg. Servicing Corp. v. Winterlakes Property Owners Assoc.*, 169 So.3d 253, 255 (Fla. 4d DCA 2015) [40 Fla. L. Weekly D1575a].

On a procedural level, a third-party purchaser has a protectable legal interest in property purchased at a foreclosure sale. See *Shlishey the Best, Inc. v. CitiFinancial Equity Servs., Inc.*, 14 So.3d 1271, 1275 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1393b]. A purchaser at a foreclosure sale is entitled to notice and an opportunity to be heard on a motion to vacate the sale. *Avi-Isaac v. Wells Fargo Bank, N.A.*, 59 So.3d 174, 177 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D483a]; *accord Skelton v. Lyons*, 157 So.3d 471 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D403a] (due process is violated when a sale is vacated without notice to purchaser and an opportunity to be heard).

Substantively, a borrower may object to a foreclosure sale under section 45.031(5), Florida Statutes (2013), but it must be directed toward conduct that occurred at, or which related to, the foreclosure sale itself. *Skelton v. Lyons*, 157 So.3d 471, 473 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D403a], *citing IndyMac Fed. Bank FSB v. Hagan*, 104 So.3d 1232, 1236 (Fla. 3d DCA 2012) [38 Fla. L. Weekly D34a]; *see also Indian River Farms v. YBF Partners*, 777 So.2d 1096, 1098 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D286b] (affirming the trial court's order overruling the borrower's objection "on the grounds that such objections did not concern any defect or irregularity with the foreclosure sale itself in order to be a legally sufficient ground to set aside the sale"). An objection "must be based upon a cause which is adequate to justify the equitable relief," and when the trial court does not make findings regarding the existence of cause and the record is silent on any facts showing such cause, the court will reverse. *See Sulkowski v. Sulkowski*, 561 So.2d 416, 418 (Fla. 2d DCA 1990).

The Lopezes' objection to the sale contends that the trial court lacked *jurisdiction* to enter an amended judgment because the time for rehearing under Rule 1.530 had passed. The court disagrees. The so-called amended judgment was not the result of a Rule 1.530 rehearing motion, it was the enforcement of the parties' negotiated agreement. Significantly, not only did the initial foreclosure judgment retain jurisdiction to enter further orders, in their first stipulated agreement the Lopezes and Rivercrest submitted to the court's continuing jurisdiction. Having done so they could not later deny that jurisdiction. *Bush v. Schiavo,* 871 So. 2d 1012, 1013-14 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1141b] (if a party takes steps to submit to court's jurisdiction, and receives a material benefit therefrom, it cannot later challenge the court's jurisdiction). Calling the judgment "amended" was a misnomer; to call it "corrected" or a new final judgment would have been more accurate. Because the court had jurisdiction to correct the judgment and schedule a sale, the resultant sale is valid, absent any showing otherwise.

Appellant correctly asserts that no order of the court has vacated the judgment or set aside the sale. Instead, the court's last order merely approves the second stipulation, which says that the judgment *should* be vacated. Based on its belief that the existing judgment and sale remained in effect, Appellant proceeded on its [renewed] motion for

issuance of a certificate of title, which had been previously granted by the court. It was not until the trial court entered an order denying the motion that it indicated its intent that the approval of the second stipulation effectively set aside the sale and vacated the amended judgment. Still, the court did not enter a separate order setting aside the sale or vacating the final judgment.

Appellant argues, and this court agrees, that the May 31, 2017, order approving the second stipulated agreement is void because it was entered without notice. *Viets v. Am. Recruiters Enters., Inc.*, 922 So.2d 1090, 1095 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D851a] ("A violation of the due process guarantee of notice and an opportunity to be heard renders a judgment void."). The orders following it must be set aside because they flow from the void order. Accordingly, the April 19, 2016, amended judgment of foreclosure judgment remains valid, as are the sale, the February 17, 2017, order *denying* the Lopezes' objection to the sale and granting motion for issuance of the certificate of title.

It is ORDERED that the voluntary dismissal, the May 31, 2017, order approving (second) stipulation, and the November 30, 2017, order denying motion for issuance of certificate of title, writ of possession, and to strike the Lopezes' May 27, 2016, Objection to Sale and Motion to Vacate Sale are set aside. This case is REMANDED for further proceedings consistent with this opinion. (FUSON and STEPHENS, JJ.)

---

[1]The court had earlier denied the Lopezes' objection to the sale.

* * *

Municipal corporations—Ordinances—Rezoning—City did not depart from essential requirements of law by not requiring traffic study before passing rezoning ordinance where anticipated gross daily trips for development did not meet threshold for requiring traffic study set in city land development code—No merit to argument that traffic study should been conducted because development will have only one point of ingress and egress where land development code contains no such requirement—No merit to argument that traffic impact study was required because maximum number of residential units allowable in zone would generate gross daily trips in excess of threshold requiring traffic study where development application is for less than maximum allowable number of units

F. GARY KOVAC, and JANET B. KOVAC, Petitioners, v. CITY OF ZEPHYRHILLS, a Florida municipal corporation, CBD REAL ESTATE INVESTMENT, LLC, a Florida limited liability company, and WARECO-PASCO II, LLC, a Florida limited liability company, Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-CA-0068. UCN Case No. 512020CA000068CAAXES. February 13, 2020. Petition for Writ of Certiorari from Decision of the City of Zephyrhills. Counsel: Kasey A. Feltner and Meredith S. Delcamp, Shutts & Bowen, LLP, Tampa, for Petitioners. No response required from Respondents.

(**PER CURIAM.**) Petitioners F. Gary Kovac and Janet B. Kovac seek appellate review of Respondent City of Zephyrhills' (the City) passage of City Ordinance 1395-19 (the ordinance). Upon review, the Petition for Writ of Certiorari is denied.

There appear to be two issues possibly fatal to this petition before reaching the merits of Petitioners' arguments. First, Petitioners assert that they have been unable to obtain a copy of the ordinance approving the rezoning. Instead, a prior draft of the ordinance has been included in the appendix. Thus, Petitioners have not included a conformed copy of the order under review. *See* Fla. R. App. P. 9.220(b) (requiring that an appendix include, in relevant part, "a conformed copy of the opinion or order to be reviewed"). Second, Petitioners did not provide a transcript of either of the two public table readings on the ordinance despite part of their petition relying upon their assertion that they raised the traffic study issue in a motion before the City during the second public table reading. However, even taking the assertions in their petition and appendix as true, Petitioners are not entitled to relief.

STATEMENT OF THE CASE AND FACTS[1]

Respondent Wareco-Pasco II, LLC (Wareco) owns land in Zephyrhills. Wareco and Respondent CBD Real Estate Investment, LLC (CBD) initiated a rezoning request via city ordinance. The application states that CBD and Wareco seek to rezone the project area from an Agricultural-Residential (AR) zoning district to a Residential 3 (Res-3) zoning district. However, the ordinance states that rezoning is from a mix of County Residential 1 (R1) and Commercial 2 (C2) to City Planned Unit Development (PUD). Regardless, the question of under which zoning district the land will end up is not before this Court.

Relevant to this petition, CBD and Wareco's rezoning application contained a traffic impact statement. The statement estimated that each residential unit would produce 9.52 Annual Average Daily Trips (AADT).[2] For the planned 91-unit subdivision, this would result in an estimated 867[3] AADT. The impact statement provided that the basis of these estimates was the ITE 9th edition.[4] A proposed ordinance was drafted and two public table readings with public comment periods were held. During the second public table reading, Petitioners moved to delay the reading for one month so that a traffic study could be conducted. The motion was denied and the City voted to pass the ordinance. Petitioners then filed the petition at bar.

STANDARD OF REVIEW

While this rezoning occurred via passage of a city ordinance, it was the result of an owner-initiated and site-specific rezoning request. Therefore it is of "sufficiently judicial character" to qualify as a quasi-judicial decision by an administrative agency "appropriate for appellate review." *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996, 1001 (Fla. 2d DCA 1993).

This Court may review quasi-judicial action by an administrative board to determine (1) whether the parties were afforded adequate due process; (2) whether there was a departure from essential requirements of law; and, (3) whether the board's decision is supported by competent, substantial evidence. *See Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982); *Powell v. City of Sarasota*, 953 So. 2d 5, 6 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2349a].

Competent substantial evidence is a standard of review, which the reviewing court must apply. *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]. It is tantamount to legally sufficient evidence. Id.

ANALYSIS

I. Procedural Due Process

Petitioners first argue that the City failed to afford them procedural due process. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d at 1002.

The basis of Petitioners' due process argument is that the City approved the ordinance despite evidence that the City may not have followed its own Land Development Code (LDC) by not requiring a traffic study be conducted. Petitioners further argue that their due process rights were violated when the City denied their request for a one month delay to conduct a traffic study. Petitioners' arguments are competent substantial evidence and essential requirement of law arguments clothed as due process arguments.

The Court holds that Petitioners were afforded procedural due process by the City. The petition itself states that Petitioners were provided notice and an opportunity to be heard at a public hearing. The petition further states that Petitioners were permitted to move for a traffic study and a delay of the public hearing. The petition does not assert that they were not permitted to present evidence, cross-examine witnesses, or be informed of all the facts upon which the City acted. Nor does the petition assert any other basis for this Court to hold that Petitioners were denied procedural due process.

II. Departure from the Essential Requirements of Law

Petitioners argue that the City's passage of the ordinance was a departure from the essential requirements of law. A departure from the essential requirements of law is not mere legal error, but instead, involves a "gross miscarriage of justice." *Sutton v. State*, 975 So. 2d 1073, 1081 (Fla. 2008) [33 Fla. L. Weekly S76a]. The concern is the seriousness of the legal error. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 528 (Fla. 1995) [20 Fla. L. Weekly S318a]. There is a departure from the essential requirements of law where the legal error violates a "clearly established principle of law resulting in a miscarriage of justice." *Id*. (*quoting Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)). It is "an error so fundamental in character as to fatally infect the judgment and render it void." *Id*. at 527 (*quoting State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st DCA 1960)).

A. Applicable Provisions of the City's Land Development Code

Section 5.04.01 of the Zephyrhills LDC provides that "[a]n application for . . . a rezoning or site plan approval of a proposed development shall determine the impact of the project. . ." and that "[a] traffic impact analysis shall be prepared . . . that includes a projection of the gross daily trips to be generated by the project . . ." § 5.04.01, LDC. "Institute of Traffic Engineers trip generation rates or another approved source shall be used as the basis for trip generation calculations." § 5.04.01(A), LDC.

"A development may be defined as de minimus if the development is anticipated to generate less than 1,200 gross daily trips. No additional concurrency analysis will be required for de minimus developments." § 5.04.01(B), LDC.

"A traffic study is required if the development is anticipated to generate more than 1,200 gross daily trips." § 5.04.01(C), LDC.

B. Petitioners' Arguments

Petitioners put forth three arguments in support of their assertion that the City departed from the essential requirements of law by passing the rezoning ordinance without first requiring a traffic study: (1) the LDC required a traffic study under the facts of this case, (2) the planned subdivision only has one point of ingress and egress, and (3) the maximum number of residential units allowed in a Res-3 zone is 213 which would generate more than 1,200 gross daily trips.

1. City did not follow the LDC

Petitioners argue that the City did not follow the LDC when it passed the rezoning ordinance without first having a traffic study conducted. As noted in the Statement of the Case and Facts section of this order, the application states that the proposed subdivision will contain 91 residential units. The impact statement provides a trip generation rate of 9.52 AADT's or gross daily trips per unit. Based upon that information, the development is anticipated to generate 867 gross daily trips. This is well under the 1,200 gross daily trips that would trigger the traffic study requirement under LDC section 5.04.01(C).

Because a traffic study was not required for this project, the City did not depart from the essential requirements of law by not requiring a traffic study before passing the rezoning ordinance.

2. Single point of ingress and egress

Petitioners next argue that even though the estimated number of gross daily trips does not exceed 1,200, a traffic study should still have been conducted because the development will have only one point of ingress and egress. However, Petitioner does not cite to, and the Court cannot find, a provision of the City's LDC containing such a requirement. Per the LDC, a traffic study is only required in one situation: where the estimated number of gross daily trips generated by the development exceeds 1,200. Accordingly, the City did not depart from the essential requirements of law.

3. Maximum number of residential units in a Res-3 zone

Petitioners assert that the maximum allowable number of residential units in a Res-3 zone is 213. Petitioners correctly note that according to the traffic impact statement, 213 units would produce an estimated 2,028 gross daily trips. Petitioners argue that this exceeds the 1,200 gross daily trips triggering the traffic study requirement and therefore a traffic study was required before the rezoning ordinance could be approved. However, this argument fails to consider the entirety of LDC section 5.04.01.

LDC section 5.04.01 and the traffic study requirement of LDC section 5.04.01(C), are based upon the number of planned residential units in the application itself, not the maximum number of possible residential units permitted in a particular zoning district. *See* LDC § 5.04.01 (providing that "an *application* for . . . a rezoning or site plan approval . . . *shall determine the impact* of the project. . ." and that the "traffic impact analysis" must include "a projection of the gross daily trips to be *generated by the project*") (emphases added). Assuming *arguendo* that a maximum of 213 residential units are permitted in a Res-3 zoning district, this does not change the fact that the application and its corresponding traffic impact analysis only contain 91 residential units. Thus, for the reasons detailed in Section II(B)(1) of this order, a traffic study was not required and the City did not depart from the essential requirements of law.

III. Competent Substantial Evidence

Competent substantial evidence in a quasi-judicial action is "evidence a reasonable mind would accept as adequate to support a conclusion . . . [F]or the action to be sustained, it must be reasonably based in the evidence presented." *Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d at 1002-03 (*quoting Town of Indialantic v. Nance*, 400 So. 2d 37, 39 (Fla. 5th DCA 1981), *approved*, 419 So. 2d 1041 (Fla. 1982)).

Petitioners argue that because the City did not conduct a traffic study, there is no evidence that the planned development meets the traffic flow requirements of the City's LDC and therefore the City's approval of the rezoning ordinance is not supported by competent substantial evidence.

Because a traffic study was not required under the relevant provisions of the LDC, it follows that neither CBD, Wareco, nor the City were required to adduce any evidence from a traffic study.

CONCLUSION

Because Petitioners were provided notice and an opportunity to be heard, they were afforded procedural due process. Because CBD and Wareco's rezoning application provided that the planned development would generate less than 1,200 gross daily trips, the City did not depart from the essential requirements of law by not requiring a traffic study and the City's decision was supported by competent substantial evidence.

Accordingly, it is **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby **DENIED**. (DANIEL D. DISKEY, KIMBERLY SHARPE BYRD, and LAURALEE WESTIN, JJ.)

---

[1]The Statement of the Case and Facts is based upon the facts asserted in Petitioners' petition and appendix.

[2]Per the petition, AADT in the traffic impact statement is synonymous with the term "gross daily trips" in the City's LDC. Accordingly, this order uses the terms interchangeably.

[3]Rounded up by this Court from 866.32.

[4]ITE 9th edition is short for "Institute of Transportation Engineers Common Trip Generation Manual, 9th edition."

* * *

Attorney's fees—Appellate—Prevailing party

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. SHAZAM AUTO GLASS, LLC, as assignee of Christine Jennings, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 18-CA-4341, Division E. L.T. Case No. 17-CC-021125. July 1, 2020.

AGREED ORDER ON PENDING MOTIONS FOR REHEARING AND/OR CLARIFICATION

(HOLDER, J.) THIS CAUSE came before the Court on: (1) "Shazam's Motion for Rehearing and/or Clarification Concerning 'Order on Petitioner's Motions for Fees and Costs' " filed on February 17, 2020; (2) "Shazam's Motion for Rehearing and/or Clarification Concerning Court's 'Order On Remand' dated April 3, 2020, 'Order on Petitioner's Motions to Tax Appellate Costs' dated April 6, 2020, and 'Amended Order on Respondent's Motion to Tax Appellate Costs" dated April 6, 2020" filed on April 14, 2020; and (3) "Petitioner's Motion for Clarification" filed on April 14, 2020. The Court, having considered the parties' motions and responses, and being advised that the parties agree to this Order,

ORDERED AND ADJUDGED as follows:

1. The parties' pending motions for rehearing and/or clarification are granted to the extent set forth below, and are otherwise denied.

2. This Court's "Order Granting Petition for Writ of Certiorari" dated January 17, 2019 and this Court's "Order on Remand" dated April 3, 2020, are hereby amended to conform to the Florida Second District Court of Appeal's appellate decision in *Shazam Auto Glass, LLC, a.a.o. Christine Jennings v. State Farm Mut. Automobile Ins. Co.*__So.3d__, 2020 WL 215962, 45 Fla. L. Weekly D131a (Fla. 2d DCA Jan. 15, 2020).

3. In accordance with the Second District's decision, Shazam's "Motion for Conditional Award of Appellate Attorneys' Fees" dated July 10, 2018 is conditionally granted with respect to the appellate attorneys' fees incurred by Shazam in defending the trial court's March 9, 2018 order on certiorari review, contingent upon Shazam ultimately prevailing in the case, and in an amount to be determined by the trial court.

4. This Court's "Order on Petitioner's Motions for Fees and Costs" dated February 14, 2020 is vacated, but the ruling on Petitioner's motion for appellate attorneys' fees set forth in this Court's "Order Granting Petition for Writ of Certiorari" dated January 17, 2019 remains in effect.

5. This Court's "Order on Petitioner's Motion to Tax Appellate Costs" dated April 6, 2020 is vacated.

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment—Trial court abused its discretion by denying motion to amend affirmative defenses to assert defense of untimely billing where amendment would not prejudice medical provider that was on notice of untimely billing issue since before suit was filed, insurer had not abused amendment process, and proposed amendment was not futile

GEICO GENERAL INSURANCE COMPANY, Appellant, v. HOLLYWOOD DIAGNOSTICS CENTER, INC., a/a/o Judith Petit-Homme, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-010199 (AP). L.T. Case No. COCE16-018935. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Mardi Levey Cohen, Judge. Counsel: Michael A. Rosenberg, Cole, Scott & Kissane, P.A., Plantation, for Appellant. Frantz C. Nelson, Font & Nelson, PLLC, Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Geico General Insurance Company ("Geico") appeals a final judgment in favor of Hollywood Diagnostics Center, Inc. ("Provider"). Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **REVERSED** as set forth below.

In the proceedings below, Provider filed suit for breach of contract to recover personal injury protection ("PIP") benefits from Geico pursuant to an assignment of benefits from Judith Petit-Homme (the "Insured"). Upon the parties' cross motions for summary judgment, Geico made its *ore tenus* motion for leave of court to amend its affirmative defenses to include untimely billing. The county court denied Geico's request, and granted Provider's motion for summary judgment as to late billing. On appeal, Geico's main argument is that the county court abused its discretion in denying its *ore tenus* motion for leave of court to amend its affirmative defenses to include untimely billing.

"[R]efusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." *Hutson v. Plantation Open MRI, LLC,* 66 So. 3d 1042, 1044-45 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1682a] (quoting *Spradley v. Stick,* 622 So. 2d 610, 613 (Fla. 1st DCA 1993)); accord *Carter v. Ferrell,* 666 So. 2d 556 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2745c]. "The primary consideration in determining whether a motion for leave to amend should be granted is a test of prejudice. . . ." *Id.* (quoting *Video Indep. Med. Examination, Inc. v. City of Weston,* 792 So. 2d 680, 681 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2092a]).

"Florida Rule of Civil Procedure 1.190(a) provides that leave to amend shall be given freely when justice so requires." *Id.* at 1044. "In addition, courts 'should be especially liberal when leave to amend is sought *at or before* a hearing on a motion for summary judgment.' " *Id.* (quoting *Quality Roof Servs., Inc. v. Intervest Nat'l Bank,* 21 So. 3d 883, 885 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2205d]); (quoting *Thompson v. Bank of New York,* 862 So. 2d 768, 770 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2536d]) (emphasis added).

Here, the county court denied Geico's *ore tenus* motion to amend its affirmative defenses to include untimely billing because "the age of the case. . . it's set for trial. . . gone past the pre-trial, and [there's] a stipulation". (R. 229). However, the record indicates there was no prejudice to Provider because (1) Provider has been on notice of the issue of the untimely submission of medical bills since before the lawsuit was filed when Provider received Geico's explanations of review detailing untimeliness as the basis for denial of payment (R. 42-43; PDF. 49-50); (2) the parties' filed cross-motions for summary judgment on the issue on untimeliness (R. 45-50; 82-112; PDF. 52-57; 89-119); and (3) the parties' joint pre-trial stipulation identified timeliness of the bill for medical services as the *sole* disputed issue of law and fact (R. 65-80; PDF. 72-87) (emphasis added). There is no prejudice when the opposing party is aware of the most serious part of the accusation. *See Winslow v. Deck,* 225 So. 3d 276, 280 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1696b] ("Granting the opportunity to amend would not have prejudiced appellee because she was aware of the gravamen of appellant's two petitions.").

Next, the record indicates that Geico has not abused the amendment process. This was Geico's first time seeking to amend its affirmative defenses[1]. *See Cousins Rest. Assocs. ex rel. Cousins Mgmt. Corp. v. TGI Friday's, Inc.,* 843 So. 2d 980, 982 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1066a] ("This is not a case where the plaintiff filed repetitive motions for leave to amend and abused the privilege."); *See also, Collado v. Baroukh,* 226 So. 3d 924, 928 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1916a] (". . .this is not a case where

the [plaintiff] filed repetitive motions to amend and abused the privilege. . .."). Geico has not abused its privilege to amend since it was the first time seeking leave.

Last, the record indicates Geico's proposed affirmative defense was not futile. Several cases have indicated that an affirmative defense is futile if it is insufficiently pled, "conclusory in their content, and lacking in any real allegations of ultimate fact demonstrating a good defense to the complaint." *Cady v. Chevy Chase Sav. & Loan, Inc.*, 528 So. 2d 136, 137-38 (Fla. 4th DCA 1988); *See Thompson,* 862 So. 2d at 770 (The Fourth District Court of Appeal affirmed the lower court's ruling and determined "the motion to amend [affirmative defenses on the] allegations of fraud were 'conclusory in their content, and lacking in any real allegations of ultimate fact showing fraud on the part of the Plaintiff'. Such defenses were insufficient as a matter of law."). Geico's affirmative defense for untimely billing is found under section 627.736(5)(c)(1), Florida Statutes. The statute provides, in pertinent part:

> If the insured fails to furnish the provider with the correct name and address of the insured's personal injury protection insurer, *the provider has 35 days from the date the provider obtains the correct information to furnish the insurer with a statement of the charges. The insurer is not required to pay for such charges* unless the provider includes with the statement documentary evidence that was provided by the insured during the 35-day period demonstrating that the provider reasonably relied on erroneous information from the insured and either. . .

Geico's affirmative defense for untimely billing is legally cognizable, and has been an issue in this case from the beginning of the lawsuit. *See United Auto. Ins. Co. v. Eduardo J. Garrido, D.C., P.A.,* 990 So. 2d 574, 575 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1846b] ("Under section 627.736(5)(c)(1), an insurer has no obligation to pay late-filed bills.") (citing *Coral Imaging Servs. v. Geico Indem. Ins. Co.,* 955 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a]).

Based on the foregoing, this Court finds that the county court abused its discretion when it did not allow Geico to amend its affirmative defenses, and therefore, reversal is proper. *See Winslow,* 225 So. 3d at 280 (The Fourth District Court of Appeal reversed and remanded the case where "nothing in the record indicates that appellant abused the privilege to amend, there would have been prejudice to [appellee] by permitting leave to amend, or the amendment would have been futile.").

Accordingly, the final judgment in favor of Appellee is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellee's Motion for Appellate Attorney's Fees and Costs is **DENIED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

---

[1]The record does not indicate if a motion for leave to amend affirmative defenses was ever filed, or brought up, except at the hearing on the cross-motions for summary judgment on untimeliness.

* * *

Criminal law—Violation of probation—Trial court erred in *sua sponte* dismissing amended violation of probation affidavit when no motion to dismiss had been filed—Further, trial court erred when it determined that defendant who was on probation for petit theft was not ordered to submit to random drug testing—Requirement to submit to such testing is general condition of probation that was included in order of probation issued to defendant at his sentencing

STATE OF FLORIDA, Appellant, v. MAGNOLIS DEJESUS VILAR LAUZAO, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 19-16 AP. L.T. Case No. 19-334 MM. April 22, 2020. Appeal from the County Court for Collier County; Nicola L. Tamara, Judge. Counsel: James F. Stewart, Assistant State Attorney, Naples, for Appellant. Magnolis Dejesus Vilar Lauzao, Pro Se, Naples, Appellee.

(**PER CURIAM.**) Appellant, State of Florida, is appealing the lower court's *sua sponte* dismissal of Appellee's Violation of Probation ("VOP") affidavit. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). On appeal of an order granting a motion to dismiss, the standard of review is *de novo. State v. Bennett,* 111 So.3d 943, 944 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D846a]. We reverse.

Appellant and Appellee, Magnolis DeJesus Vilar Lauzao, appeared before the lower court on September 10, 2019 to address a pending VOP case. The relevant VOP affidavit is the amended VOP affidavit filed on July 3, 2019. The proceeding began with counsel for Appellee asking the court for a continuance. Counsel for Appellee advised the court that his client had completed all conditions of his probation, that there was an outstanding violation for testing positive for marijuana, and that they hoped to get an offer from the Appellant.

The lower court then asked the probation officer why he was testing Appellee for drugs when he was on probation for petit theft and there had been no order from the court for Appellee to be randomly drug tested. The probation officer responded that random drug testing is a general condition of probation. The court then dismissed the violation over Appellant's objection.

Appellant argues that the court should not have dismissed the amended VOP affidavit because it was neither afforded due process nor proper notice to argue against the dismissal, and the dismissal was without a legal basis. Appellant is not afforded the same due process safeguards as individuals. *See State v. Robinson,* 873 So.2d 1205, 1212 (Fla. 2004) [29 Fla. L. Weekly S112a] ("Both the United States and Florida Constitutions protect individuals from arbitrary and unreasonable interference with a person's right to life, liberty, and property."). However, the trial court does not have the authority to *sua sponte* dismiss a criminal prosecution when no motion to dismiss has been filed. *State v. D.A.*, 171 So.3d 229, 230 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1878a]. By dismissing a criminal prosecution *sua sponte,* the court infringes on the prosecutorial discretion of the State. *See State v. Bloom,* 497 So.2d 2, 3 (Fla. 1986). We find that the trial court erred, as matter of law, when it dismissed the amended VOP affidavit *sua sponte.*

Appellant argues that the court's dismissal of Appellee's amended VOP affidavit is without a legal basis because the court wrongfully determined that the Appellee was not ordered to submit to random drug testing. Random testing to determine the presence or use of alcohol or controlled substances is a standard condition of probation that does not require oral pronouncement at the time of sentencing. Fla. Stat. § 948.03(1)(*l*). The condition requiring random drug and alcohol testing does not have to relate to the defendant's present criminal conduct or future criminality. *Diaz v. State,* 691 So.2d 589, 590 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D985c]. We find that the trial court erred, as matter of law, when it determined the Appellee was not ordered to submit to random drug testing. The requirement to submit to random drug testing is a general condition of probation that was included on the Order of Probation that was issued to Appellee at his sentencing.

Accordingly, we REVERSE the dismissal of the amended VOP affidavit, and remand to the trial court for further proceedings in accordance with this opinion. (J. PORTER, FOSTER, and CUPP, JJ., concur.)

* * *

Volume 28, Number 3
July 31, 2020
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Insurance—Attorney's fees—Insurer should not be joined as party defendant on motion to enter final judgment for attorney's fees and costs in negligence action where insurer asserted denial of coverage and reservation of rights defenses and claimed attorney's fees award arose out of proposal for settlement that exceeded policy limits

GOLDIE KILGORE, Plaintiff, v. MARC MOSHER, JR., Defendant. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2015-CA-1050, Division A. April 28, 2020. Michael Sharrit, Judge.

ORDER DENYING MOTION TO ENTER FINAL FEE JUDGMENT AND JOIN INSURER

This matter is before the Court on Plaintiff's Motion to Enter Final Judgment of Fees and Costs and to Join Defendant's Insurer as a Party Defendant pursuant to Florida Statute 627.4136. The Court having been advised in the premises finds:

1. With regard to the cost judgment and negligence judgment, Plaintiff concedes Defendant's insurer should not be joined as a party at this time.

2. With regard to forthcoming fees arising out of Plaintiff's proposal for settlement, Defendant's insurer disputes coverage.

3. To the extent there is denied coverage or asserted reservation of rights defenses, the Court may not utilize Fla. Stat. Sec. 627.4136 to join an insurer as a party. *Tallahassee Mem. Reg. Med. Ctr., Inc. v. Kinsey,* 655 So.2d 1191 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1211a].

4. Because the claimed attorneys fees arise out of proposal for settlement which exceeds the policy limits, they do not constitute "expenses incurred . . . at our request." *Cf., Gov't Employees Insurance Co. v. Macedo,* 228 So.3d 1111 (Fla. 2017) [42 Fla. L. Weekly S731a] (fees resulting from PFS within policy limits deemed "requested" and "covered" because insco could have exercised control and settlement discretion). .

Therefore, it is;

ORDERED and ADJUDGED:

Plaintiff's Motion is **DENIED**.

* * *

Arbitration—Arbitrable issues—Insurance—Insurer's motion to compel arbitration in action brought by medical provider seeking compensation for services provided to insureds after insurer terminated agreement with provider is denied—Court has jurisdiction to determine arbitrability of dispute where parties' agreement does not include clear and unmistakable evidence of agreement to submit arbitrability question to arbitrator—No merit to insurer's claim that arbitration clause in terminated agreement requires arbitration of claims notwithstanding fact that dispute arose after termination of agreement and claims were not related to agreement

KIDZ MEDICAL SERVICES, INC., Plaintiff, v. UNITEDHEALTHCARE OF FLORIDA, INC. et al, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-023456-CA-01, Section CA43. May 1, 2020. Michael Hanzman, Judge.

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY CASE

THIS CAUSE came before the Court on Defendants UnitedHealthcare of Florida, Inc. ("United HMO") and UnitedHealthcare Insurance Company's ("United PPO") (collectively, "United" or "Defendants") Motion to Compel Arbitration and to Stay Case, filed September 30, 2019 (the "Motion"). The Motion was fully briefed, as plaintiff Kidz Medical Services, Inc. ("Kidz Medical") filed its opposition on October 31, 2019, and United filed a reply on November 14, 2019. The parties appeared for a Case Management Conference on April 13, 2020, at which time the Court set a hearing on the Motion on April 24, 2020, and directed the parties to file supplemental briefs on or before April 17, 2020, on the question of the Court's authority to determine arbitrability, in light of the recent decision in *Doe v. Natt*, 2020 WL 1486926 (Fla. 2nd DCA March 25, 2020) [45 Fla. L. Weekly D712a]. The Court received and reviewed the supplemental briefing.

The parties appeared before the Court on April 24, 2020 for the hearing on the Motion. Having considered all of the relevant submissions, having reviewed the Court file, having heard argument of counsel, and being otherwise duly advised in the premises, the Court **DENIES** the Motion for the reasons set forth in this Order.

RELEVANT BACKGROUND

Kidz Medical filed the Complaint on August 7, 2019. *See* Complaint. Kidz Medical alleged that it previously had an Agreement with United (the "Agreement") which governed the reimbursement of claims for medical services provided by Kidz Medical to United's members. *See id.* at ?4. Kidz Medical further alleged that United purported to terminate the Agreement, effective August 1, 2018, and, since that time, United has treated the Agreement as terminated and Kidz Medical as an out-of-network provider, with no written agreement. *Id.* at ?4-5. Kidz Medical alleged that it continues to provide medical services to United's insureds after the purported termination date,[1] and that United's payments to Kidz Medical for these out-of-network services were far below the rates of reimbursement that United had routinely and customarily paid it for many years, and were below the "usual and customary provider charges for similar services in the community", as required by Florida law. *Id.* at ?28-34.

Kidz Medical asserted claims for breach of section 641.513, Florida Statutes (Count I, against United HMO), 627.64194, Florida Statutes (Count II, against United PPO), Breach of Contract Implied in Fact (against United (Count III)), Unjust Enrichment (against United (Count IV)), Quantum Meruit (against United (Count V)) and Declaratory Judgment (Against United (Count VI). Each claim seeks compensation for services rendered to United insureds **after** termination of the Agreement. For this reason, each claim accrued after termination, and **no** claim relates to services provided pursuant to the Agreement. In other words, this is not a case where, for example, the parties continued to perform under the Agreement post termination. It is a case where Plaintiff continued to provide services to United insureds post termination because it was obligated to do so by law, and is statutorily entitled to compensation notwithstanding the **absence** of an extant contract.

Kidz Medical further alleged that it initiated an arbitration challenging United's termination of the Agreement, effective August 1, 2018 (the "Arbitration"). Because the Agreement renewed for one-year terms, Kidz Medical contends in the Arbitration that United improperly terminated the Agreement, and that the Agreement should be effective through July 31, 2019. *Id.* at ?? 6-11. The Arbitration has not concluded, but the results will impact the scope of this litigation: whether Kidz Medical's claims for services performed after the termination of the Agreement start on August 1, 2018 or August 1, 2019. *Id.* at ?12. To clarify this point, counsel for Kidz Medical specifically stipulated on the record that Kidz Medical was not challenging United's termination of the Agreement as of July 31, 2019, and that the only claims that will be adjudicated in this lawsuit are claims for medical services performed ***after*** the termination of the Agreement.

In the Motion, United seeks to compel arbitration and to stay this reimbursement dispute based on an arbitration provision in the Agreement that United terminated. The Agreement's arbitration provision provides:

> The parties will work together in good faith to resolve any and all disputes between them (hereinafter referred to as "Disputes") including but not limited to all questions of arbitrability, the existence, validity, scope or termination of the Agreement or any term thereof.
>
> If the parties are unable to resolve any such Dispute within 60 days following the date one party sent written notice of the Dispute to the other party, and if either party wishes to pursue the Dispute, it shall thereafter be submitted to binding arbitration in accordance with the Commercial Dispute Procedures of the American Arbitration Association, as they may be amended from time to time. . . .
>
> . . . The arbitrator(s) may construe or interpret but shall not vary or ignore the terms of this Agreement and shall be bound by controlling law. . . .
>
> . . . The parties acknowledge that because this Agreement affects interstate commerce the Federal Arbitration Act applies.

See Agreement, Art. VIII. The arbitration provision also includes the following:

> . . . This Article VIII governs any dispute between the parties arising before or after execution of this Agreement and shall survive any termination of the Agreement.

Id. Section 10.13 states that "Article VIII . . . will survive the termination of this Agreement." The Agreement provides that Florida law governs its interpretation. *Id.* § 10.10.

United contends that, even though it terminated the Agreement and treated it as terminated, the arbitration provision contains a survival clause that requires arbitration of any dispute arising between the parties any time in the future, regardless of whether that dispute has any relationship to the Agreement. According to United, any disputes between the parties arising after the termination of the Agreement must be arbitrated pursuant to Article VIII, including the claims for medical services provided by Kidz Medical *after* the termination of the Agreement **and** which United adjudicated on an out-of-network basis. In other words, United contends that the arbitration provision extends in perpetuity and attaches to any future disputes between these parties, regardless of whether such future disputes arise out of, or bear any relation to, the contract containing the arbitration clause.

Kidz Medical opposes the Motion, contending that United failed to meet the applicable legal standards to compel arbitration under the three-part test announced in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. Kidz Medical argues that there is no valid agreement to arbitrate reimbursement disputes for claims for medical services provided *after* the Agreement terminated and that United fails to identify any arbitrable issue because Kidz Medical's legal claims have no relationship with the Agreement.

III. Analysis

Generally, under both the federal and Florida law, the three fundamental elements that a court must consider when determining whether a dispute is required to be compelled to arbitration are: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Seifert*, 750 So. 2d at 636; *CarePlus Health Plans v. Interamerican Medical Center Group, LLC*, 124 So. 3d 968, 971 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2219c]. Arbitration provisions are contractual in nature and remain a matter of contractual interpretation. *Id.*; *see also Seaboard Coast Line R.R. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982). The intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration. *Seifert,* 750 So. 2d at 636. Courts generally favor such provisions and will try to resolve an ambiguity in an arbitration provision in favor of arbitration. *Id.* However, the "general rule is that where an arbitration agreement exists between the parties, arbitration is required only of those controversies or disputes which the parties have agreed to submit to arbitration." *Id.* (quoting *Regency Group, Inc. v. McDaniels*, 647 So. 2d 192, 193 Fla. 1st DCA 1994).

As a threshold matter, based on the applicable law cited above and supplemental briefing, the Court concludes that it has jurisdiction to determine the arbitrability of this dispute. *See, e.g., Natt,* 2020 WL 1486926 at 7-8 (finding that it is presumed that parties do not agree to submit questions of arbitrability to arbitrators unless the arbitration agreement includes "clear and unmistakable evidence" of the parties' asset to submit those questions to the arbitrators rather than the court); *accord First Option of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 945 (1995) ("If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently"). In addition, neither party objected to the Court's authority to determine arbitrability either in their written submissions, supplemental briefing or at oral argument. Indeed, United's counsel stipulated at the April 24, 2020 hearing that the Court should decide this issue. Hrg. Tr. at 4:16-25 ("On that second issue [who determines arbitrability], that's a non-issue here, although the jurisprudence and the binding case law says that [sic] for the arbitrator, given our provision, we are, United here in this case, are willing to submit that to Your Honor, that decision, so as to not—to conserve judicial resources. And also, we're doing that without prejudice with the right to arbitrate.").

Turning now to the first *Seifert* factor, United fails to demonstrate that there is a written arbitration agreement applicable to the claims at issue in this action. By United's own assertion, no written contract exists between the parties that governs this dispute. And, United does not contest that it has treated the Agreement as terminated, and that Kidz Medical's claims are all for medical services provided after United terminated the Agreement. United nonetheless argues that the arbitration clause survived termination of the Agreement to govern any and all disputes that arise post-termination. United's position is that the arbitration clause in the Agreement is a roaming covenant untethered to the contract that attaches to any claim, regardless of its time frame or relationship to the Agreement. United's position borders on frivolous.

Pursuant to well-settled Florida law, plain and unambiguous contract terms must be construed and given effect as they evidence the parties' intent. *State Farm Mut. Auto Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986); *Charles Bernard, Ltd. v. Tobias Jewelry Ltd.*, 751 So. 2d 711, 713 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D402a]; *Walgreen Co. v. Habitat Dev. Corp.*, 655 So. 2d 164, 165 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1132a]. Further, "it is well settled that a single contractual term must not be read in isolation." *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 860 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2195a]. "Rather, the goal is to arrive at a reasonable interpretation of the entire agreement, and to construe contractual terms 'in such a manner as to give them a meaning consistent with the apparent object of the parties in entering into the contract.' " *Id.* (quoting *Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 407 (Fla. 1974)).

In examining the Agreement's plain and unambiguous language, the arbitration clause in Article VIII simply cannot be read to apply to disputes that arise **after** termination of the Agreement **and that are not based upon any breach of the agreement.** The first phrase of

Article VIII speaks temporally to what disputes are governed by Article VIII—those occurring before and after execution of the Agreement—but the second phrase provides only that Article VIII survives termination, not that arbitrability of any and all disputes—even those arising post-termination **and that are not related to the agreement**—survive termination, as United argues. What this clause does is make clear that a post termination claim based upon, or related to, the contract remains subject to arbitration notwithstanding the contracts termination. It does not mean that any future dispute between the parties, **unrelated to the contract**, is arbitrable. Put simply, for a dispute to be arbitrable, it must be a dispute arising out of, or related to, the contract containing the arbitration clause. There are no terms in the Agreement that govern or even reference claims arising post-termination **that are unrelated to the contract itself**, much less a provision that makes unrelated claims arbitrable in perpetuity.[2] The first *Seifert* factor therefore is not satisfied.

For this same reason, the second *Seifert* factor—whether an arbitrable issue exists—likewise is not satisfied. To meet this standard, there must be a significant relationship between the claim and the agreement containing the arbitration clause. *Id.* at 637-38. The Florida Supreme Court expounded on the requirement of a "significant relationship" or "nexus" in *Jackson v. Shakespeare Found., Inc.,* 108 So. 3d 587 (Fla. 2013) [38 Fla. L. Weekly S67a] as follows:

> A "significant relationship" between a claim and an arbitration provision does not necessarily exist merely because the parties in the dispute have a contractual relationship. Rather, a significant relationship is described to exist between an arbitration provision and a claim if there is a "contractual nexus" between the claim and the contract. A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract.

108 3d at 593.

Here, there is absolutely **no** relationship between the claims and the Agreement, let alone a significant relationship.[3] United identified no provision of the Agreement that applies to Kidz Medical's rendition of post-termination services or United's reimbursement of those post-termination services. The arbitration clause again is not a roaming covenant that attaches to any claim whatsoever that the parties may have for eternity, untethered to the contract or having nothing to do with the contract. *Seifert,* 750 So. 2d at 636; *see CarePlus,* 124 So. 3d at 973 (affirming the trial court's decision that absent any identifiable nexus or significant relationship between the parties' agreement and the claims at issue, the defendant's motion to compel arbitration must be denied). As the Third District Court of Appeal explained:

> In order to be arbitrable, the claim "must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself."

CarePlus, 124 So. 3d at 973 (quoting *Seifert,* 750 So. 2d at 638).

Because resolution of Kidz Medical's claims for reimbursement of services rendered post-termination and **not pursuant to the contract** does not require reference to or construction of any portion of the Agreement, they have no significant relationship or nexus to the Agreement at all and, for that reason, are not within the scope of the arbitration clause. Again, the bottom line here is that for a **dispute** to fall within the scope of an arbitration clause contained within a contract, the **dispute** must arise under, or at least have some nexus to, the contract itself. And this dispute has absolutely **nothing** to do with the Agreement containing the arbitration clause.

Because neither of the first two *Seifert* factors is satisfied, the Court need not reach the third factor regarding waiver. The Court notes that Kidz Medical did not contend that United waived any right to arbitrate. Having failed to satisfy at least two *Seifert* factors, the Motion must be denied.

III. Conclusion

For the foregoing reasons, United's Motion to Compel Arbitration and to Stay Case is **DENIED.**

---

[1]Kidz Medical represents that it continues to provide emergency care to newborns and children of United members pursuant to its obligations under federal and Florida law. *See* 42 U.S.C. § 1395dd (Emergency Medical Treatment and Active Labor Act (EMTALA)); § 395.1041, Fla. Stat. (Access to Emergency Services and Care). Complaint at ??23, 29.

[2]The Court invited United to identify any case or authority that supports its position that the arbitration clause in the Agreement extends to disputes that accrue after the termination of the Agreement **and which are unrelated to the contract containing the arbitration clause.** Unsurprisingly, United cited none.

[3]Furthermore, the Agreement recognizes that any arbitration must have a significant relationship with the Agreement because it directs that the Arbitrator(s) may construe or interpret but shall not vary or ignore the terms of this Agreement. *See* Article VIII. Thus, the Agreement clearly does not contemplate arbitration of post-termination disputes that have no relation to the contract.

* * *

Insurance—Mortgage protection—Standing—Third-party beneficiaries—Mortgagors do not have standing to bring claim for damages against insurer as third-party beneficiaries of lender-placed mortgage protection insurance policy where policy specifically excludes coverage for any interest that mortgagors may have in property—Having insurable interest in property is insufficient to provide mortgagors with standing to pursue claim under policy as intended third-party beneficiaries where policy language demonstrates contrary intent—Motion to dismiss is granted

HAROLD LORENCEAU, et al., Plaintiffs, v. GREAT AMERICAN ASSURANCE CO., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-030425-CA-01, Section CA24. May 7, 2020. Antonio Arzola, Judge. Counsel: Kertch Conze, Law Offices of Kertch Conze, P.A., Miramar, for Plaintiffs. Gary M. Pappas, Carlton Fields, P.A., Miami, and Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND ENTERING FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

THIS CAUSE having come before the Court on April 30, 2020, on Defendant Great American Assurance Company's Motion to Dismiss Plaintiff's First Amended Complaint, and the Court having heard argument of counsel and having reviewed the merits of said Motion, Plaintiffs' Response in Opposition to the Motion, Defendant's Reply Memorandum, and the First Amended Complaint, and being otherwise fully advised in the premises, the Court finds as follows:

On January 21, 2020, Plaintiffs, Harold Lorenceau and Kareen Lorenceau, filed their Amended Complaint against Great American Assurance Company ("Great American") alleging one count for breach of contract and one count seeking declaratory relief. Plaintiffs pled that they were intended third-party beneficiaries or parties with an "insurable interest" in property giving them standing to pursue their claim for damages under the insurance Policy issued by Great American to Carrington Mortgage Services, Inc. ("Carrington"), their lender. The Plaintiffs' Amended Complaint was filed following this Court's order granting Defendant's original Motion to Dismiss where this Court provided Plaintiffs with leave to amend their initial complaint to attach the Policy that had been produced by Great American. *See* Order dated January 10, 2020. Great American filed its Motion to Dismiss Plaintiff's First Amended Complaint on January 31, 2020. In their Response in Opposition filed on March 6, 2020, Plaintiffs also rely on Florida Statute section 627.405 for their standing. Great American filed its Reply Memorandum on April 27, 2020. As explained below, the Court finds that, based on the allega-

tions of the First Amended Complaint, the Plaintiffs are not intended third party beneficiaries of the Policy. Thus, Plaintiffs' First Amended Complaint is dismissed *with* prejudice.

In ruling on a motion to dismiss, a trial court is limited to the four corners of the complaint and its incorporated attachments. *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.,* 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. If an exhibit attached to the complaint facially negates the cause of action asserted, the exhibit controls. *Fladell v. Palm Beach Co. Canvassing Bd.,* 772 So. 2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b]; *see also Harry Pepper & Assoc. v. Lasseter,* 247 So. 2d 736, 737 (Fla. 3d DCA 1971). In Florida, coverage under an insurance contract is defined by the plain language and terms of the policy. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003) [28 Fla. L. Weekly S307d].

Great American issued a lender-placed "Mortgage Protection Insurance" policy bearing number E027127 ("Policy") to Carrington, insuring Carrington's interest in Plaintiffs' property located at 17600 N.E. 3rd Ct., North Miami Beach, Florida 33162. The Declarations page of the policy identifies Carrington as the *sole Named Insured.* The Policy defines "*Named Insured*" as "the creditor, lending institution, company, or person holding or servicing the mortgage interest in the described location" (i.e., Carrington). Additionally, the Policy defines "you" and "your" as the *Named Insured* identified on the Policy declarations. The Policy also specifically excludes mortgagors—such as Plaintiffs—from coverage as a *Named Insured*:

> B. Mortgagor is the purchaser of the **described location** for whom **you** [Carrington] have financed property or which **you** are servicing for others under the terms of a written agreement. The **mortgagor** is not a **Named Insured** under this policy.

Policy Definitions, page 1 of 11 (bold font original). Thus, the Court finds that Plaintiffs are not named insureds under the Policy.

Plaintiffs allege that they are intended third party beneficiaries under the Policy. ***First,*** the Court finds that, based on the express language of the Policy and case law, Plaintiffs do not qualify as intended third party beneficiaries. The Florida Supreme Court has held that four elements are required to state a claim for breach of contract as an intended third-party beneficiary: "(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach." *Mendez v. Hampton Court Nursing Ctr., LLC,* 203 So. 3d 146, 148 (Fla. 2016) [41 Fla. L. Weekly S394a]; *Found. Health v. Westside EKG Assocs.,* 944 So. 2d 188, 195 (Fla. 2006) [31 Fla. L. Weekly S669b]. A non-party to a contract may not sue for breach of that contract unless the party was an intended third-party beneficiary of such contract. *See Biscayne Inv. Grp., Ltd. v. Guarantee Mgmt. Servs., Inc.,* 903 So. 2d 251, 254 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1207a]. A non-party is the specifically intended beneficiary only if the contract clearly expresses intent to primarily and directly benefit the third party. *Id.* The intent of the parties, "gleaned from the contract itself, is determinative." *Networkip, LLC v. Spread Enters., Inc.,* 922 So. 2d 355, 358 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D653a] *quoting City of Tampa v. Thornton-Tomasetti, P.C.,* 646 So. 2d 279, 282 (Fla. 2d DCA 1994). It is insufficient to show that only one of the contracting parties unilaterally intended some benefit to the third party. *Biscayne Inv. Grp.,* 903 So. 2d at 254. It is also insufficient to show that the non-party will obtain an incidental or consequential benefit from the contract. *Networkip,* 922 So. 2d at 358.

Here, the express language of the Policy contradicts Plaintiffs' allegations that they are insured or third-party beneficiaries under the Policy and that Great American was contractually obligated to pay Plaintiffs any benefits under the Policy. Instead, the language of the Policy contains a clear and manifest intent *not* to primarily and directly benefit the Plaintiffs, as mortgagors. The Policy specifically excludes coverage for *any interest* that mortgagors—such as Plaintiffs—may have in the Property:

> **Unless indicated otherwise by endorsement, this policy does not . . . provide coverage for the interest or equity of the mortgagor. This is creditor placed insurance, protecting your mortgagee interest, subject to policy terms and conditions. Please read your policy for specific terms and conditions of coverage.**

Policy Declarations (bold font original). This exclusion applies to any party having an insurable interest in the property—as Plaintiffs claim here—other than Carrington:

> **J. Insurable Interest**—If more than one party has an insurable interest in the property, **we** [Great American] shall not be liable for more than **your** [Carrington] interest in the property unless the other party is an Additional Insured.

Policy Conditions, page 9 of 11 (bold font original). Plaintiffs are not named as "Additional Insureds" in the Policy. These Policy terms contradict Plaintiffs' claims in their First Amended Complaint and therefore control over Plaintiffs' allegations. Thus, based on the plain language of the Policy, Plaintiffs have not and cannot satisfy the second element necessary to proceed forward with, or prevail on, a claim for breach of contract as intended third-party beneficiaries under the Policy.

The parties have not directed the Court to any reported Florida appellate court opinion analyzing a homeowner's standing as a third party beneficiary of a lender-placed insurance policy. Nevertheless, as Great American described in its Motion and Reply, Chief Judge Michael Moore's decision in *Catatonic Invs. Corp. v. Great Am. Assurance Co.,* 2014 WL 11997839 (S.D. Fla. Nov. 25, 2014) is *directly on point*. In *Catatonic,* Judge Moore considered a mortgagor/plaintiff's claim against Great American involving a similar lender placed insurance policy that also excluded the plaintiff, as mortgagor, from coverage. Like the Plaintiffs here, the plaintiff in *Catatonic* claimed to be a third party beneficiary of the policy. Judge Moore ruled that because the policy specifically excluded the mortgagor/plaintiff from coverage, Great American did not intend to make plaintiff a third-party beneficiary to the policy. Therefore, Judge Moore dismissed the complaint with prejudice.

Great American's Motion and Reply also correctly point out that other insurers have issued lender placed insurance policies excluding the mortgagor/homeowner from coverage like the Great American policy does here. Those insurers have also prevailed against third-party-beneficiary claims by plaintiff/mortgagors like Plaintiffs in the instant case. *See Mustakas v. Integon Nat'l Ins. Co.,* 2019 WL 6324259 (S.D. Fla. Nov. 26, 2019) (Rosenberg, J.) (dismissing homeowner's complaint alleging status as a third party beneficiary of lender placed policy because the policy expressly excluded plaintiff from coverage and thus policy was not intended to primarily and directly benefit homeowner); *Suarez v. Integon Nat'l Ins. Co.,* 2019 WL 8014371 (S.D. Fla. October 15, 2019) (Moreno, J.) (following *Catatonic* and dismissing homeowner's complaint alleging status as a third party beneficiary of lender placed policy because policy expressly excluded plaintiff from coverage); *Bajduan v. Integon Nat'l Ins. Co.,* 2019 WL 8014367 (S.D. Fla. Sept. 30, 2019) (Ungaro, J.) (dismissing homeowner's complaint alleging status as a third party beneficiary of lender placed policy and rejecting reliance on *Fla. Stat.* §627.405 because policy clearly and expressly excluded plaintiffs from coverage demonstrating contracting parties' intent not to primarily and directly benefit plaintiffs); *Ulloa v. Integon Nat'l Ins. Co.,* 2019 WL 2176941 (S.D. Fla. March 13, 2019) (Torres, J.)

(rejecting homeowner's insurable interest argument under *Fla. Stat.* §627.405 because policy expressly excluded homeowner from coverage); *Arias v. Integon Nat'l Ins. Co.,* 2018 WL 4407624 (S.D. Fla. Sept. 17, 2018) (Altonaga, J.) (following *Catatonic* and dismissing homeowner's third party beneficiary complaint against insurance company that issued lender-placed policy to homeowner's bank); and *Hogan v. Praetorian Ins. Co.,* 2017 WL 5643234 (S.D. Fla. July 31, 2017) (Ungaro, J.) (rejecting homeowner claim that she was a third party beneficiary under a lender placed insurance policy based on her insurable interest and *Fla. Stat.* §627.405 because the policy expressly excluded the homeowner from coverage).

Plaintiffs' Response directs the Court to a line of cases from the Middle District of Florida against Balboa Insurance Company allowing homeowners to proceed as third party beneficiaries of the lender-placed policy Balboa issued to the homeowner's mortgagees. *See, e.g., Kelly v. Balboa Ins. Co.,* 897 F.Supp.2d 1262 (M.D. Fla. 2012). As Great American discusses in its Reply, however, the Balboa policy at issue in those cases is distinguishable because it does *not* include the express exclusion of the mortgagor as the Great American, Praetorian, and Integon policies did in *Catatonic, Mustakas, Suarez, Bajduan, Ulloa, Arias,* and *Hogan.* As Judge Ungaro stated in *Hogan,* "the Court has carefully reviewed the [*Balboa*] cases and finds them to be inapposite, as ***none*** of these cases involve policies that contain 'the clear or manifest intent *not* to primarily and directly benefit the third party.' " 2017 WL 5643234 at *4 (emphasis original, quoting *Catatonic*).

Second, the Court rejects the Plaintiffs' argument that they are intended third-party beneficiaries under the Policy because they have an insurable interest in the Property pursuant to Florida Statutes section 627.405. As with Plaintiffs' first argument, the Court adopts the reasoning of the United States District Court for the Southern District of Florida in *Catatonic* and its progeny. The plaintiff in *Catatonic* relied on the identical "insurable interest" argument under §627.405 as Plaintiffs do here. *See* 2014 WL 11997839 at *2. Nevertheless, based on similar Great American policy language excluding the mortgagor/plaintiff from coverage, Judge Moore rejected plaintiff's insurable interest argument finding "the Policy contains the clear or manifest intent *not* to primarily and directly benefit the third party." *Id.* at *3 (emphasis in original). As a result, Judge Moore found that plaintiff could not be a third party beneficiary under Florida law. *Id.* Similarly, in *Hogan,* the plaintiff claimed that she had standing as a third party beneficiary of the policy because she had an insurable interest in the property pursuant to §627.405. *See Hogan,* 2017 WL 5643234 at *3. The court rejected this argument and held that the mere ownership of the insured property is insufficient to provide the homeowner plaintiff the requisite standing or right to pursue a claim under an insurance policy as an intended third-party beneficiary where the language of the insurance policy demonstrates a contrary intent. *Id.; see also Bajduan,* 2019 WL 8014367 at *6; *Ulloa,* 2019 WL 2176941 at *3.

Plaintiffs' Response directs the Court to *Schlehuber v. Norfolk & Dedham Mut. Fire Ins. Co.,* 281 So. 2d 337 (Fla. 3d DCA 1973) for the proposition that a homeowner can be a third party beneficiary of an insurance policy, even though the homeowner has no policy in his own name, based on its insurable interest in the property covered by the policy and §627.405. *Schlehuber* is a case upon which Middle District of Florida relied in the *Balboa* line of cases. *See, e.g., Kelly v. Balboa,* 897 F.Supp. at 1266. As Great American explains in its Reply, however, the *Schlehuber* case is distinguishable because it did not involve a lender placed policy, let alone one that expressly excluded the plaintiff from coverage like the Policy at issue in this case or in *Catatonic* and its progeny in the Southern District of Florida. Furthermore, while the *Balboa* line of cases did involve lender placed policies, once again, the Court distinguishes these cases because those policies did not have the express exclusions that the policies in *Catatonic* and its progeny contained. As Judge Torres stated in *Ulloa* when referring to the *Balboa* line and *Schlehuber*, "But, those cases are unavailing because none of them contain policies with a clear or manifest intent *not* to benefit a third party." 2019 WL 2176941 at *4 emphasis in original).

In the present Policy, as in the cases cited above, the language clearly and unambiguously shows that the contracting parties, Great American and Carrington, explicitly intended to benefit only Carrington through the Policy, with no direct benefit whatsoever to the mortgagor, Plaintiffs. This Policy language negates the Plaintiffs' argument that their ownership of the Property confers third-party beneficiary standing pursuant to §627.405 or as intended third party beneficiaries under the Policy. Plaintiffs have not and cannot satisfy the elements necessary to proceed forward with, or prevail on, a claim for breach of contract as intended third-party beneficiaries under the Policy based on their ownership of the Property.

Pursuant to the express language of the Great American insurance policy and applicable case law, Plaintiffs have no standing to pursue their claim against Great American as intended third-party beneficiaries. Plaintiffs have already amended their complaint once, and given the clear and unambiguous language in the Policy *not to* primarily and directly benefit the Plaintiffs, the Court finds that any further amendment would be futile. Plaintiffs' secondary count for declaratory relief fails for the same reasons listed hereinabove.

Accordingly, after due consideration, it is **ORDERED AND ADJUDGED** as follows:

Defendant Great American Assurance Company's Motion to Dismiss Plaintiffs' First Amended Complaint is **GRANTED** and the First Amended Complaint, and this action, are DISMISSED WITH PREJUDICE. The Court enters a Final Judgement of Dismissal. Plaintiffs shall take nothing by this action and Defendant shall go hence without day.

* * *

Estates—Attorney's fees and costs—Pandemic-related stay granted

IN RE ESTATE OF: ESTHER MEDINA HERNANDEZ, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-1405-CP-02. April 25, 2020. Milton Hirsch, Judge.

ORDER ON PENDING CROSS-MOTIONS

Central to the plot of Charles Dickens's *Bleak House* is the case of *Jarndyce v. Jarndyce*, a probate lawsuit that dragged on interminably and purposelessly, and ended only when the litigation had consumed the entire estate, leaving nothing for the heirs. Apparently Dickens thought that *Jarndyce* was all too typical of probate litigation. "Suffer any wrong that can be done you," says a character in the novel, no doubt expressing Dickens's own view, "rather than come here" to Chancery Court.

Presently before me are a Petition for Attorney's Fees and Expenses filed by counsel for the personal representative, DE 99769979; an Objection to Petition for Attorney's Fees and Expenses, DE 100743161; a Petition to Determine Reasonable Compensation for counsel for the personal representative, DE 100743502; a Motion to Strike the Petition to Determine Reasonable Compensation, DE 101539842; a Response in Opposition to the Motion to Strike the Petition to Determine Reasonable Compensation, DE 102950831; a Motion to Extend Stay of Ruling on Personal Representative's Motion to Strike Petition to Determine Reasonable Compensation, DE 106206282; a Supplement to Petition for Attorney's Fees and Expenses, DE 106256214; a Petition for Discharge, De 106318678; and a Response to Motion to Extend Stay of Ruling, DE 106410094.

So far as I can glean from these pleadings, this unseemly fee dispute—for that is all it is—has engendered two other lawsuits, an arbitration, and an appeal, all of which are ongoing. And so far as I can glean from the pleadings, there is nothing left in the estate.

Shades of *Jarndyce v. Jarndyce*!

Wisely or foolishly, on February 11 I entered an order staying proceedings for 90 days, *i.e.*, till May 11. I did so in deference to my colleagues in the general civil and family divisions who had the spin-off lawsuits before them and were attempting to adjudicate them; and in hope that an epiphany of good judgment, collegiality, concern for the dignity of the legal profession, and a sense of fair play, would prompt the distinguished and experienced probate litigators in whose hands this case is to bring this pointless and demeaning litigation to a resolution of some kind. Among the motions inventoried *supra* is one seeking an extension of the stay period.

It is with a heavy heart and a profound sense of disappointment that I grant the motion for extension, holding all other matters in abeyance. I do so for one simple reason: An unprecedented pandemic has cast its shadow over all pending litigation, bringing proceedings of all kinds to a halt or near-halt. Perhaps, but for this *force majeure*, this case and the related cases would have been disposed of in one fashion or another by now. The stay is extended another 60 days from May 11.

In the interim, all counsel can act according to the dictates of common sense and self-interest and resolve this matter expeditiously and efficiently. Or, taking their cue from *Jarndyce v. Jarndyce,* they can continue to squander their valuable time and valuable talents in pursuit of a valueless victory; all the while providing the Dickenses of our own day with reasons to think that the law is about anything but justice and the lawyers not about anything but fees.

* * *

Attorney's fees—Proposal for settlement—Torts—Product liability—Tobacco—Hourly rate—Relevant market rates—Hours reasonably incurred—Paralegals—Block billing

STEFANNY SOMMERS, Plaintiff, v. R.J. REYNOLDS TOBACCO CO., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2008-001464-CA-01, Section CA02. May 19, 2020. Alan Fine, Judge.

ORDER ON ATTORNEYS FEES AND COSTS

THIS CAUSE came before the Court on Plaintiff's Motion for Attorneys' Fees and Court Costs. The Court held evidentiary hearings on April 27 and May 6, 2020 and heard argument of counsel on May 11, 2020. After full consideration of the parties' submissions of evidence by affidavit, testimony and exhibits presented during the hearings, and comprehensive argument of counsel, it is

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

The parties agree on the Plaintiff's entitlement to an award of reasonable attorneys' fees pursuant to the Plaintiff's Proposal for Settlement ("PFS") that was not accepted by the Defendant. The two main issues in this case are the reasonable rates for the respective attorneys involved[1] and the amount of time reasonably incurred by the attorneys and paralegals during the relevant time period.

REASONABLE HOURLY RATES

The Court will use the date of the Final Judgment in this case, April 16, 2018, as the date to determine the relevant market rates. Pursuant to Sec. 768.79, Fla. Stat. the Court has considered the following factors: The then apparent merit or lack of merit in the claim. The number and nature of offers made by the parties.The closeness of questions of fact and law at issue.Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting non-parties.The amount of additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

Pursuant to *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985) as modified by *Sarkis v. Allstate Ins. Co.,* 863 So. 2d 210 (Fla. 2003) [28 Fla. L. Weekly S740a] the Court has also considered the following additional factors: The skill required to perform the legal services properly. The likelihood (if apparent to the client) that the acceptance of the particular employment will preclude other employment by the lawyer. The fee customarily charged in the locality for similar legal services. The amount in controversy. The time limitations imposed by the client or by the circumstances. The nature and length of the professional relationship with the client. The experience, reputation, and ability of the lawyers performing the services.

The Court having considered the above factors, the respective expert testimony and applied the evidence introduced at the hearings and finds that the hourly rates set forth below in the far right column are reasonable:

Attorney	Plaintiff's Expert	Defendant's Expert	Court Finding
Richard J. Diaz	$900	$500-750	$800
William G. Wolk	$800	$425-550	$650
Douglas F. Eaton	$800	$375-550	$650
J. B. Harris	$600	$400-500	$600
Carlos Santisteban, Jr.	$475	$300-425	$475

While all applicable factors have been considered, the Court has relied principally on the experience and expertise of the attorneys involved, the very complicated nature of the litigation, the extraordinary demands placed on plaintiff's counsel in *Engle* litigation, the rates set by other courts as indications of the market, sometimes for some of the same attorneys, and the rates charged by defense counsel. The Court has considered but given less weight to the evidence of the hourly rates charged by these attorneys in unrelated and very different litigation. As a check on the final rates, from the evidence presented it is reasonable to conclude that a very wealthy client who could have paid these attorneys on an hourly monthly basis would have paid these attorneys these rates and they would have accepted them.

Number of Hours Reasonably Incurred

After considering the testimony and exhibits from the expert witnesses, the affidavits and depositions, spreadsheets summarizing time entries with specific objections and responses and the Defense criticisms of the failure of four of the five attorneys to keep any contemporaneous time records, duplicative efforts, excessive hours for certain tasks, block billing entries and non-compensable (administrative time) and the limited concessions offered by the Plaintiff (which are incorporated into the chart below of time requested), the Court finds as follows:

Timekeeper	Plaintiff's Expert or Lower Revised Total from Attorney	Defense Expert	Court Finding of Reasonable Hours
Richard J. Diaz	1,382.3	925.1	1,313.2
William G. Wolk	646.0	432.6	613.7
Douglas F. Eaton	233.6	155.6	221.9
J. B. Harris	1,025.8	675.2	871.9

Carlos Santisteban, Jr.	706.1	469.3	635.4
Elizabeth Zaharas	265.1	265.1	265.1
Nicole Sans	67.5	67.5	67.5
Kristian Toimil	272.5	0	136.25
Ciro Forray	320.5	0	160.25

The Court has opted to use a percentage reduction in the time requested, principally, but not exclusively, because of the lack of contemporaneous time keeping (partial in the case of Mr. Diaz and total for the others). Since the Plaintiff's counsel knew that, if successful, they would be seeking a fee award once their client's Proposal For Settlement was not accepted and that they would have the burden of proving the amount of time, their choice not to keep contemporaneous time must mean that any doubts about the accuracy of the reconstructed time must be construed against them. Therefore, the global discount is five (5) percent for Mr. Diaz (because of his partial contemporaneous records) and for Messrs. Eaton and Wolk because their reconstructed time appears better tied to objective criteria than Mr. Santisteban whose time is therefore reduced by ten (10) percent. Mr. Harris' time will be reduced by fifteen (15) percent because of the lack of objective criteria used to reconstruct the time and because of the unique method employed to reconstruct the time. The Court has considered and given some weight to the testimony of the Plaintiff's attorneys that their reconstructed time actually undercounts their time.

The proof submitted to support the hours requested for paralegals Toimil and Forray, on the other hand, is entirely different. While the testimony in favor of the request is, essentially, that they worked full time on multiple tobacco cases during the applicable months, the documentary evidence is the worst sort of block billing—a single entry for an entire month with no breakdown as to tasks on any given day and a number of hours for a month at a time. Since there is a limited description of tasks that would be compensable the Court has discounted their time by fifty (50) percent.

Conclusion

Based on the above findings, the reasonable attorneys' fees due and owing are:

Richard J. Diaz	@ $800 per hour x 1,313.2 hours =	$1,050,560
William G. Wolk	@ $650 per hour x 613.7 hours =	398,905
Douglas F. Eaton	@ $650 per hour x 221.9 hours =	144,235
J. B. Harris	@ $600 per hour x 871.9 hours =	523,140
Carlos Santisteban, Jr.	@ $475 per hour x 635.4 hours =	301,815
Elizabeth Zaharas	@ $125 per hour x 265.1 hours =	33,137.5
Nicole Sans	@ $125 per hour x 67.5 hours =	8,437.5
Kristian Toimil	@ $125 per hour x 136.25 hours =	17,031.25
Ciro Forray	@ $125 per hour x 160.25 hours =	20,031.25

Accordingly, Plaintiff is entitled to $2,497,292.50 in attorneys' fees with interest from the date of Final Judgment.[2] In addition, the parties agreed to the reimbursable costs at $117,500 with interest from the date of Final Judgment for a total award of $2,614,792.50.

The Court sincerely appreciates the professionalism of the attorneys on both sides in their presentation of evidence and argument on the matters before the Court.

---

[1]The parties have agreed to $125 as the reasonable hourly rate for the Plaintiff's paralegals.

[2]The Court requests that counsel for the Plaintiff: 1) check the Court's math, 2) calculate an interest number through May 20, 2020 with a stated current *per diem* interest amount, 3) confer with counsel for the Defendant to reach an agreement on the interest calculations, and 4) submit a proposed Final Judgment.

* * *

Taxation—Documentary stamps—Intangible tax—Mortgages—Affordable housing—Nonprofit corporation's challenge to Department of Revenue's partial denial of requested refunds of documentary stamps and nonrecurring intangibles tax paid at time of recording note and mortgage financing affordable housing apartment complex—Summary judgment entered in favor of plaintiff—Section 420.513 unambiguously states that all mortgages and notes arising out of or given to secure repayment of loans issued in connection with financing of chapter 420 housing shall be exempt from taxation—Matters that were not pleaded or raised in department's answer cannot be basis to avoid summary judgment—Answer stating that department is without knowledge as to satisfaction of conditions precedent is legally insufficient and constitutes waiver of that defense

NONPROFIT HOUSING PRESERVATION SB, INC., a Florida corporation, Plaintiff, v. EXECUTIVE DIRECTOR OF FLORIDA DEPARTMENT OF REVENUE, Respondent. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division. Case No. 502019CA000474XXXXMB. May 11, 2020. Scott Kerner, Judge. Counsel: Frank R. Brady and Jeanne C. Brady, Brady & Brady, P.A., Boca Raton, for Plaintiff. Robert P. Elson, Senior Assistant Attorney General, Office of the Attorney General, Tallahassee, for Respondent.

SUMMARY FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS CAUSE having come before the Court on Plaintiff, NONPROFIT HOUSING PRESERVATION SB, INC.'s June 13th, 2019 Motion for Summary Judgment (Plaintiff's Motion) [DE 21] and Defendant Executive Director of the Florida Department of Revenue's ("DOR") Response In Opposition and Cross Motion for Summary Judgment [DE 30] ("DOR's Cross-Motion"), and the Court having reviewed Plaintiff's Motion, DOR's Cross-Motion, the pleadings and affidavits on file, applicable case law and legal authorities, heard argument of counsel and being otherwise duly apprised in the premises, the Court determines that the following material facts are undisputed:

1. Plaintiff, a non-profit Florida corporation, has been determined by IRS to be tax exempt under section 501(c)(3) of the Internal Revenue Code.

2. In October, 2016 Plaintiff obtained a HUD insured mortgage loan in the amount of $25,620,000 to finance its acquisition of a multifamily residential rental property commonly known as Sunset Bay Apartments, located at 10000 SW 2241st Street, Miami, Florida 33190 (the "Apartment Complex") and to refinance all debts and mortgages on the Apartment Complex (the "Multifamily Mortgage").

3. Plaintiff alleges, and DOR admits that the Apartment Complex is "Affordable Housing" under Part V of Chapter 420, Florida Statutes.

4. The cover page of the Multifamily Mortgage bears the following legend:

> THIS MORTGAGE AND THE PROMISSORY NOTE IT SECURES ARISE OUT OF OR ARE GIVEN TO SECURE THE REPAYMENT OF A LOAN ISSUED IN CONNECTION WITH THE FINANCING OF HOUSING UNDER PART V OF CHAPTER 420, FLORIDA STATUTES AND ARE EXEMPT FROM DOCUMENTARY STAMP TAX AND INTANGIBLE TAX PURSUANT TO SECTION 420.513(1), FLORIDA STATUTES.

5. DOR's answer to the complaint states that the Multifamily Mortgage speaks for itself [DE 14 ¶22].

6. At the time of closing and recording of the Multifamily Mort-

gage, in an abundance of caution so as not to cause the County recording office to reject the recording for failure to pay the documentary stamps and intangible tax or otherwise delay the closing, the title closing agent, on behalf of the Plaintiff, paid documentary stamp taxes in the amount of $89,670.00 on the Multifamily Mortgage. Likewise, the title closing agent, on behalf of the Plaintiff, paid nonrecurring intangible tax in the amount of $51,240.00 on the promissory note secured by the Multifamily Mortgage.

7. Plaintiff timely applied for a refund of both the documentary stamps and nonrecurring intangible tax. In turn, DOR granted a partial refund of $61,904.06 of the documentary stamps and $27,765.94 of the nonrecurring intangible tax.

8. DOR denied $27,765.94 of the documentary stamps paid on the Multifamily Mortgage. DOR also denied $15,866.25 of the nonrecurring intangible tax paid on the Promissory Note.

9. DOR's justification for its partial denial of Plaintiff's refund application is that the monies pursuant to Partnership buyout line item in the settlement statement for the closing of the Multifamily Mortgage have been disallowed [DE 2 p. 13].

10. Plaintiff timely petitioned this Court to challenge DOR's partial denials of the requested refund of documentary stamps and nonrecurring intangible tax, in accordance with the instructions contained in DOR's partial denial letter and section 72.011, Florida Statutes.

11. DOR answered Plaintiff's complaint stating that it is "without knowledge" of most of Plaintiff's allegations and that the exhibits incorporated into the complaint "speak for themselves" [DE 14].

12. DOR's answer to the complaint does not assert any defenses to the allegations in Plaintiff's complaint.

13. DOR's response in opposition to Plaintiff's Motion and supporting affidavit attempts to defeat summary judgment with the allegations that "monies pursuant to Partnership buyout should be removed from the calculation of any refund because this transaction appeared to be a separate partnership payoff, unrelated to the purchase or financing of the property, and unrelated to any of the entities involved in the sale and purchase of the property." DOR's answer to the complaint is devoid of these allegations.

14. DOR's response in opposition to Plaintiff's Motion and supporting affidavit further attempts to defeat summary judgment with the allegations that the Purchase and Sale Agreement was not submitted to DOR in the refund application process. DOR's answer to the complaint is devoid of this allegation.

15. DOR's response in opposition to Plaintiff's Motion and supporting affidavit further attempts to defeat summary judgment with the allegations that Plaintiff did not comply with sections 215.26, 215.06, Florida Statutes, the conditions prescribed in sections 213.06, 213.235 and 213.255, Florida Statutes or chapter 12-26, F.A.C., Rule 12A-1, F.A.C. or section 420.502, Florida Statutes. DOR's answer to the complaint is devoid of these allegations.

16. DOR's counsel conceded at the hearing on Plaintiff's Motion that DOR did not request Plaintiff to submit a copy of the Purchase and Sale Agreement to DOR for its consideration during its review of the refund application, nor was the court able to locate an express request from same prior to the initiation of this litigation.

CONCLUSIONS OF LAW

Based on the forgoing, the Court makes the following conclusions of law:

1. The allegations in DOR's response in opposition to Plaintiff's Motion and its affidavit in support of its response described in paragraphs 12, 13 and 14 each constitute an avoidance or affirmative defense, none of which are contained within its answer to the complaint. Moreover, the record reflects that there is no outstanding request for leave to amend Defendant's affirmative defenses, nor was an "ore tenus" request for leave made at any time during the hearing on the parties dueling summary judgment motions.

2. DOR's response in opposition to Plaintiff's Motion and supporting admit its receipt of the settlement statement for the closing and recording of the Multifamily Mortgage and Promissory Note during the refund application process.

3. There is only one settlement statement for the closing and recording of the Multifamily Mortgage and Promissory Note.

4. DOR's response in opposition to Plaintiff's Motion and its affidavit in support of its response do not dispute the application of the $25,620,000 of proceeds of the Multifamily Mortgage and Promissory Note to the "Purchase Price $7,115,000.00/Partnership account Payments $818,124.87" line item in the settlement statement for the closing of the Multifamily Mortgage.

5. The allegations in DOR's response in opposition to Plaintiff's Motion and its affidavit in support of its response stating that Buyer's Closing Statement line item reflecting "Purchase Price $7,115,000.00/Partnership account Payments $818,124.87" *appeared* to be a separate transaction unrelated to the purchase or financing of the property, and unrelated to any of the entities involved in the sale and purchase of the property, constitutes speculative lay opinion that is unsupported by any evidence (emphasis added). *See, e.g., Panzera v. O'Neal*, 198 So. 2d 663, 665 (Fla. 2nd DCA 2015) [40 Fla. L. Weekly D2661a] (speculative lay testimony cannot be relied on to create genuine issue of material fact to defeat summary judgment).

6. The application of the Multifamily Mortgage and Promissory Note to payment of the "Purchase Price $7,115,000.00/Partnership account Payments $818,124.87" is one of innumerable line items in the Buyer's Closing Statement. That line item is not separated or distinguished as a separate transaction in any way within the Buyer's Closing Statement.

7. DOR's response in opposition to Plaintiff's Motion and its affidavit in support of its response admit that the Multifamily Mortgage and Promissory Note financed Affordable Housing Property as that term is defined in Chapter 420, Florida Statutes.

8. Section 420.513, Florida Statutes unambiguously states that all notes, mortgages, security agreements, etc. that arise out of or are given to secure the repayment of loans issued in connection with the financing of any housing under chapter 420, Florida Statues, *shall be exempt from taxation* by the state and its political subdivisions, *regardless of the status of any party thereto as a private party* (emphasis added). There are no exceptions or exclusions within section 420.513 for the exemption.

9. DOR's answer to the complaint states that section 420.513 speaks for itself [DE 14 ¶27].

10. The cover page of the Multifamily Mortgage bears the legend stating that:

> This Mortgage and the Promissory Note it secures Arise Out of or Are Given to Secure the Repayment of a Loan Issued in Connection with a Financing of Housing under Part V of Chapter 420, Florida Statutes.

11. Therefore, the allegations in DOR's response in opposition to Plaintiff's Motion and its affidavit in support of its response do not create any genuine issue of material fact as to the applicability of section 420.513 to the entire principal amount of the Multifamily Mortgage and Promissory Note.

12. The matters asserted in DOR's response in opposition to Plaintiff's Motion affidavit in support of its response are not pleaded or contained within its answer to the complaint. A party who opposes summary judgment cannot alter the positions taken in its pleadings by affidavit or response in opposition in order to defeat summary judgment. *Noble v. Martin Memorial Hospital Ass'n*., 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a] (citing *Inman v. Club on Sailboat Key*, 342 So. 2d 1069 (Fla. 3rd DCA 1977)).

13. Therefore, DOR's response and affidavit in opposition to

Plaintiff's Motion cannot be a basis to avoid summary judgment in Plaintiff's favor. *Id.*; *Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2471a] (defendant cannot raise an unpled affirmative defense as a basis for resisting a motion for summary judgment).

14. As a matter of law, a denial of the performance of conditions precedent *shall* be made with specificity and particularity. *Rule 1.120(c), Fla.R.Civ.P.*; *Neal v. Bryant*, 149 So. 2d 529, 533 (Fla. 1962) (use of the word 'shall' in statute or rule, according to its normal usage, has mandatory connotation).

15. DOR's answer to the complaint alleging that it is merely "without knowledge" as to conditions precedent lacks specificity and particularity. Therefore, its without knowledge allegation is legally insufficient and constitutes a waiver of the failure to perform conditions precedent defense. *Davie Westview Developers, Inc. v. Bob-Lin, Inc.*, 533 So. 2d 879 (Fla. 4th DCA 1988).

16. DOR's failure to assert any affirmative defenses whatsoever, along with its "speaks for itself" allegations and failure to deny Plaintiff's satisfaction of conditions precedent with particularity and specificity, bar DOR's attempt to defeat Plaintiff's Motion by way of its response in opposition to Plaintiff's Motion and affidavit in support of its response.

17. Fla. Stat. § 420.513(1)'s use of the word "shall" in declaring that all notes, mortgages and security agreements that arise out of or are given to secure the repayment of loans issued in connection with the financing of any housing *shall be exempt from taxation* conveys a clear, ordinary and *mandatory* meaning that the Multifamily Mortgage and Promissory Note are exempt from the entire amount of documentary stamp tax and the entire amount nonrecurring intangible tax paid at the time of recording the Multifamily Mortgage. *See Neal*, 149 So. 2d at 533 (emphasis supplied).

Therefore, it is hereby **ORDERED, ADJUDGED and DETERMINED** that there are no genuine issues of material fact, and Plaintiff's Motion is **GRANTED**; and it is further

ORDERED and ADJUDGED that Summary Final Judgment is hereby rendered in Plaintiff's favor. Plaintiff's Multifamily Mortgage and Promissory Note are exempt from the entire amount of documentary stamp tax and the entire amount of nonrecurring intangible tax paid on behalf of Plaintiff at the time of recording the Multifamily Mortgage. Therefore, DOR shall refund to Plaintiff within forty-five (45) days after the date of this Order the sums of $27,765.94 of documentary stamps and $15,866.25 of nonrecurring intangible tax that DOR erroneously denied on Plaintiff's application for refund of the taxes paid on the Multifamily Mortgage and the Promissory Note at the time of recording the same, for all of which let execution issue. The Court reserves jurisdiction on Plaintiff's entitlement to and amount of prejudgment interest.[1]

[1]*See Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567, 575 (Fla. 2010) [35 Fla. L. Weekly S735a] (final judgment that authorizes execution but reserves jurisdiction to award prejudgment interest will be considered final for purposes of appeal).

* * *

Taxation—Documentary stamps—Intangible tax—Mortgages—Affordable housing—Department of Revenue's cross-motion for summary judgment in action challenging department's partial denial of requested refunds of documentary stamps and nonrecurring intangible taxes paid at time of recording mortgage and note financing affordable housing apartment complex is denied where motion is based on avoidances and affirmative defenses that were unpled and, therefore, considered waived

NONPROFIT HOUSING PRESERVATION SB, INC., a Florida corporation, Plaintiff, v. EXECUTIVE DIRECTOR OF FLORIDA DEPARTMENT OF REVENUE, Respondent. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division. Case No. 502019CA000474XXXXMB. May 11, 2020. Scott Kerner, Judge. Counsel: Frank R. Brady and Jeanne C. Brady, Brady & Brady, P.A., Boca Raton, for Plaintiff. Robert P. Elson, Senior Assistant Attorney General, Office of the Attorney General, Tallahassee, for Respondent.

ORDER DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE having come before the Court on Plaintiff, NONPROFIT HOUSING PRESERVATION SB, INC.'s June 13th, 2019 Motion for Summary Judgment (Plaintiff's Motion) [DE 21], and Defendant Executive Director of the Florida Department of Revenue's ("DOR") Response In Opposition and Cross Motion for Summary Judgment [DE 30] ("DOR's Cross-Motion"), and the Court having reviewed Plaintiff's Motion, DOR's Cross-Motion, the pleadings and affidavits on file, applicable case law and legal authorities, heard argument of counsel and being otherwise duly apprised in the premises, it is hereby

ORDERED, ADJUDGED and DETERMINED that:

1. DOR's Cross-Motion is predicated on its allegations that Buyer's Closing Statement line item reflecting "Purchase Price $7,115,000.00/Partnership account Payments $818,124.87" *appeared* to be a separate transaction unrelated to the purchase or financing of the property, and unrelated to any of the entities involved in the sale and purchase of the property.

2. DOR's Cross-Motion is further predicated on its allegations that (a) Plaintiff's Purchase and Sale Agreement was not submitted to DOR in the refund application process; and (b) Plaintiff did not comply with sections 215.26, 215.06, Florida Statutes, the conditions prescribed in sections 213.235 and 213.255, Florida Statutes or chapter 12-26, F.A.C. or section 420.502, Florida Statutes.

3. Each of the allegations described in paragraph 1 and 2 above constitute an avoidance or affirmative defense to Plaintiff's complaint. Yet, none of those allegations are contained within DOF's answer.

4. As a matter of law, any matter constituting an avoidance or affirmative defense is waived unless pleaded. *Rule 1.110(d) Fla.R.Civ.P.*; *Congress Park Office Condos II v. First Citizens Bank & Trust Co.*, 105 So. 3d 602, 607 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D145a] (Rule 1.110(d) provides that a party shall set forth affirmatively in its pleadings any matter constituting an avoidance or affirmative defense). Application of Rule 1.110(d) means "that affirmative defenses must be pleaded or they are considered waived." *Congress Park Office Condos*, 105 So. 3d at 607.

5. Since none of the matters on which DOR relies in its Cross Motion for Summary Judgment are contained within its answer, DOR cannot assert these unpleaded defenses as a basis for its cross motion for summary judgment. *Id.*; *Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2471a].

6. Therefore, DOR's Cross Motion for Summary Judgment is hereby DENIED.

* * *

Criminal law—Search and seizure—Vehicle stop—Obscured tag—Where frame around defendant's tag completely blocked out "Sunshine State" on bottom of tag, traffic stop for violation of current version of section 316.605(1) that prohibits all printing and writing on tag from being obscured was lawful—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. HERSCHELL WILLIAMS, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 18-1337CF10A. March 21, 2019. Elizabeth A. Scherer, Judge. Counsel: Islam Dashoush, Office of the State Attorney, for Plaintiff. Rick J. Douglas, for Defendant.

[AFFIRMED at 45 Fla. L. Weekly D1139b]

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

THIS CAUSE comes before the Court upon Defendant's Motion

to Suppress Evidence and Statements, brought pursuant to Florida Rule of Criminal Procedure 3.190(h) and (i). Having considered Defendant's motion, the testimony of the witness, arguments of the respective parties, applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

Defendant moves to suppress evidence recovered from Defendant's person, Defendant's vehicle, and statements he made to law enforcement, all which was obtained after a traffic stop initiated by Sunrise Police Officer Long Lam. Defendant alleges that the traffic stop was unlawful. This Court disagrees.

Officer Lam was conducting surveillance at a specific condominium due to possible drug activity. When he observed Defendant leave the condo, he initiated a traffic stop for an obscured tag. The State entered into evidence a picture of the tag on Defendant's vehicle. The picture demonstrates that the tag had a frame around it which almost completely blocked out the bottom of the tag, where it states 'Sunshine State.' The parties agree that the 'Sunshine State' portion of the tag were the only words obscured by the tag frame.

In claiming that the stop was unlawful, Defendant relies on *State v. St. Jean,* 697 So. 2d 956 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1868a]. In that case, however, the pertinent traffic statute, Section 316.605(1), Florida Statute, differed from its current language in a crucial way. At the time of the stop in *St. Jean,* that statute required that every vehicle on the state roadways at all times display the license plate assigned to it by the state ". . . with all letters, numerals, printing, writing, *and other identification marks* upon the plate clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times. . ." (emphasis added). *Id.* at 957. The Fifth District Court of Appeal stated, "In construing the statute, the trial court concluded that section 316.605(1) does not require the county name be 'plainly visible' because it is not an essential 'identification mark' on the state's license plate." *Id.* at 957. It concluded:

> . . . that in using the term, 'identification mark' as applied to state license plates in section 316.605(1), the legislature did not intend to include the name of the state and county at the top and bottom of the plate that identify the name of the state or county. Although the language of section 316.605 is broad, the overall statutory scheme suggests that the 'identification marks' that must be visible and legible are those that identify' the 'registration.'

Id. at 957.

However, the key language relied upon by the Fifth District Court in *St. Jean* is no longer contained in the statute. Effective January 1, 2016, Section 316.605(1), Florida Statute, reads, in pertinent part:

> Every vehicle, at all times . . . shall . . . display the license plate . . . assigned to it by the state . . . and all letters, numerals, printing, writing, the registration decal, and the alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times . . .

The legislature has since entirely removed any reference to 'identification marks' of the license plate, but now only refers to *all* letters, numerals, printing, and writing. As such, the holding in *St. Jean,* which relies on a previous version of the statute, is no longer applicable. *See, State v. Pena,* 247 So. 3d 61 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1030a].

The evidence presented in this case clearly demonstrates that the words 'Sunshine State' were almost entirely obscured by the license tag frame on Defendant's vehicle. Since the statute now applicable prohibits *all* letters, numerals, printing, and writing from being obscured, this would include the words 'Sunshine State' which is printed on the license plate. The language of the statute is clear and unambiguous. As the Florida Supreme Court stated in *English v. State,* 191 So. 3d 448, 450 (Fla. 2016) [41 Fla. L. Weekly S219b]:

> When construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning. When the statutory language is clear and unambiguous, this Court need not look behind the statute's plain language or employ principles of statutory construction to determine legislative intent. In such an instance, the statute's plain and ordinary meaning must control unless that meaning leads to a result that is unreasonable or clearly contrary to legislative intent.

Id. at 450.

On this particular issue, the Legislature's intent is clear from the plain language of the statue. The phrase 'Sunshine State' was obscured by the license tag frame, Defendant was in violation of a traffic statute, and Officer Lam's stop was lawful under Section 316.605(1), Florida Statute. Furthermore, the evidence thereafter recovered is not subject to suppression as fruit of the poisonous tree. Based on what occurred after Officer Lam approached Defendant in his vehicle, all evidence recovered thereafter was properly and lawfully obtained.

Accordingly,

It is **ORDERED AND ADJUDGED** that Defendant's Motion is hereby **DENIED**.

* * *

Insurance—Homeowners—Coverage—Interior damage due to windstorms—Class action—Certification—Motion for certification of proposed class of insureds who submitted claims for interior damage to structure and/or contents and whose claims were denied on ground that there were no visible openings is denied—Court cannot reasonably ascertain if an insured is a member of proposed class where determination necessitates an individualized claims analysis—Inherently unique nature of windstorm claims also prevents plaintiffs from establishing numerosity and commonality—Due to insurer's unique defenses to plaintiffs' claim for contents and differences in letter denying plaintiffs' claim and letters to other insureds containing similar terms, typicality is not established—Class certification as action for declaratory relief under rule 1.220(b)(2) is improper where declaratory relief is not primary relief requested—Plaintiffs have failed to establish commonality, predominance, and superiority requisites for class certification under rule 1.220(b)(3)

KENNETH DOREMUS and REBECCA DOREMUS, Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE16-021507(07). March 31, 2020. Jack Tuter, Judge. Counsel: Ty Tyler, Tyler & Hamilton, P.A., and Michael S. Drews, Drews Law Firm, for Plaintiffs. Marcy Levine Aldrich and Bryan T. West, Akerman LLP, Miami, for Defendant.

ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This cause came before the Court on Plaintiffs' Motion for Class Certification (the "Motion"). Having reviewed the Motion, the response, reply, transcript of the proceedings, and materials submitted by the parties, the Court finds and decides as follows:

Procedural Background

1. On November 23, 2016, Plaintiffs filed their class action complaint ("Complaint") against Universal Property and Casualty Insurance Company ("Universal") alleging causes of action for breach of contract (count I) and declaratory relief (count II). Plaintiffs assert their claims pursuant to the windstorm provisions of their homeowner's policy (the "Policy") for alleged interior water damage as a result of wind. They also seek coverage for damaged contents. Plaintiffs allege that the interior of their home was damaged as a result of Hurricane Matthew in October 2016.

2. Plaintiffs' claim is premised on the "Perils Insured Against"

provision of their named-perils Policy. The provision that provides coverage for windstorm states:

> We insure for direct physical loss to the property described in Coverages A, B and C caused by a peril listed below unless the loss is excluded in SECTION I—EXCLUSIONS . . .
>
> **Windstorm or hail.** This peril does not include loss to the inside of a building or the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening. This peril includes loss to watercraft and their trailers, furnishings, equipment, and outboard engines or motors, only while inside a fully enclosed building.

3. Plaintiffs' theory of recovery is based on a letter they received from Universal dated October 12, 2016, in connection with their Hurricane Matthew claim. That letter indicates that Universal would cover the damage to Plaintiffs' roof and fence caused by the hurricane; but would deny the portion of the claim related to interior damage. That letter states, in part:

> The inspection was completed and it was determined that due to wind or hail damaged [sic] to the roof, water penetrated and caused damage to the interior of the dwelling. There was no evidence of any visible openings observed to the roof system, and damage was isolated to the shingles. Based on the above, we are hereby denying coverage in connection with this claim for the interior water damage and contents portion of your loss.

The letter quotes the Policy's "Perils Insured Against" provision. Plaintiffs focus on the portion of the letter that states "[t]here was no evidence of any visible openings observed to the roof system, and damage was isolated to the shingles." They allege that their Policy does not contain a requirement that an opening must be "visible" so as to trigger coverage; and therefore, they seek coverage for the denied interior water damage and contents.

4. Universal filed an Answer to the Complaint, asserted defenses, and denied that this action is suitable for class action treatment.

5. Plaintiffs have now moved for class certification on behalf of the following class:

> All persons and entities whose properties in the State of Florida are or were insured under a policy of insurance issued by Universal under its forms HO3, HO6, HO8 and/or DP1, including but not limited to those policies which contained endorsement form number UPCIC 250196 (06-07), who submitted claims which included interior damage to structure and/or contents, whose claims were denied (in whole or part) from and after November 23, 2011 on the stated ground that there were no "visible openings" when Universal: (a) admitted in writing that a roof or wall was damaged due to wind or hail (named perils under the policy); and (b) admitted in writing that due to such roof o[r] wall damage, water entered and caused damage to the interior of the dwelling/building or contents contained therein.

Findings of Fact

6. At all relevant times, Plaintiffs have resided at a single-family home located at 284 Woodland Avenue, Daytona Beach, Florida.

7. Universal issued a policy insuring that residence. Plaintiffs' Policy form is a "Homeowners 8 Modified Coverage Form" ("HO8") and contains numerous endorsements and exclusions. It provided windstorm coverage and was in effect on the date of Hurricane Matthew.

8. Beginning in or about 2011—and before Hurricane Matthew—Plaintiffs' roof had experienced water leakage which led to water entering the interior of the house and causing damage to several rooms. Plaintiffs attempted to repair the roof leaks over a period of several years prior to Hurricane Matthew. While Plaintiffs claim to have repaired the exterior roof leaks prior to the time of the arrival of Hurricane Matthew, there was water damage to the interior to Plaintiffs' home immediately prior to Hurricane Matthew, including (as indicated by Plaintiffs in their depositions) water stains and holes (partially covered with stapled garbage bags) in the ceilings.

9. Hurricane Matthew reached the Daytona Beach, Florida area on October 6-7, 2016, and Plaintiffs thereafter reported a claim to Universal and requested that Universal send a claims adjuster to inspect Plaintiffs' residence.

10. On October 10, 2016, a Universal field adjuster inspected Plaintiffs' residence. He prepared an internal inspection report noting that there was roof damage in the form of missing shingles, a flat roofing pealed back to the sheathing, soffit and gutter damage, and damage to over 25% of the roofing system. He noted damage to the fence. He concluded that the interior damage was pre-existing. Based on his conclusions, he recommended that Universal pay Plaintiffs' claim as to the roof and the fence but deny the claim for interior damage based on the pre-existing damage to the interior. He also prepared an estimate to calculate the payment for the roof and fence.

11. Universal adjusted the amount of Plaintiffs' loss for the roof and fence damage, which, after applying the $9,888.00 deductible, resulted in a payment of $4,607.56.

12. Universal concedes that the October 12, 2016, letter is not consistent with the circumstances of Plaintiffs' claim. The adjuster's report recommended denial of the claim for interior damage based on pre-existing damage—and not for the lack of an opening. While the letter refers to damage being "isolated to the shingles," Plaintiffs' roof exhibited damage beyond damage to the shingles. Indeed, Universal paid Plaintiffs for damage over and above damage to the shingles. Universal concedes that the October 12, 2016, letter was sent in error.

13. As to Plaintiffs' claim for contents, Plaintiffs did not notify Universal of that claim until after this lawsuit was filed. A claim for "contents" was not part of Plaintiffs' original claim in 2016. It was not until October 2018, during discovery, that Plaintiffs first raised the issue of contents damage. Despite determining that they had damaged contents, Plaintiffs discarded those damaged "contents" before advising Universal of their claim for contents damage.

14. In response to discovery requests, Universal conducted an electronic search for denial letters to insureds based on the following criteria: (1) the letters included both the terms "visible opening" and "isolated"; (2) the insured peril was wind and/or hail; (3) the insurer was Universal; (4) the state was Florida; and (5) the dates of loss were dates on or after November 23, 2011. Approximately 1,300 sent letters met this search criteria. The search criteria do not correspond directly with the proposed class definition, which includes different criteria. Many of the 1,300 letters relate to claims that have been individually litigated and/or settled. Moreover, a letter-by-letter review reveals that there are significant differences among many of the letters. While not exclusive, examples of such letters refer to damages being caused by failure to make repairs, compromised roofing systems, "wear and tear," and, as to others, the damage through which water entered was not to a roof or wall (which are the exclusive areas subject to windstorm coverage). In other letters, there was a lack of correlation between roof damage and interior damage. The mere fact that the letters contain the terms "visible opening[s]" and "isolated" does not mean that the recipients of those letters fulfill the criteria for class membership.

15. Homeowners' insurance claims implicate a multiplicity of individualized factual and legal issues, including, but not limited to, the extent of damage to the residence, and the application of particular policy provisions, exclusions, or limits. There are also individualized defenses. With regard to Plaintiffs' claim standing alone, Universal has raised or will likely raise defenses associated with Plaintiffs' pre-existing water damage, Plaintiffs' late notification of their contents claim, and Plaintiffs' discard of the damaged contents themselves. In

addition, other putative class members may seek coverage for items beyond the limited interior water damage and contents sought by Plaintiffs (*e.g.,* they may be seeking coverage for a fence (which was paid for on Plaintiffs' claim) or challenging the extent of coverage to a roof or other structures). Plaintiffs' own causation expert, Neil Hall, whom Plaintiffs proffered in support of class certification, testified under oath that windstorm claims are "not straightforward" and that each windstorm claim "stands on its own." (Hall Dep. at 208.) Universal also indicated that each individual homeowners claim is unique and must be adjusted and reviewed on its own merits. (Peer Aff., ¶¶ 4-6.)

Conclusions of Law

16. In addition to the threshold issue of standing, a class plaintiff must first satisfy the requirement of Florida Rule of Civil Procedure 1.220(a):

> Under Fla. R. Civ. P. 1.220, the prerequisites for bringing a class action are as follows: (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

Arrowsmith v. Broward Cty., 633 So. 2d 21, 21-22 (Fla. 4th DCA 1993).

17. Plaintiffs must also plead and prove that certification is appropriately sought pursuant to one of the categories set forth in Florida Rule of Civil Procedure 1.220(b). In the instant case, Plaintiffs contend that certification is appropriate pursuant to Rule 1.220(b)(2) and Rule 1.220(b)(3).

18. Upon review, Plaintiffs have not presented an adequate factual record to support the class action requirements set forth in Rule 1.220(a) and Rule 1.220(b). The Court finds that Universal has proffered substantial competent evidence demonstrating the inapplicability of class treatment in this matter.

19. Florida Rule of Civil Procedure 1.220(a) requires that a court be able "to reasonably ascertain if a person or entity is a member of the class." *Canal Ins. Co. v. Gibraltar Budget Plan, Inc.,* 41 So. 3d 375, 377 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1690b]. Here, Plaintiffs have failed to propose a class that can be reasonably ascertained because whether or not a class member makes a valid claim for interior damage to structure and/or contents necessitates an individualized claims analysis. Essentially a class member who did not suffer the requisite damage has no claim. This reality also poses an impediment to the numerosity determination. Further, class members other than Plaintiffs may wish to seek coverage for items beyond the limited interior water damage and contents sought by Plaintiffs (*e.g.,* a fence, roof, and other structural coverage, etc.).

20. Given the highly individualized nature of homeowners' claims, courts in Florida have repeatedly rejected proposed class actions involving the litigation of individual homeowners' insurance disputes. *See, e.g., Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 677 (M.D. Fla. 2010). As the Third District Court of Appeal has observed with respect to auto insurance claims, the litigation of individual insurance claims necessarily "devolve[s] into a series of mini-trials." *Ocean Harbor Cas. Ins. v. MSPA Claims, 1,* 261 So. 3d 637, 639 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2219a].

21. Plaintiffs have failed to establish commonality. Given that windstorm claims are inherently unique, there is no common right of recovery based on the same essential facts. *See Arvida/JMB Partners v. Council of Villages, Inc.,* 733 So. 2d 1026, 1030 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1766a].

22. Plaintiffs have failed to establish typicality. Plaintiffs contend that typicality exists because they received a letter with the terms "visible openings" and "isolated." However, Plaintiffs' letter is not identical to other letters with these search terms and Plaintiffs do not necessarily possess the same interest and/or seek recovery for the same injury as other insureds. Plaintiffs' position on typicality is also tenuous with respect to their "contents" claim because Universal has unique defenses to that claim, including the fact that the claim was made almost two years after the date of loss and only after the allegedly damaged contents had been discarded.

23. Class certification under Florida Rule of Civil Procedure 1.220(b)(2) is improper in this matter because declaratory relief is not the primary relief requested. *Freedom Life Ins. Co. v. Wallant,* 891 So. 2d 1109, 1117-18 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D110c] (finding that when monetary recovery is the predominant issue in the presence of a claim for declaratory relief, 1.220(b)(2) certification is improper). Here, the essence of the declaratory relief claim in this matter is to lay the predicate for subsequent **payment** of individual windstorm claims. Plaintiffs' attempt to characterize their claim as one for "readjustment" of insurance claims is unavailing.

24. Plaintiffs have also failed to establish the requisites for class certification under Rule 1.220(b)(3): (1) commonality; (2) predominance; and (3) superiority. The Court's analysis is guided by the following standard:

> The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.

Fla. R. Civ. P. 1.220(b)(3).

25. Plaintiffs have not satisfied the predominance requirement. The Fourth District Court of Appeal has advised that in order to establish predominance:

> [t]he class representative must demonstrate the existence of a reasonable methodology for generalized proof of class-wide impact and damages. The predominance requirement is established if the class representative can prove his own individual case and, by so doing, *necessarily* prove the cases for each of the other class members.

InPhyNet Contracting Servs., Inc. v. Soria, 33 So. 3d 766, 771 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D880a] (emphasis in original). By the very nature of the windstorm claims at issue, common questions of law and fact cannot predominate over the circumstances of the individual claims of each class member. *See Mills*, 269 F.R.D. at 677 ("post-hurricane claim adjustments are not appropriate for class treatment due to the individualized facts of each claim"). Even if Plaintiffs were able to prove their own windstorm claim, that would not *necessarily* prove the cases of other class members.

26. Plaintiffs also fail to establish superiority. The Florida Supreme Court has set forth the factors that courts should consider on the issue of superiority:

> Three factors for courts to consider when deciding whether a class action is the superior method of adjudicating a controversy are: (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable.

Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 116 (Fla. 2011) [36

Fla. L. Weekly S373a].

27. The *Mills* court noted, in the context of windstorm claims, that it had "grave concerns regarding the manageability of this suit as a class action, specifically the claim by claim review that will undoubtedly be needed." *Mills*, 269 F.R.D. at 678. The *Mills* court indicated that "the court in determining manageability should consider the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages," advising that the insurer may raise defenses founded on an individual basis. *Id.* at 680. This Court shares those same concerns.

For the reasons stated herein, Plaintiffs' Motion is ***DENIED***. The Court notes that the foregoing analysis does not constitute a merits determination of any kind.

* * *

Torts—Product liability—Foreign object in food—Summary judgment is entered in favor of food service and processor where over four years of litigation and discovery has produced no evidence that ties them to chicken nugget that allegedly harmed plaintiff when he bit into bone in nugget

SALVATORE VIGNERE, Plaintiff, v. BURGER KING CORPORATION, a Florida Profit Corporation, MAGIC BURGERS, LLC, a Foreign Limited Liability Company, TYSON FOODS, INC. and MBM FOOD SERVICE, INC., Defendants. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2015-CA-002512. April 22, 2020. Susan Stacy, Judge. Counsel: Salvatore Vignere, Pro se. Abbye E. Alexander and Christopher Perini, Kaufman Dolowich Voluck, Orlando, for Defendants Burger King and Magic Burgers. E.T. Fernandez III, and Catherine V. Arpen, Fernandez Trial Lawyers, P.A., Jacksonville, for Defendants Tyson Foods and MBM.

ORDER ON DEFENDANTS, TYSON FOODS, INC. AND MBM FOOD SERVICE, INC.'S, MOTION FOR SUMMARY JUDGMENT

This cause came before the Court upon Defendants', Tyson Foods, Inc. ("Tyson") and MBM Food Service, Inc.'s ("MBM"), Motion for Summary Judgment, and the Court having heard argument and being otherwise fully advised in the premises, the Court makes the following findings:

1. The subject lawsuit is a 4 and 1/2 year old case.

2. During the 4 and 1/2 years, counsel represented Plaintiff, Salvatore Vignere, for 3 and 1/2 years.

3. Discovery was conducted by Defendants Tyson and MBM, and no documents or other evidence was provided by Plaintiff that ties Tyson and/or MBM to the chicken nugget which allegedly caused harm to Plaintiff.

4. No Affidavits were provided by any party.

5. There is no record evidence that supports a duty or relationship between Tyson and/or MBM to the Plaintiff from the alleged harm due to biting into a bone in a chicken nugget.

6. Pursuant to the holding in *National Airlines Inc. v. Florida Equipment Co. of Miami,* 71 So. 2d 741 (Fla. 1954), a party cannot avoid a motion for summary judgment by asserting facts, without evidence to support it, 4 and 1/2 years after the lawsuit was filed.

7. According to *Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Company*, 105 So. 3d 602, 608 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D145a], summary judgment was appropriate when a party failed to act diligently regarding discovery.

8. According to *Leviton v. Philly Steak-Out, Inc.,* 533 So. 2d 905 (Fla. 3d DCA 1988), summary judgment was not improper when there was a 7-month delay in completing discovery and the non-moving party failed to request a continuance of a motion for summary judgment hearing to conduct additional discovery.

9. Here, the parties agreed to the hearing, scheduled the hearing with proper notice to all and conducted discovery prior to the Summary Judgment hearing.

10. There is no genuine issue of material fact outstanding between these two parties based on the aforementioned and relevant case law.

It is, therefore, **ORDERED AND ADJUDGED**:

Defendants', Tyson Foods Inc. and MBM Food Service, Inc., Motion for Summary Judgment is hereby GRANTED.

* * *

Volume 28, Number 3
July 31, 2020
Cite as 28 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Complaint—Failure to attach complete policy, including declarations page, to amended complaint seeking declaration that policy is void *ab initio* requires dismissal of amended complaint—Insurer's request for entry of final default judgments against some codefendants is denied where other codefendants are actively defending action

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. KELLEY A. HUFF, KRISTIN A. HUFF, ANDREW J. HAGERTY, GULFCOAST SPINE INSTITUTE D/B/A BIOSPINE INSTITUTE, ST. JOSEPH'S HOSPITAL INC., D/B/A ST. JOSEPH'S HOSPITAL NORTH, PHYSICIANS GROUP OF SARASOTA, LLC F/K/A PHYSICIANS GROUP, LLC, TAMPA BAY IMAGING, LLC, STERN DRAKE ISBELL & ASSOCIATES, PA, d/b/a SDI RADIOLOGY, EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, LLC, SPINE AND ORTHOPAEDICS SPECIALISTS, PLLC, d/b/a TRINITY SPINE CENTER, Defendants. County Court, 6th Judicial Circuit in and for Pasco County. Case No. 2019-CA-2715. April 1, 2020. Susan G. Barthle, Judge. Counsel: Robert K. Savage, Savage Villoch Law, PLLC, Tampa, for Plaintiff. K. Douglas Walker, Bradford Cederberg, P.A., Orlando, for Defendant.

ORDER

THIS MATTER having come before this Honorable Court on April 1, 2020, and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff did not attach the policy's Declarations Page to the Amended Complaint, despite Exhibit A to the Amended Complaint stating, "This Policy With The Declarations Page . . . Complete the Policy." Plaintiff, therefore, did not attach the complete policy to its Amended Complaint for Declaratory Relief.

2. For those reasons, Defendant, Emergency Medical Associates of Tampa Bay, LLC's, Motion to Dismiss Plaintiff's Amended Complaint for Declaratory Relief is **GRANTED.**

3. Plaintiff shall have thirty (30) days from the date of this order to file a Second Amended Complaint. Defendants shall have twenty (20) days from the filing of Plaintiff's Second Amended Complaint for which to respond to Plaintiff's Amended Complaint.

4. With regards to Plaintiff's request for Entry of Final Default Judgments: Plaintiff's Amended Complaint for Declaratory Relief requests this Court declare the subject insurance policy "*void ab initio*." Entering Final Default Judgments against some co-Defendants in this instance, while other co-Defendants are actively defending this action would be improper at this time. Under these circumstances, entry of Final Default Judgments against the defaulting co-Defendants would severely prejudice the non-defaulting co-Defendants who are actively defending this action, *See Kotlyar v. Metro. Cas. Ins. Co.,* 192 So. 3d 562, 567 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1182a] (holding a plaintiff is not "always entitled to a default judgment against a defaulting defendant prior to the adjudication of the merits against non-defaulting co-defendants," and "the trial court should evaluate whether the entry of the default judgment could lead to an absurd, unjust, or logically inconsistent result"). Accordingly, this Court is not inclined to enter a Final Default Judgment against any of the defaulting co-Defendants at this time.

5. For those reasons, Defendant's Motion to Stay Entry of Final Judgments is **GRANTED;** and Plaintiff's Motion for Entry of Final Default Judgment is **DENIED.**

* * *

Criminal law—Search and seizure—Vehicle stop—Officer acting outside jurisdiction—Citizen's arrest—Off-duty, out-of-jurisdiction officer who observed defendant driving erratically but not so egregiously as to constitute breach of peace improperly conducted traffic stop and detained defendant pending arrival of deputies—Motion to suppress is granted

STATE OF FLORIDA v. MAURICE LITTLE, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 100372 MMDL, Division Sanders. May 5, 2020. Robert A. Sanders, Jr., Judge. Counsel: Boone Forkner, Assistant State Attorney, for State. Aaron Delgado, Daytona Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE coming before the Court on March 5, 2020 for an evidentiary hearing on the "Defendant's Motion to Suppress Evidence Following an Unlawful Stop," and the Court having heard the testimony of the witness, having reviewed the case law cited by the parties, heard the argument of counsel and being fully informed in the premises, makes the following findings of fact and conclusions of and law:

Findings of Fact

To meet its burden of proof on this warrantless detention and arrest, the State presented the testimony of one witness, Sanford Police Officer Bree Bradshaw, who was an off-duty officer outside of her jurisdiction at the time she observed the Defendant's vehicle on 17-92 in Volusia County, Florida. Bradshaw testified she was in a marked police vehicle and wearing her full uniform, including her sidearm.

Bradshaw did not have a body-worn camera and did not author a police report *per se*, rather she completed a sworn statement on her police department's form, which she testified was completed shortly after her encounter with the Defendant, was complete and accurate to the best of her knowledge and was "sworn to" as being truthful under penalty of perjury. This is significant because her testimony at the hearing differed and was impeached by her prior statement and by omissions from her prior statement.

Bradshaw testified she noticed traffic becoming an issue with cars slamming on brakes and moving evasively, and when she got closer, she observed it was Defendant's vehicle causing drivers to act that way. Bradshaw observed Defendant's vehicle swerving, going over lines, slowing down, speeding up, a lot of erratic driving. Bradshaw testified she made a decision to pull Defendant over "because other vehicles and pedestrians were at risk of some issue." No other vehicles crashed or were damaged; rather it appears vehicles may have had to change lanes or slow down or speed up.

On cross-examination, Bradshaw was confronted with her original statement, which states she stopped the driver because his headlights were out and because she was concerned, he might be "ill, tired or impaired." Her first question to the Defendant was concerning his health.

Prior to stopping the driver, Bradshaw followed him for some time and "called in his plate" to Seminole County Dispatch. Using her red and blue lights and sirens, Bradshaw stopped the Defendant, identified herself as a police officer, questioned the driver and took his drivers' license, running it through her computer database, and had the driver exit the vehicle. Bradshaw asked the driver if he had been drinking. She further testified to smelling a faint odor of alcohol from inside the vehicle—she could not say it came from the driver's mouth or person. She observed the drivers' eyes to be "mildly glazed." She observed no other indicators of impairment—when specifically questioned, she did not testify to red, blood shot eyes, slurred speech, flushed face or other classic indicators of impairment. Bradshaw admitted her original statement made no mention of any indicators of impairment.

Bradshaw testified that after an unknown period, probably less than thirty minutes, Volusia County Sheriff Deputies arrived on scene

and Bradshaw, in her own words, "transferred her probable cause to them"[1] and left. There was no testimony elicited about where the Defendant's license went or what specific information (observations of impairment, etc.) was relayed to the deputies. Bradshaw testified that she told the driver to exit the vehicle, so the driver was outside the vehicle, leaning against it, when the deputies arrived. The Court heard no testimony from the deputies which might have cleared up how long the defendant was held roadside or otherwise corroborated any of Bradshaw's observations.

Bradshaw's testimony was lacking in detail in many important areas, particularly the Defendant's car's interaction with other vehicles on the roadway. The Court notes there was no testimony of any emergency calls or reports by other citizens on the road regarding erratic driving. And unlike many of the cases relied on by the State, there was no testimony of any cars having to leave the roadway, no cars striking other cars, or similarly dangerous and erratic driving.

Conclusions of Law

There was no dispute that, at all times relevant to this motion, Bradshaw was a citizen. There was no legitimate basis for an extra jurisdictional stop or an expansion of her police powers. She was not acting pursuant to Mutual Aid and she was not in fresh pursuit from her own jurisdiction. *See* § 901.25(1), Fla. Stat. Ann.; *State v. Gelin*, 844 So. 2d 659 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D746b]; *Cheatem v. State*, 416 So. 2d 35 (Fla. 4th DCA 1982). The State concedes that unless there is a valid citizen's arrest, the Defendant's stop, detention and arrest are unlawful.

To help guide the Court's decision, both sides provided the Court with extensive case law including County Court decisions, some of them from the 7th Judicial Circuit here in Volusia County. Although there was no traffic crash in this case, the Court finds Judge Feigenbaum's well-reasoned opinion in *State v. Shattuck* to be persuasive. *State v. Shattuck*, 25 Fla. L. Weekly Supp. 465a (Fla. 7th Jud. Cir. Ct. June 29, 2017).

In the instant case, Bradshaw testified she made a "traffic" stop out of concern for the well-being of the driver, along with an observed traffic infraction, and then "detained" the driver. There is no such thing as a citizen's detention; the law is well-settled citizens lack the authority to detain and make an "arrest" for a civil traffic infraction and citizens cannot conduct a *Terry* style "stop" or detain a suspect. *See State of Fla., Department of Highway Safety and Motor Vehicles v. Pipkin*, 927 So. 2d 901 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2558a]; *State v. Earle*, 17 Fla. L. Weekly Supp. 953a (Fla. 6th Jud. Cir. Ct. April 12, 2010).

Bradshaw testified she did not intend to make an arrest—she intended only to detain the driver and her testimony was clear on this point. *State v. Ryan*, 18 Fla. L. Weekly Supp. 243b (Fla. 18th Jud. Cir. Ct. Dec. 2, 2010) ("There was no testimony that [the officer] intended to affect a citizen's arrest. . . . [T]he Defendant was subjected to a citizen's stop that is not part of a lawful citizen's arrest. Citizens have no authority to make stops for traffic infractions nor do they have authority to conduct investigations. *Sobrino* stands for the proposition that when an extra jurisdictional police officer stops a defendant without intending to arrest him, the stop is illegal.")

The law is clear that there is no such thing as a citizen's traffic stop or citizen's detention, yet evidence of a DUI is generally obtained by detaining a suspect after a traffic stop. Most of the case law upholding citizen's arrests for DUI concludes that a DUI is a breach of the peace, and the focus is solely on the particularly egregious driving patterns. The courts were not holding that the initial stop of the vehicle is retroactively justified by the subsequent DUI investigation, but rather that the driving pattern of those individuals who were driving under the influence was so excessively erratic as to constitute a breach of the peace in itself. The converse simply could not be the case, because if the citizen's arrest was for DUI, generally there would not be adequate probable cause at the time of the citizen's arrest, i.e. the initial stop.

Because a citizen is not authorized to stop a driver for a civil traffic infraction, the evidence must show more than "failing to maintain a single lane" or even "careless driving." Thus, even with probable cause to believe a civil traffic infraction had been committed, the initial stop by Bradshaw on this basis was unlawful.

Regarding the initial stop of the vehicle being based on Bradshaw believing the driver might be ill, tired or, impaired, this Court declines to extend the scope of the "citizen's arrest" by adding the "community caretaker" doctrine to it and permitting citizens to do "well-being checks" on drivers. To hold otherwise, and to allow a synthesis of citizen's arrest powers and the community caretaker doctrine, would risk creating a class of legalized vigilantism. The community caretaker doctrine has been criticized as allowing for police abuse and retroactive justification of unlawful stops, and to extend it to private citizens would open the door to anarchy.

This Court specifically finds that even though Bradshaw had probable cause for a civil traffic infraction, and at best, a reasonable suspicion that Defendant might have been ill, tired, or impaired, these are not valid bases for Bradshaw to have conducted the initial stop. Because Bradshaw was acting as a citizen, she would have needed probable cause to believe a Breach of Peace had occurred in order to stop the vehicle. The evidence presented in this case falls short of that requirement.

The State urges the Court to find the defendant was properly "arrested" by the off-duty, out-of-jurisdiction Officer acting as a citizen and making a citizen's arrest for misdemeanor DUI. Courts have held a DUI can be a breach of the peace and therefore a citizen can make a DUI arrest. *Edwards v. State*, 462 So. 2d 581, 582 (Fla. 4th DCA 1985) ("We cannot think of a more apt illustration of such breach of the individual and collective peace of the people in Okeechobee County than to have a drunk driver at the wheel of a killing machine that is going all over the road and scaring oncoming drivers to death rather than killing them.").

Defense counsel argues the breach of peace language is dicta, that was improperly inserted in the case law and that a "breach of the peace" is a misdemeanor offense in Florida and should not be read *in pari materia* with "felonies." Further, Defense counsel argues the only way to reconcile the holdings is to focus on the traffic pattern and find the driving alone is sufficiently dangerous as to justify a citizen's arrest for felony level conduct—for example, in *Edwards* cars were being actively driven off the road and crashing.

Here, the driving pattern alone does not rise to the level necessary to justify a citizen's arrest. Although some case law suggests that a traffic stop can be upheld as a citizen's arrest when there is erratic driving, the Court finds these cases distinguishable as there is no credible testimony in the instant case of a driving pattern egregious enough to justify such a stop. Therefore, even if the Court considers Bradshaw's "totality of the circumstances" post traffic stop, the Court does not find probable cause for DUI.

As previously explained, the only way to reconcile the cases is to say that unless the driving pattern is so egregious as to be a breach of the peace in and of itself, beyond that of a traffic infraction, there is no basis for a valid citizen's arrest. This Court finds the citizen's arrest was the "stop" of the Defendant's vehicle which was not justified on the facts before the Court, therefore the citizen's arrest was invalid and the Motion to Suppress is GRANTED.

All evidence gathered from the Defendant's stop and detention is inadmissible as tainted fruit of the poisonous tree.

---

[1]This Court took Judicial Notice of the probable cause/arrest affidavit in this case, authored by Deputy Jacob Nealis. The arrest affidavit states in pertinent part: "Officer Bradshaw stated she observed the vehicle '*run several cars off the roadway*'." The

alleged facts constituting probable cause in the arrest report are materially different from the facts testified to by Bradshaw at hearing.

* * *

Attorney's fees—Debt collection—Mutuality and reciprocity of obligation—Account stated cause of action to collect unpaid credit card account is action that was brought with respect to cardholder agreement such that prevailing party is entitled to award of attorney's fees under section 57.105(7) based on attorney's fees provision contained in agreement—Motion to stay fee proceedings pending Florida Supreme Court's resolution of inter-district conflict on issue is denied, as stay would be prejudicial to prevailing party

CAPITAL ONE BANK (USA), N.A., Plaintiff, v. SADRACK RICHARDSON, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 48-2019-SC-022626-A001OX. May 13, 2020. Brian Duckworth, Judge. Counsel: Kevin Spinozza, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STAY PROCEEDINGS AND GRANTING DEFENDANT'S MOTION FOR THE COURT TO DETERMINE ENTITLEMENT TO AN AWARD OF ATTORNEY FEES AND COSTS AND THEN TO TAX SAME AGAINST PLAINTIFF

THIS CAUSE having come before the Court at a hearing held on May 4, 2020, on Defendant's Motion for the Court to Determine Entitlement to an Award of Attorney Fees and Costs and Then to Tax Same Against Plaintiff ("Defendant's Motion for Entitlement") and Plaintiff's Motion to Stay Proceedings on Defendant's Motion for Attorney's Fees ("Plaintiff's Motion to Stay"); and the Court, having reviewed the pleadings and various orders brought to its attention; and the Court having heard argument from counsel for the respective parties, and being otherwise fully advised of the premises, finds as follows:

FINDINGS OF FACT AND LAW

1. Plaintiff originally filed a Statement of Claim against Defendant alleging counts for "Account Stated" and "Unjust Enrichment". Subsequently, Plaintiff filed an Amended Statement of Claim that included a single count for "Account Stated", as the action for "Unjust Enrichment was deleted. The action alleges that monies are allegedly due and owing by Defendant under a consumer credit card account.

2. On or about July 29, 2019, Defendant's attorneys filed a notice of appearance that includes a notice of Defendant's intent to seek prevailing party attorney fees pursuant to Section 57.105 (7), Florida Statutes, should Defendant be adjudged the prevailing party in this lawsuit.

3. On or about January 30, 2020, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice.

4. Following the voluntary dismissal of this lawsuit by Plaintiff, the Defendant timely filed Defendant's Motion for Entitlement, alleging that Defendant had a right and entitlement to attorney's fees and costs, as the prevailing party, pursuant to the terms and conditions of the written Cardholder Agreement that established the subject consumer credit card account, and the unilateral contractual attorney fee provision in favor of Plaintiff set forth therein, which Defendant alleged was made reciprocal by Section 57.105 (7), Florida Statutes.

5. The Court finds that the Defendant is the prevailing party in this cause of action as a result of the voluntary dismissal by Plaintiff. This is so even if the dismissal was without prejudice. In this regard, the Court is persuaded by the matter of *Alhambra Homeowners Assn., Inc. v. Asad,* 943 So.2d 316 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3118a], which was brought to the Court's attention by counsel for Defendant. A copy of the order entered in *Alhambra* is attached to Defendant's Notice of Filing of Order Where Court Found Entitlement to Prevailing Party Attorney Fees When a Lawsuit is Dismissed Without Prejudice.

6. In this lawsuit, Defendant filed with this Court a copy of the underlying Capital One Cardholder Agreement that was produced by Plaintiff in response to Defendant's First Request for Production (the "Capital One Cardholder Agreement"), that includes in its terms and conditions, an attorney fee provision providing for the recovery by Plaintiff of attorney's fees and costs. Specifically, at the section entitled "Account Default", the Capital One Cardholder Agreement provides as follows: "If we file a lawsuit, you agree to pay our court costs, expenses and attorney fees, unless the law does not allow us to collect these amounts".

7. This Court notes that the language in Florida Statutes Section 57.105 (7) makes reciprocity applicable where there is a contract allowing for the recovery of attorney fees when the other party prevails in any action "with respect to the contract". As noted above, the requisite contract exists in this lawsuit, and Defendant is the prevailing party. Thus, the issue for this Court is whether the instant lawsuit is an action "with respect to the contract".

8. The account balance claimed as due and owing by Defendant in this lawsuit contains at least some portion that is attributable to interest. Defendant filed Defendant's Notice of Filing of Copies of Account Statements Showing that Plaintiff was Seeking a Sum that Included Interest. The account statements attached thereto reflect interest being added to the account balance at rates of 23.40% and 23.65%. The Court finds that in order for Plaintiff to be able to charge interest at these rates, there must be a contract that authorizes the same. The Court finds that the addition of interest in this lawsuit supports a finding that the lawsuit is an action that was brought "with respect to the Contract".

9. Counsel for Defendant filed multiple orders entered in Orange County finding in favor of entitlement (see the cases cited in and attached to Defendant's Motion for Entitlement). Among those cases is the Final Order Affirming Trial Court entered by the Orange County Circuit Court sitting in its appellate capacity in *Portfolio Recovery Associates, LLC v. Cathleen Allman,* Orange case 2014-CV-000030.

10. Counsel for Defendant also filed multiple orders entered by courts in counties in the Fifth District other than Orange that found in favor of entitlement (see the cases cited in and attached to Defendant's Notice of Filing of Copies of Orders Finding in Favor of Entitlement Entered by Courts in Various Counties Within the Fifth District Court of Appeals).

11. Counsel for both parties noted to the Court that while the Second District has ruled in favor of entitlement, the First District has ruled against entitlement, and that the Florida Supreme Court will be rendering a decision to resolve this conflict. This is the basis of Plaintiff's Motion to Stay. The Court notes that counsel for Defendant filed Defendant's Notice of Filing of Case Law in Opposition to Plaintiff's Motion to Stay Proceedings which cites to cases in which a similar motion to stay was denied. One of the cases cited by counsel for Defendant is *Portfolio Recovery Associates, LLC v. Nancy Rice,* Sarasota Appellate case number 2018-SP-1510, in which the court found that the granting of a similar motion to stay would be prejudicial. This Court is persuaded by *Rice,* and similarly finds that a decision to grant Plaintiff's Motion to Stay would be prejudicial to Defendant.

12. In light of the foregoing findings of fact and law, this Court finds that by defending the action brought by the Plaintiff, alleging a claim for collection of amounts alleged to be due and owing under a credit card account established and governed by the terms and conditions of the subject Capital One Cardholder Agreement, and, that by Defendant timely pleading notice of Defendant's right and

entitlement to an award of attorney's fees and costs prior to dismissal of the cause of action, the Defendant is entitled, as the prevailing party, to an award of attorney's fees and costs pursuant to the attorney fee provision in the Capital One Cardholder Agreement, which is made reciprocal to apply to the Defendant in accordance with Section 57.105 (7), Florida Statutes.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that:

1. Plaintiff's Motion to Stay is hereby **DENIED**.

2. Defendant's Motion for Entitlement is hereby **GRANTED**.

3. The Court reserves jurisdiction of the parties and of this lawsuit for the purpose of determining the amount of reasonable attorney's fees and costs to be awarded to the Defendant as the prevailing party, and granting such other relief as may be appropriate.

* * *

Insurance—Appeals—Stay—Insurer's motion to stay county court action pending appeal of order denying motion to consolidate this action with fifteen other pending cases between same named parties is denied—Appeal of order denying consolidation is not likely to succeed due to differences in facts and defenses in cases sought to be consolidated, and insurer has not shown irreparable harm necessary to warrant stay

DIGESTIVE MEDICINE HISTOLOGY LAB (LLC), Plaintiff, v. CELTIC INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-012502-SP-23, Section ND02. May 7, 2020. Natalie Moore, Judge.

ORDER DENYING STAY PENDING APPEAL

THIS CAUSE having come before the Court on April 27, 2020, on the Defendant's Motion to Stay Pending Appeal, and this Court having heard argument of counsel and being otherwise advised of the premises thereof, it is hereby:

ORDERED and ADJUDGED that for the reasons set forth below the Defendant's Motion to Stay Pending Appeal is hereby DENIED.

The Defendant has moved this Court to enter an order staying this matter pending a ruling on its Petition for Writ of Certiorari pending before the Eleventh Judicial Circuit Court whereby the Defendant has petitioned the appellate court to review an Order issued by Judge Linda Singer Stein on October 8, 2019 which denied the Defendant's motion to consolidate this matter with fifteen (15) other matters currently pending before the County Court in and for Miami Dade County.

1. In determining whether or not an action should be stayed pending an appeal the moving party must demonstrate to the Court that there is both a likelihood of success in the appellate court and that the party requesting the stay would suffer irremediable harm if the stay was denied. *State ex rel. Price v. McCord*. 380 So. 2d 1037 (Fla. 1980).

2. In this case the Court finds that while the named parties are the same in the various pending matters, each contract of insurance at issue was entered into by different individual insureds. The Court notes that the medical services provided by Plaintiff to each individual patient all arose under different circumstances. Thus, the contracts and parties in each case are different. The injuries and cause of injuries leading to the medical services at issue in the various matters are different. Additionally, as conceded by counsel for the Defendant at the hearing, there may be some defenses and issues that are applicable to one matter that are not applicable to another. Though no answer has been filed at this time, Defendant acknowledges that there may be defenses specific to individual contracts or individual treatments.

3. Based upon the foregoing together with the reasons stated on the record, the Court finds that that the appeal of the order denying consolidation is not likely to succeed. Further, the Court finds that the Defendant has not demonstrated the irreparable harm necessary to warrant a stay of this matter.

4. Due to time restrictions the Court did not reach the Defendant's Motion to Dismiss which was also scheduled to be heard during the same hearing as the Motion to Stay. The parties will coordinate to reset the Motion to Dismiss for hearing in June.

* * *

Insurance—Automobile—Windshield replacement— Appraisal—Unambiguous appraisal clause provides for easy, fair, efficient, and inexpensive means of determining reasonable cost of replacing windshield and does not violate statutory law or public policy—Motion to compel appraisal is granted—Insurer that promptly sent demand for appraisal after receipt of repair invoice did not waive its right to appraisal—Prohibitive cost doctrine is not applicable in breach of contract claim

PAGE 42, LLC; a/a/o Shazam Auto Glass, LLC; a/a/o Nancy Arzia, Plaintiffs, v. PROGRESSIVE AMERICAN INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; PROGRESSIVE DIRECT INSURANCE COMPANY; PROGRESSIVE EXPRESS INSURANCE COMPANY; PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-036489, Division J. December 24, 2019. Daryl M. Manning, Judge. Counsel: Ronald S. Haynes, Christopher Ligori & Associates, Tampa, for Plaintiffs. Lisa M. Lewis, Cole, Scott, & Kissane P.A., Tampa, for Defendants.

ORDER ON DEFENDANT'S MOTION TO COMPEL APPRAISAL AND STAY DISCOVERY

THIS CAUSE having come before the Court on Defendant's Motion to Compel Appraisal and Stay Discovery and the Court having heard argument of counsel, and being otherwise advised in the Premises, finds that Defendant's Motion should be GRANTED.

Plaintiff has submitted Complaint for breach of contract against Defendant. Defendant argues, in pertinent part, that the appraisal process should be compelled and discovery stayed, pending completion of the appraisal process, as is required pursuant to the automobile insurance policy executed between Progressive and Nancy Arzia.

I. Jurisdiction, Applicable Rules and Statutes

This is a small claims lawsuit involving a dispute between an insurance company and an auto glass vendor regarding the reasonable cost of replacing the insured's windshield. Accordingly, the Florida Small Claims Rules apply to these proceedings.

Under Florida law, "[t]he deductible provisions of any policy of motor vehicle insurance, delivered or issued in this state by an authorized insurer, providing comprehensive coverage or combined additional coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy." *Fla. Stat.* §627.7288. Simply said, the insured gets a new windshield without having to pay a deductible given the applicable coverage.

Upon replacement of the windshield, the auto glass vendor requires the insured to sign a work order that includes an assignment of benefits from the insured to the auto glass vendor. While the assignment language may vary depending on the vendor, an assignment of benefits relating to an auto glass claim typically allows the auto glass company to "step into the shoes" of the insured for the purposes of negotiating and collecting the reasonable replacement cost of the windshield after the date of loss; however, the auto glass vendor must "wear the shoes" as assigned. Coverage of the windshield is not disputed, rather the instant claim concerns the replacement cost of the windshield or the amount of the loss.

II. Background

Progressive insured Arzia's vehicle, and the Policy included comprehensive coverage for damage to the vehicle. The vehicle sustained damage to the windshield and Arzia contacted Plaintiff to replace the windshield. Neither Arzia nor Plaintiff contacted Progressive before the windshield was replaced. Instead, Plaintiff replaced the windshield and then sent an invoice to Progressive. Arzia signed the

Invoice authorizing the glass repairs and assigning to Plaintiff any and all benefits from the insurer providing coverage for the repaired vehicle. When Progressive received the Invoice, Progressive promptly sent a letter to Plaintiff and Arzia disputing the amount to repair the loss and demanding an appraisal of the loss pursuant to the Policy. Neither Arzia nor Plaintiff responded to Progressive's demand for an appraisal. Instead, Plaintiff filed the instant Complaint.

III. Policy Language at Issue

Progressive's policy of insurance provides, in pertinent part, as follows:

> **Appraisal**
>
> If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. However, mediation, if desired, must be requested prior to demanding appraisal. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraiser will determine the amount of loss. If they fail to agree, the disagreement will be submitted to an impartial umpire chosen by the appraisers, who is both competent and a qualified expert in the subject matter. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal. [Policy p.30]
>
> **Legal Action Against Us**
>
> We may not be sued unless there is full compliance with all the terms of this policy. . . [Policy p. 42]

This Court has considered the three necessary factors when ruling on a motion to compel appraisal: (1) whether a valid written agreement to appraisal exists; (2) whether an appraisal issue exists; and (3) whether the right to appraisal was waived. *Heller v. Blue Aerospace, LLC*, 112 So.3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. This court finds that a valid written agreement to appraisal exists, an appraisal issue exists, and the right to appraisal was not waived by Defendant.

IV. Opinion

A. Enforceability of Contractual Appraisal Provisions.

In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America*,704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Progressive Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977). In this case, Plaintiff does not point to any statute or public policy considerations that are violated by this "retained rights" provision. "Moreover, controlling Florida law permits 'retained rights' provisions, and these provisions do not render the appraisal clause unenforceable." *Cincinnati Ins.*, 162 So.3d at 143 ("Hence, the trial court erred to the extent it found that Cincinnati Insurance could not demand an appraisal due to the language of the appraisal clause being unenforceable as inconsistent or violative of public policy.").

1. Vagueness, Conflicting Language and Public Policy Arguments

Plaintiff makes several arguments that Progressive's appraisal clause is vague, contains conflicting language and/or violates public policy as follows: (1) Progressive's appraisal provision provides an undefined standard of reimbursement; (2) Progressive's appraisal provision is an attempt to strike the insured's rights and block access to courts; and (3) Progressive's appraisal provision is ambiguous and subject to different interpretations in that the appraisal clause conflicts with the Limits of Liability Clause found within the Policy. Progressive and Arzia freely contracted for the right of appraisal. In Florida, parties may negotiate to contractually waive certain constitutional rights. Therefore, within reason, parties are free to contract even though either side may get what turns out to be a "bad bargain." *Quinerly v. Dundee Corp.*, 31 So.2d 533, 534 (1947) ("[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute [the Court's] judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain."). "We have long held that under contract law principles, contract language that is unambiguous on its face must be given its plain meaning." *Green v. Life & Health of America*, 704 So.2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a]; *Carefree Villages, Inc. v. Keating Properties, Inc.*, 489 So.2d 99 (Fla. 2d DCA 1986).

Upon a review of the appraisal language at issue, this Court finds that such language is clear, unambiguous and provides a simple and informal appraisal process, which if followed, would provide both parties an easy, fair, efficient and inexpensive means of determining the reasonable cost of replacing a windshield. Not only is an informal appraisal an appropriate alternative to litigation in determining the reasonable cost of replacing a windshield, in the instant case an informal appraisal is the *best* course of action. *See e.g., Johnson v. Nationwide Mut. Ins., Co*., 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] and *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a].

To the extent the Plaintiff seeks to attack or requests the Court to rewrite any contractual provisions in the Policy, this Court is powerless to rewrite the contract or interfere with the freedom of contract. If the insured had not assigned this claim to the auto glass vendor, then the insured would have been bound by the appraisal provision contained within the Policy. As an assignee of the insured, the auto glass vendor is subject to all equities and defenses that could have been asserted against the assignor (i.e. the right to appraisal).

2. Waiver

Plaintiff argues that Progressive waived its rights to an informal appraisal process because it "should have informed its insured/the glass shop of which services were being reimbursed and how rates were determined" or by not providing proper notice to the insured and/or the Plaintiff as the insured's assignee.

A waiver of the right to appraisal only occurs when a party engages in conduct inconsistent with that right. *See Travelers of Florida v. Stormont*, 43 So.3d 941, 945 (Fla. 2010) [35 Fla. L. Weekly D2059a]. Pursuant to the prompt written communications from Progressive to Plaintiff, it is clear that Progressive did not engage in conduct inconsistent with its rights of appraisal; rather, Progressive retained its rights to invoke the appraisal process pursuant to the Policy at all times relevant hereto. In addition, Progressive attempted to unilaterally participate in the appraisal process by sending payment in the amount determined by Progressive's appraiser to Plaintiff, along with a letter of explanation of payment and retaining rights to invoke Plaintiff's participation in the appraisal process.

For these reasons, the Court finds that any arguments made by

Plaintiff based on an attempt to attack the terms of the Policy as unconstitutional, unconscionable, vague, or against public policy are unpersuasive. Likewise, the Court finds that any arguments made by Plaintiff requesting the Court to renegotiate the terms of the Policy, or otherwise requesting the Court to re-write the terms of the Policy are not properly brought before this Court.

3. Appraisal Provision as Prohibitively Costly

This Court rejects Plaintiff's argument in this matter that the subject appraisal provision is invalid as prohibitively costly and in violation of the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine is applicable where a party is seeking to vindicate a statutory right and not in breach of contract claims. *See Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), *McKenzie Check Advance of Fla., LLC v. Betts*, 122 So.3d 1176 (Fla. 2013) [38 Fla. L. Weekly S336a] *and Citibank v. Desmond*, 114 So.3d 401 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1175a].

For the reasons stated above, it is ORDERED AND ADJUDGED as follows:

1. Defendant's Motion is hereby GRANTED.

2. Within ten (10) days of this Order, the parties must provide each other with the name, address, email address, and phone number of their selected appraisers;

3. The appraisal process shall occur within sixty (60) days of this Order;

4. This matter is hereby stayed/abated until the parties comply with the appraisal provision set forth in the subject policy;

5.. If the appraisal award is in excess of the benefits already paid; Progressive shall send payment for the additional amounts within fifteen (15) days of the appraisal award;

6. Upon payment of the additional amount, if any, or once the appraisal is completed, whichever comes first, the Defendant shall have twenty (20) days to file its response to the Complaint.

7. This court retains jurisdiction of the matter for further proceedings as necessary.

* * *

Insurance—Discovery—Depositions—Failure to appear—Sanctions

LOURDES PENA, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-011004. April 27, 2020. James S. Moody, III, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the court on April 23, 2020 on Plaintiff's Motion for Sanctions. The Court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff's Motion for Sanctions alleges that Defendant failed to timely provide deposition dates and that Defendant subsequently refused to appear for a noticed deposition.

2. Defendant filed a Motion for Protective Order but did not schedule it for hearing in violation of the Rules. Parties are not allowed to ignore the Rules and processes for discovery.

3. Plaintiff's Motion for Sanctions is **HEREBY GRANTED**. Defendant is ordered to pay sanctions to Plaintiff's counsel. As such, Defendant is ordered to pay one (1) hour of attorney's fees at the rate of $500.00 per hour.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to compel appraisal of windshield repair is granted—Prohibitive cost doctrine is not applicable in breach of contract claim

SHAZAM AUTO GLASS LLC., a/a/o Charlotte McCormick, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; PROGRESSIVE DIRECT INSURANCE COMPANY; PROGRESSIVE EXPRESS INSUARNCE COMPANY; PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-053195, Division L. September 3, 2019. Cynthia S. Oster, Judge. Counsel: John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL APPRAISAL AND STAY DISCOVERY

THIS CAUSE having come before the Court on Defendant's Motion to Compel Appraisal and Stay Discovery and the court, having reviewed the file(s), pertinent case law and having heard the argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

1. This Court has considered the three necessary factors when ruling on a Motion to Compel Appraisal: 1) whether a valid written agreement to appraisal exists; 2) whether an appraisable issue exists; and 3) whether the right to appraisal has been waived. *Heller v. Blue Aerospace, LLC*, 112 So.3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. This Court finds that a valid written agreement to appraisal exists, an appraisable issue exists and that that right to appraisal has not been waived.

2. This Court further rejects Plaintiff's argument that the subject appraisal provision is invalid as prohibitively costly pursuant to the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine is applicable where a party is seeking to vindicate a statutory right and not in breach of contract claims. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), *McKenzie Check Advance of Fla., LLC v. Betts*, 122 So.3d 1176 (Fla. 2013) [38 Fla. L. Weekly S223a] *and Citibank v. Desmond*, 114 So.3d 401 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1175a].

IT IS THEREFORE ORDERED and ADJUDGED

1. That Defendant's Motion to Compel Appraisal and Stay Discovery is hereby GRANTED. This matter is hereby stayed until the parties comply with the appraisal provision set forth in the subject policy.

2. Within 30 days from the date of this Order, the parties must provide each other with the name, address, e-mail address and phone number of their selected appraisers.

3. The appraisal process shall be completed within 90 days from the date of this Order.

* * *

Insurance—Personal injury protection—Affirmative defenses—Fraud—Staged accident—Medical provider's motion for summary judgment as to affirmative defense of fraud is granted where insurer failed to file or identify any counter-evidence that would reveal existence of factual issue, and there is no evidence of any sworn statement by insured admitting to fraud or any court records establishing that insured committed fraud, but only the alleged fact that the driver of the other vehicle involved in the accident pled guilty to fraud

ADVANCED X-RAY ANALYSIS, INC., a/a/o Elia Beltran, Plaintiff, v. WINDHAVEN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2015-SC-020802. June 4, 2019. Alissa M. Ellison, Judge. Counsel: Pamela Rakow-Smith, Eiffert & Associates, P.A., Orlando, for Plaintiff. John Koplitz, Windhaven Insurance Company, Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSE OF FRAUD

THIS MATTER came before the Court on May 28, 2019 on Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense of Fraud (the "Motion for Summary Judgment"). After reviewing the Court file, the motion, having heard arguments of

Counsel and, being considered by the Court and otherwise being fully advised of the premises; the Court finds as follows:

I. FACTUAL BACKGROUND

The Assignor, Elia Beltran was involved in a motor vehicle accident on December 6, 2009 (*See* Defendant's Response to Plaintiff's Request for Admissions) and on December 23, 2009, she purportedly received treatment from Plaintiff for the injuries she sustained in the accident. At the time of the accident, Ms. Beltran was insured through a Windhaven Insurance Company policy, which provided Personal Injury Protection Benefits to Ms. Beltran pursuant to Florida Statutes § 627.730-627.7405 (*See* Notice of Filing Declarations of Coverage Page and Policy of Insurance filed with the Court on December 10, 2018). The policy was in effect on the date of the accident (*Id.*). As part of her treatment, Ms. Beltran executed an assignment of benefits in favor of Plaintiff (*See* Statement of Claim). Plaintiff filed this lawsuit and seeks a judgment for the alleged non-payment and/or reduction of personal injury protection benefits (*Id.*).

This case was originally filed on September 9, 2014, in the County Court of the Ninth Judicial Circuit in Orange County, Florida and ultimately transferred to this Court on June 17, 2015. On December 11, 2018, Plaintiff filed its Motion for Summary Judgment as to Defendant's Affirmative Defense of Fraud alleging that Defendant has not properly pled its defense of fraud and has no evidence to support its defense that Elia Beltran committed fraud and is not entitled to benefits under Fla. Stat. §627.736 ("PIP Statute") and its policy of insurance. Defendant's affirmative defense alleges that Elia Beltran and Plaintiff are not entitled to recover PIP benefits under the policy of insurance and PIP Statute because the motor vehicle accident was staged. Defendant's affirmative defense is based on the conviction of Tina Figueroa, the other driver involved in the accident. In support of its argument, Plaintiff cites to section (4)(h) of the PIP Statute, Defendant's policy of insurance, Fla. R. Civ. Pro. 1.120(b), Fla. R. Civ. Pro. 1.510(c), and relevant case law cited in Plaintiff's motion and provided to the Court at the hearing.

II. LEGAL ANALYSIS

As a preliminary matter, the Court finds that Defendant failed to file any evidence in opposition to Plaintiff's Motion for Summary Judgment or to specifically identify any evidence previously filed as required by Florida Rule of Civil Procedure 1.510 (c). *See cmmt.* to Rule 1.510 ("If the movant sustains his initial burden, the opponent has the burden to come forward with counter-evidence revealing a factual issue . . . ."; *see also Varnedore v. Copeland,* 210 So.3d 741, 746 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D360a] (party may not rely on evidence, even if already filed, unless it is identified in a timely filed notice), *State Farm v. Figler Family Chiropractic,* 189 So.3d 970, 974 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D805b] (Rule 1.510 requires evidence in support of and *in opposition to* a motion for summary judgment to be specifically identified prior to the hearing). Notably, Defendant mutually coordinated Plaintiff's motion for summary judgment to take place on May 28, 2019 and did not file any motions to continue. Despite this fact, Defendant failed to meet its burden to come forth with any counter-evidence which would reveal a factual issue before or at the hearing.

Plaintiff is also entitled to summary judgment as to Defendant's Affirmative Defense as Defendant has presented no evidence that its insured, Elia Beltran committed fraud or had any involvement in staging the subject accident, as required to deny PIP benefits, pursuant to Section (4)(h) of the PIP Statute and Defendant's policy of insurance. Section §627.736(4)(h) provides in pertinent part:

> (h) Benefits *shall not be due or payable* to or on the behalf of an *insured person if that person* has committed, by a material act or omission, any insurance fraud relating to personal injury protection coverage under his or her policy, *if the fraud is admitted to in a sworn statement by the insured or if it is established in a court of competent jurisdiction.* Any insurance fraud shall void all coverage arising from the claim related to such fraud under the personal injury protection coverage *of the insured person who committed the fraud,* irrespective of whether a portion of the insured person's insurance claim may be legitimate, *and any benefits paid prior to the discovery of the insured's person's insurance fraud shall be recoverable by the insurer from the person who committed the insurance fraud in this entirety . . .*

See Fla. Stat. § 627.736(4)(h)(2009)(Emphasis added). Thus, pursuant to the statute, an insurer is required to have either: (1) a sworn statement by the insured admitting to fraud; or (2) a determination by a court that fraud occurred *prior* to withholding payments. One of these two requirements must be met in order for the insurer to withhold the payment of benefits at the outset. The statute then provides a mechanism pursuant to which an insurer can recover any insurance proceeds previously paid in the event the insured committed insurance fraud.

Likewise, Defendant's policy of insurance provides, in pertinent:

> We do not provide coverage for any ***"insured"*** that has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under policy.

See Policy filed with the Court, p.14 General Definitions "FRAUD" (Emphasis added). Section IV Part F (A) in the Personal Injury Protection Endorsement states:

> We do not provide Personal Injury Protections Coverage for an **"insured"** *if that "insured has committed,* by a material act or omission, any insurance fraud relating to Personal Injury Protection under this policy, ***and*** *if the fraud is admitted to in a sworn statement by the "insured" or if the fraud is established in a court of competent jurisdiction.* Any insurance fraud shall void all Personal Injury Protection Coverage arising from the claim *with respect to the "insured" who committed the fraud.*

See Policy filed with the Court, Personal Injury Protection Endorsement P.21 Section IV Part F (A) FRAUD (Emphasis added).

The Court finds the plain language of the PIP Statute and Defendant's policy of insurance precludes the payment of the benefits of an insured, if that person committed fraud and the fraud is admitted to in a sworn statement or established in a court of competent jurisdiction. Here, there is no record evidence of any statements of Elia Beltran admitting to fraud, nor any Court records which establish she committed fraud. Rather, the facts as alleged reflect that Tina Figueroa, an unnamed party, pled guilty to fraud in conjunction with the accident giving rise to this case.[1] As such, Plaintiff has met its burden showing no genuine issue of material fact remains on the issue of fraud and Defendant has not provided any evidence to support its defense that Ms. Beltran committed fraud and summary judgment in favor of Plaintiff is proper.

Further, Courts across the state have upheld summary judgment on the issue of fraud when there is no evidence of fraud and thus no genuine issue of material fact on the question of fraud. *See 2765 South Bayshore Drive Corp. v. Fred Howland, Inc.,* 212 So. 2d 911, 914 (Fla. 3d DCA 1968). The Court finds based on the court file and record evidence, Defendant has not set forth any facts or evidence to establish Ms. Beltran committed fraud relating to the subject motor vehicle accident. Thus, Plaintiff's motion for summary judgment as to Defendant's affirmative defense of fraud must be granted.

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

Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense of Fraud is hereby **GRANTED.**

[1]Although this fact has been referenced in certain documents previously filed with

the Court, as discussed above, Defendant failed to specifically identify any such documents in opposition to Plaintiff's Motion for Summary Judgment and, in any event, the documents were not in admissible form. Regardless, even if these documents had been offered as evidence in opposition to Plaintiff's Motion for Summary Judgment, the documents only related to Ms. Figueroa and there is no evidence establishing any relationship between Ms. Figueroa and Ms. Beltran other than Defendant's assertion that Ms. Figueroa was driving the other car involved in the collision at issue.

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter was valid notwithstanding fact that it referenced incorrect claim number where insurer sustained no prejudice from error—Demand letter that included itemized statement in form of original HICF substantially complied with section 627.736(10)—Letter is not deficient for failing to indicate exact amount owed

ALLIANCE SPINE & JOINT II INC., Plaintiff v. GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO18011520, Division 61. April 22, 2020. Jackie Powell, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Brigitte Silver, for Defendant.

SUMMARY JUDGMENT

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED,** as follows:

Plaintiff's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense is hereby **Granted**. The Court finds that Plaintiff's Demand Letter substantially complies with Florida Statute 627.736 and qualifies as a valid Demand Letter.

Notwithstanding the foregoing and even if Plaintiff's clerical error in identifying the claim number as 037582329-002 as opposed to 037582329-003 constituted a fatal error, which this Court does not so find, the Court finds that the Defendant sustained no prejudice as a result of the foregoing and therefore the Plaintiff should not be prevented from pursuing this action. The Court finds that the first part of the claim number, 037582329, is actually the policy number, that the add on pertains to a particular person, that all submitted documents reference Nina Bolden and that the Defendant issued an additional payment in response to the Demand Letter. Clearly the Defendant did not sustain any prejudice related to the clerical error of using -002 v -003.

> "a plaintiff need only substantially comply with conditions precedent." Id. at 61 (citing *Fed. Nat'l Mortg. Ass'n v. Hawthorne*, 197 So.3d 1237, 1240 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1800a]). "Substantial compliance or performance is 'performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez v. JPMorgan Chase Bank*, 187 So.3d 343, 345 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D595b] (quoting *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971)). "Moreover, a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice. . . . Even if we concluded that the required notice was mailed to an incorrect address, the Bank correctly points out that the defective notice did not prejudice the Borrowers, as they did not attempt to cure the default.

Citigroup Mortg. Loan Tr. Inc. v. Scialabba, 238 So. 3d 317, 319-20 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a].

> Additionally, section 627.736(5)(b)1.d., Florida Statutes (2004), states that an insurer is not required to pay a claim or charges "[w]ith respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d)." Accordingly, based upon the statute's plain language, a bill or statement need only be "substantially complete" and "substantially accurate" as to relevant information and material provisions in order to provide notice to an insurer.

United Auto. Ins. Co. v. Prof'l Med. Grp., Inc., 26 So. 3d 21, 24 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a].

Regarding Defendant's contention that the Demand Letter:

> must attach "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." § 627.736(10)(b), Fla. Stat., and must specify an exact amount for an insurer to pay to prevent a lawsuit. Plaintiff's Demand . . . demanded an amount that would never be due under the policy and Florida Statutes because, at a minimum, it does not reflect the Policy's co-pay, incorporate the fee schedule or Medicare coding and payment methodologies, and does not properly place Defendant on notice of the basis of the claim.

The Court finds that the Demand Letter included a copy of the original HICF that was submitted to the insurance carrier and that this satisfies the Plaintiff's obligation to include an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court adopts the reasoning set forth by Judge Guzman in *Saavedra v. State Farm,* 26 Fla. L. Weekly Supp. 664a (Dade Cty. Ct. 2018) where he held:

This Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount owed. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible.1 The Court is not free to edit statutes of add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So.2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c].

Moreover, this Court is also aware of its constitutional duty to allow litigants access to the courts. When examining conditions precedent, they must be construed narrowly in order to allow Florida citizens access to courts. *Pierrot v. Osceola Mental Health*, 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a]. "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System*, 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. For this Court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostolico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to deny access to courts on the basis of technicalities") (emphasis added), citing, *Archer v. Maddux*, 645 So.2d 544 (Fla. 1st DCA 1994).

The Court would additionally note that during the hearing the Defendant conceded that the Demand Letter was not premature.

* * *

Insurance—Homeowners—Where insured's assignee met initial burden to prove that all-risk policy was in effect at time of loss, and insurer that denied coverage met burden to prove that loss fell within policy exclusion for damage caused by rain, burden of proof shifted back to assignee to prove that loss fell under exception to exclusion by establishing that rain entered home through peril-created opening—Because assignee failed to present any evidence that would create genuine issue of material fact as to existence of peril-created opening in roof, summary judgment is entered in favor of insurer

XPRESS RESTORATION INC., a/a/o/ Nicolai Catana, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE18007498, Division 52. April 15, 2020. Giuseppina Miranda, Judge. Counsel: Daniela Barreto, Marin, Eljaiek, Lopez & Martinez P.L., Coconut Grove, for Plaintiff. Miriam Merlo, Gaebe Mullen Antonelli & Dimatteo, Coral Gables, for Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE came before this Court for hearing on April 6, 2020 on Defendant's Motion for Summary Judgment filed on September 17, 2019. The Court having reviewed the Motion and the sworn testimony filed in support thereof and in opposition to, considered the responses and legal memorandum filed by the parties, applied the relevant case law and having heard argument of counsel, the Court makes the following findings of fact and conclusions of law:

The parties agree that the insured, Nicolai Catana (hereinafter referred to as "CATANA") was covered under a policy of insurance (hereinafter "the Policy") issued by the Defendant which was in full force and effect when CATANA reported[1] a loss on November 12, 2017. The alleged date of damage to CATANA's property occurred on or about September 10, 2017.[2] The loss is alleged to have been caused in connection with Hurricane Irma. The Plaintiff obtained an assignment of benefits from CATANA on November 13, 2017 (which was nine weeks after Hurricane Irma made landfall in South Florida).

The parties agree that the Policy is considered an "all-risk policy" and that the damage to the residence was *caused by rain.*

On November 13, 2017, Plaintiff contracted with CATANA to "provide water restoration services in an attempt to mitigate the damages."[3] to the property.[4]

CATANA signed Plaintiff's "Assignment of Benefits Agreement" form when Plaintiff first began work at the property on November 13, 2017. The costs of Plaintiff's services totaled $8,146.22. A copy of the invoice[5] is attached to the affidavit of Plaintiff's corporate representative, Jose Moran (hereinafter referenced to as "MORAN").

On November 17, 2017 Defendant's field adjuster, Mike Baser (hereinafter referred to as "BASER") inspected the property. BASER took 39 photographs documenting his observations.[6] Defendant denied coverage of the entire claim, asserting that the damage was not covered under the Policy. A letter dated November 29, 2017 was sent to Stellar Public Adjusting Services, LLC, (hereinafter referred to as "STELLAR") documenting the denial of the claim.[7]

The pertinent portions of the Policy are set forth herein (and all emphasis to the cited sections is added by the Court).

SECTION 1—PERILS INSURED AGAINST[8]

A. Coverage A—Dwelling And Coverage B—Other Structures

1. We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.

****

2. *We do not insure, however, for loss*:

b. *Caused by*:

(8)[9] *Rain,* snow, sleet, sand or dust to the interior of a building *unless a covered peril first damages the building causing an opening in a roof or wall and the rain. . .enters through this opening.*

(9)[10] Any of the following:

(a) *Wear and tear, . . . or deterioration*;

Based on the plain language of the Policy, the Court finds that this is an "all risk" policy which excludes damage caused by rain, unless the rain enters the building though an opening caused by a covered peril. *See Egan v. Washington Gen. Ins. Corp*., 240 So. 2d 875, 878 (Fla. 4 DCA 1970 (recognizing all risk policy is constrained by express policy exclusions); *Phoenix Ins. Co. v. Branc*, 234 So.2d 396, 398 (Fla. 4 DCA 1970 ("Of course, despite the presence of the 'all risks' provision, the loss is not covered if it comes within any specific exclusion contained in the policy.").

The law is clear regarding the parties' burden of proof relative to the Policy terms. As succinctly stated in *Zurich American Insurance Company v. Southern-Owners Insurance Company*, 314 F. Supp.3d 1284, 1298-1299 (M.D. Fla. 2018):

> Although the insured bears the burden of proving that a claim is covered by the insurance policy, the "burden of proving an exclusion to coverage is. . .on the insurer." *LaFrage Corp. v. Travelers Indem. Co.,* 118 F.3d 1511, 1516 (11th Cir. 1997*)*. However, if there is an exception to the exclusion, "the burden returns to the insured to prove the exception and show coverage." *See Mid-Continent Cas. Co. v. Frank Casserino Constr., Inc.*, 721 F.Supp.2d 1209, 1215 (M.D. Fla. 2010); *see also LaFrage Corp.*, 118 F.3d at 1516; *E. Fla. Hauling, Inc. v. Lexington Ins. Co.,* 913 So.2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a].

Accordingly, this Court summarizes the burden of proof as follows:

> a. Plaintiff has the initial burden to prove that a claim is covered by the insurance policy; meaning that the insured/assignee must establish that a loss occurred within the policy period.
>
> b. Thereafter, the burden shifts to the Defendant to prove that the cause of the loss was excluded under the terms of the policy.
>
> c. However, when there is an exception to the exclusion, the burden then shifts back to the Plaintiff to prove that the loss fails within the exception.

Therefore, once the Defendant proves that the loss was a result of rain entering the home, the burden shifts to the Plaintiff to prove that there was an opening in the roof that was created by covered peril and was not the result of wear and tear and/or deterioration of the roof. *See Fla. Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within an insurance policy. . ."). *See also, Divine Motel Group, LLC v. Rockhill Insurance Company,* 2015 WL 4095449 (Fla. M.D. 2015) ("Divine's argument is without merit. Devine ignores the portion of the exception that requires the rain to reach the interior of the Property *through* damage to the building cause by a Covered Cause of Loss.").[11]

Based on this Court interpretation of the case law cited herein, the following step-by-step process outlines the parties' obligations in the instant case:

> a. To be afforded coverage, Plaintiff must prove that CATANA's Policy was in effect at the time of the loss: DONE.
>
> b. To deny coverage, Defendant must prove that the loss fails within an exclusion listed in the Policy, i.e.: that the damage to CATANA's property was caused by rain: DONE.
>
> c. To overcome summary judgment, Plaintiff must establish an exception to the exclusion, i.e.: a *prima facie* showing that the rain entered the home though an opening caused the winds or damage associated with Hurricane Irma: NOT ESTABLISHED.

Plaintiff failed to present any sworn evidence to support a factual basis for a *prima facie* finding that the damage was caused by rain entering through an opening caused by a covered peril.

Plaintiff's argument is two-fold. First, Plaintiff argues that CATANA's and BASER's sworn deposition testimony establish that a genuine issue of material fact exists precluding summary judgment.

Upon a review of the entirety of both depositions, the Court disagrees with Plaintiff's argument. Moreover, the deposition testimony of both gentlemen actually supports Defendant's position that no peril created opening existed.

CATANA testified that his interior ceiling experienced a leak during Hurricane Irma (which was first noticed by his ex-wife while he was at work). He went up on the roof at some point and saw standing water. CATANA testified that he did not know what caused the leak, but that he saw no openings.[12] His ex-wife cleaned up the interior water and other than going up on the roof, he did nothing further. CATANA testified that he experienced other water leaks after Hurricane Irma and ultimately contacted STELLAR to file his property damage claim.[13] STELLAR came to his home approximately one month after CATANA contacted them and CATANA signed a contract on November 11, 2017 to have STELLAR handle the insurance claim. Immediately thereafter, STELLAR hired the Plaintiff for remediation services. CATANA testified that Plaintiff drilled holes in the walls, torn down moldings but never installed a tarp[14] on the roof.[15] CATANA testified that Plaintiff never went on the roof.[16] After being at his home for 2-3 days, Plaintiff left with their equipment. CATANA then experienced another leak (his ex-wife cleaned up the water again). Ultimately, CATANA went to Home Depot and purchased a pump, which he states kept the rain water from pooling/accumulating on his roof.[17] This pump remedied the situation until CATANA contacted a person to fix the roof.[18] CATANA testified that he got a roofer's name (hereinafter referred to as "JOEY") from a friend. CATANA could not remember JOEY's last name and believed JOEY may have had his own business but couldn't remember the name of the business. The repairs costs $400-500 for "patching" and a "coating" was applied to the roof costing $3,000.00. Plaintiff's counsel attempted to introduce hearsay testimony from CATANA about what JOEY said was the cause of the leak. Pursuant to Fla.R.Civ.P. 1.510 (e), a court may consider evidence at a summary judgment hearing only if it would be "admissible in evidence." What JOEY told CATANA is classic hearsay testimony that would not be admissible at trial.[19]

BASER's testimony about his observations and cause of the roof leak are consistent with CATANA's observations. Most compelling is CATANA's testimony that the pump that he purchased to keep the water from pooling on the roof corrected the problem. BASER explained on pages 25-28, 35-38, 40-46 (as well as other portions of the deposition) that he did not observed any openings on CATANA's flat roof. He further testified that the cause of the leak was the improperly installed drainage system. This defective drainage system is what caused water to pool (which is exactly what CATANA described). Furthermore, BASER went on to explain that the roof was in poor condition and described the cracking ("alligatoring") in the roofing material.

Plaintiff attempts to create an inconsistency in the testimony regarding the age/condition of the roof and argues this inconsistency establishes the "slightest doubt" requiring this Court to deny summary judgment. This too, is not established by the record evidence. Plaintiff contends that BASER was mistaken about the age of the roof and that CATANA testified that the roof was only five years old. However, CATANA's actually testified that when he purchased the home in 2012 he "thinks" it was a brand new roof.[20]

Plaintiff's first arguments fails because Plaintiff did not present competent, admissible evidence to rebut Defendant's *prima facie* showing that the loss is a result of exclusion in the Policy.

Plaintiff second argument fails because Plaintiff incorrectly relies on its position that it is *Defendant's burden* to prove that the roof leak was not caused by a covered peril. Plaintiff's position misapplies the cases cited herein. Furthermore, Plaintiff's mistakenly relies on the case *Ortega v. Citizens Property Insurance Corp*., 257 So.3d 1171 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2427b] as a reason to deny summary judgment. This reliance is misplaced because the facts in *Ortega* are distinguishable from the instant case. In *Ortega*, the sworn testimony presented established conflicting factual allegations warranting a trial. Specifically, Armando Ortega testified in deposition that during a storm, "a tree branch 'went through' the roof. . .creating a 'huge hole' directly over the kitchen." *Id.* at 1172. Also presented was an affidavit from a licensed general contractor and engineer who inspected the home and opinied that the damage was covered by the policy. "[W]ithout explication," the trial court granted summary judgment in Citizen's favor. *Id.* The *Ortega* court reversed, finding that sufficient evidence existed to 'preclude entry of summary judgment on the material issue of whether a covered peril created an opening to the roof of Ortega's home which then permitted rain water to enter and damage the interior of the home." *Id.* at 1173 [citations omitted]. Unlike the *Ortega* case, Plaintiff provided no evidence establishing that testimony would be presented at trial that would create an issue of fact that an opening caused by a covered peril existed on CATANA's roof.

For the reasons stated herein, Plaintiff has failed to come forward with any admissible evidence which would create a genuine issue of material fact as to a covered peril causing an opening in the roof which caused rain water to damage the interior of the home.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment is GRANTED.

It is further ORDERED that Plaintiff, XPRESS RESTORATION, INC., a/a/o Nicolai Catana, takes nothing by this action and Defendant, CITIZENS PROPERTY INSURANCE CORPORATION, shall go hence without day. The court reserves jurisdiction to determine entitlement to attorney fees and cost.

---

[1]CATANA's claim was actually reported by Stellar Public Adjusting Services, LLC. CATANA hired the company on November 11, 2017 (see CATANA's deposition at page 18).

[2]The record evidence references a different date which is noted in footnote #5 herein.

[3]See paragraph 10 of Plaintiff's Complaint filed on April 5, 2018.

[4]CATANA did not personally contact Plaintiff. Instead, STELLAR requested Plaintiff's services.

[5]The Court notes that the invoice references that the date of loss was August 23, 2017.

[6]Photographs 40-45 are aerial photographs taken by "Geomni" which is an aerial survey company as explained in BASER's deposition.

[7]CATANA testified during his deposition that he was never made aware of the denial by STELLAR.

[8]See page 12 of 34 of the Policy.

[9]See page 13 of 34 of the Policy.

[10]See page 13 of 34 of the Policy.

[11]The provision of *Rockhill*'s policy about the "exception to the exclusion" is similar to Defendant's policy and is outlined in the case's opinion.

[12]See CATANA deposition at page 16.

[13]CATANA never directly contact Defendant.

[14]Plaintiff's invoice includes a $1,905.50 charge for "R&R Tarp—all purpose poly—per sq ft (labor and material)."

[15]See CATANA deposition at pages 19-23.

[16]See MORAN's deposition testimony at pages 33-34, confirms that no one from Plaintiff's company went on the roof. The deposition testimony also confirms that Plaintiff did not observe any openings in the roof and did not determine where the leak was coming from.

[17]See CATANA's deposition at page 23.

[18]See CATANA's deposition at pages 23-26.

[19]Even if the Court could consider the testimony, CANTANA's recollection of the conversation was minimal, at best, and lack reliability. There was also no explanation of what would have cause the "rip" in the flashing. See CANTANA deposition at page 28, lines 14-20.

A. He said it was like a rip in the flashing, something like that, and he patched it up.
Q. Did he tell you how he thought the flashing got ripped?
A. I don't know.

[20]CATANA's deposition at page 38, lines 19-23.

* * *

Insurance—Personal injury protection—Demand letter—Defects—Motion to abate PIP case to allow service of new demand letter is granted where error in original demand letter was first raised by insurer in its affirmative defenses and medical provider immediately moved to abate action—Extension of time to respond to proposal for settlement is granted

WILLIAM H. MYONES, DMD PA, a/a/o Lana Davidson, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19023961, Division 51. May 6, 2020. Kathleen Mccarthy, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Plaintiff. Michael S. Walsh, Kubricki Draper, Fort Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO ABATE TO PERMIT SERVICE OF STATUTORY 30 DAY DEMAND LETTER AND MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO DEFENDANT'S PROPOSAL FOR SETTLEMENT SERVED APRIL 1, 2020

THIS CAUSE came before the Court for consideration on the Plaintiff's Motion to Abate to Permit Service of Statutory 30 Day Demand Letter and Plaintiff's Motion for Enlargement of Time to Respond to Defendant's Proposal for Settlement Served April 1, 2020, and the court, being fully advised in the premises, rules as follows:

Plaintiff submitted a Statutory Demand Letter to State Farm on July 30, 2019. State Farm acknowledged receipt thereof and responded on September 23, 2019 that coverage was still being investigated. On October 15, 2019, the Plaintiff filed the instant lawsuit. After filing a number of motions for extension of time to respond to the complaint, the Defendant filed its answer and affirmative defenses on April 13, 2020. Within the affirmative defenses was the first allegation by State Farm that there was a problem with the Plaintiff's Statutory Demand letter. As stated by Plaintiff's lawyer, there was a scrivener's error in the body of Plaintiff's demand letter regarding the total amount billed. Immediately upon receipt of the Defendant's Affirmative Defense, on the same day, April 13, 2020, Plaintiff filed its motion to abate to permit service of Statutory 30 Day Demand Letter requesting this Court to allow an abatement to correct the scrivener's error in its Statutory Demand Letter. Plaintiff relies upon *Angrad v. Fox,* 552 So.2d 1113 (Fla. 3rd DCA 1989)(premature filing of medical malpractice action may be cured through abatement to allow passage of requisite presuit time after notice); *Dukanauskas vs. Metropolitan Dade County,* 378 So.2d 74, 76 (Fla. 3rd DCA 1979)(no attempt to provide notice was made in sovereign immunity case during limitations period, thereby precluding abatement to cure); *Wright v. Life Insurance Company of Georgia,* 762 So.2d 992 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1527b] (proper remedy for premature litigation is abatement or state of claim); *Thomas v. Suwannee County,* 734 So.2d 492 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D1186b] (General rule is that action filed prematurely should be abated until cause of action matures, rather than dismissed). *See, Central Palm Beach Imaging, LLC v. Mercury Insurance Company of Florida*, 17 Fla. L. Weekly Supp. 1042a (Fla. 17th Jud. Cir. 2010); *Physicians Rehab Group v. State Farm Mutual Automobile Insurance Company*, 17 Fla. L. Weekly Supp. 123b (Fla. 11th Jud. Cir. 2009).

Defendant relies upon *Progressive Exp. Ins. Co., Inc. v. Menendez,* 979 So.2d 324 (Fla. 3rd DCA 2008) [33 Fla. L. Weekly D811a] for the proposition that when a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, and not abatement is the proper remedy. However, that case was quashed by the Supreme Court in *Menendez v. Progressive Exp. Ins. Co., Inc.,* 35 So.3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b]. Furthermore, the 3rd DCA held in *Menendez* that Plaintiff waived its right to move for an abatement because of its own inaction, not because it was not an available remedy. Specifically, the 3rd DCA states that after receiving notice of the demand letter issue from Defendant's Answer, Amended Answer and Motion for Summary Judgment, "the plaintiffs could have asked the trial court to abate the premature action until they complied with the statute." Therefore, the Court does not find Defendant's argument convincing.

In this case, the Plaintiff moved to abate this action immediately upon receiving notice that State Farm had an issue with the content of the demand letter. This Court agrees with the Honorable Robert W. Lee in C*entral Palm Beach Imaging, LLC v. Mercury Insurance Company of Florida*, 17 Fla. L. Weekly Supp. 1042a (Fla. 17th Jud. Cir. 2010) and orders that this case be abated for 60 days from the date of this Order.

Furthermore, Plaintiff's motion for extension of time to respond to the proposal for settlement served on April 1, 2020 is granted as Plaintiff timely filed its Motion for Extension of Time pursuant to Fla. R. Civ. P., Rule 1.090, and has shown good cause. *Koppel v. Ochoa,* 243 So.3d 886 (Fla. 2018) [43 Fla. L. Weekly S225a].

ACCORDINGLY, it is hereby ORDERED AND ADJDUGED that Plaintiff's Motion to Abate is GRANTED. Plaintiff shall submit an amended demand letter within 20 days of this hearing to both Defendant's counsel of record, as well as the individual specified by the insurer for the purposes of receiving Pre-Suit Demand letters, in compliance with Florida Statute, Chapter 627.736(10). If payment is properly made pursuant to F.S. 627.736(10) within 30 days of receipt of the amended demand letter, it shall not constitute a confession of judgment and State Farm shall not be responsible for attorney's fees or costs under F.S. 627.428. Assuming Plaintiff complies with the deadline to submit its amended demand letter, this case shall reopen 60 days from the date of this Order.

Plaintiff's Motion for Extension to Respond to the Proposal for Settlement is GRANTED. The time to respond to the Defendant's proposal for settlement is extended to 10 days after the case reopens after the abatement period ends.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint following confession of judgment for full jurisdictional amount alleged in original complaint is denied—Motion to enforce confession of judgment is granted

UNIVERSITY HEALTH CENTER, P.A., a/a/o Laura Slasinski, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE18006184, Division 83. March 10, 2020. Ellen Feld, Judge. Counsel: John C. Daly, for Plaintiff. Yineth Sanchez Aslan, for Defendant.

AGREED ORDER

ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE ITS CONFESSION OF JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT

THIS CAUSE having come before the Court on March 5, 2020, on Defendant's Motion to Enforce its Confession of Judgment and Plaintiff's Motion to Amend its Complaint, and the Court having heard argument of counsel, and being otherwise fully advised on the premises, it is hereby ORDERED AND ADJUGED, as follows:

On June 13, 2018, Plaintiff, University Health Center, P.A., as assignee of Laura Slasinski, filed its Complaint for Personal Injury Protection benefits in Small Claims Court, seeking damages that do not "exceed One Hundred Dollars ($100.00), exclusive of interest, attorney's fees and costs." No specific amount of damages was stated on the Complaint. On July 23, 2018, the parties invoked the Florida Rules of Civil Procedure, and subsequently Defendant filed its Answer and Affirmative Defenses on January 10, 2020.

On February 3, 2020, Defendant confessed judgment in this case

for the maximum jurisdictional amount of one hundred dollars ($100.00), plus interest in the amount of thirty-seven dollars with two cents ($ 37.02). In its Confession of Judgment, Defendant also stipulated to Plaintiff's entitlement to reasonable attorney's fees and costs.

On February 5, 2020, Plaintiff filed its Motion for Leave to Amend its Complaint stating that "Plaintiff had recently discovered there were additional underpayments and that the amount owed exceeds the jurisdictional amount listed in the initial Complaint." Plaintiff further stated that it sought "to file an amended complaint, changing only the jurisdictional limit to $100-$500."

On February 6, 2020, Defendant filed its Motion to Enforce its Confession of Judgment. No Notice of Rejection of Defendant's Confession of Judgment was filed by the Plaintiff on this case. Defendant asserts that Plaintiff received payment for the Confession of Judgment on February 18, 2020 and provided as evidence the return receipt for the confession payment mailed to Plaintiff via certified mail. Plaintiff did not challenge Defendant's assertion regarding the tendering of confession payment.

On March 5, 2020, Defendant's Motion to Enforce its Confession of Judgment and Plaintiff's Motion to Amend its Complaint were set for hearing. At the hearing, Plaintiff argued that in the interest of justice, the Court should permit the amendment of Plaintiff's Complaint since Plaintiff was unaware of the exact amount that was due on the case due to Defendant's failure to provide discovery during the litigation.

In response, Defendant provided to the Court Plaintiff's pre-suit demand letter, dated May 1, 2018, an assignment of benefits, and a patient ledger indicating as the amount overdue two thousand six hundred and eighty-eight dollars with forty-two cents ($2,688.42). Defendant argued that prior to the start of the litigation, Plaintiff was aware of the amount due on the case and had all necessary documents to determine the amount owed on the claim. Defendant further argued that "a plaintiff can voluntarily reduce the amount of its claim to obtain a lower filing fee, but in doing so also accepts the burden with that benefit where a confession of judgment for the reduced amount is a valid confession of judgment." *Douglas Price, P.A. d/b/a Florida Pain, Trauma & Injury Clinic, a/a/o Dickenson Chery, v. MGA Insurance Company*, 22 Fla. L. Weekly Supp. 1094b, Case No. 13-CC-032481, (Hillsborough Cty. Ct. Mar. 18, 2015).

Additionally, Defendant argued that after the filing of a Notice of Confession of Judgment for the maximum jurisdictional amount and a stipulation to reasonable attorney's fees, the Court is divested of jurisdiction except as to reasonable attorney's fees, and the Plaintiff is not entitled to substantive relief since all other motions seeking relief are moot. Defendant cited the following legal authority to support its position: *Alliance Spine & Joint III, LLC (a/a/o Audrey Belmonte) v. GEICO General Insurance Company*, Case No. 2018-005094 COCE 54, (Broward Cty. Ct. June 18, 2019, nunc pro tunc May 28, 2019) [27 Fla. L. Weekly Supp. 759a]; *Berman Chiropractic, a/a/o Rochel Albert, v. GEICO General Insurance Company*, Case No. 2017-026778 COWE 82, (Broward Cty. Ct. May 13, 2019); *Chirocare of Sunrise, LLC (a/a/o Diosky De La Cruz) v. GEICO General Insurance Company*, Case No. 2017-005436 CONO 70, (Broward Cty. Ct. Mar. 21, 2019, nunc pro tunc Apr. 13, 2018) [27 Fla. L. Weekly Supp. 202a]; *Lake Worth Chiro a/a/o Cruz McKnight, v. Progressive American Insurance Company*, Case No. 2015-008698 CONO 70, (Broward Cty. Ct. Feb. 25, 2016); *Douglas Price, P.A. d/b/a Florida Pain, Trauma & Injury Clinic, a/a/o Dickenson Chery, v. MGA Insurance Company*, 22 Fla. L. Weekly Supp. 1094b, Case No. 13-CC-032481, (Hillsborough Cty. Ct. Mar. 18, 2015); *Douglas Price, P.A. d/b/a Florida Pain, Trauma & Injury Clinic, a/a/o Nehemie Chery, v. State Farm Mutual Automobile,* Case No. 14-CC-009868, (Hillsborough Cty. Ct. May 9, 2014); *GEICO Casualty Company v. Barber*, 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a]; and *Bretz Chiropractic Clinic, a/a/o Tyler Whitlock, v. GEICO General Insurance Company*, 2017-AP-005946 NC, (12th Jud. Cir. Ct. App., Oct. 8, 2018) [26 Fla. L. Weekly Supp. 620a].

After reviewing the case law provided by the parties and the documents in question, this Court is divested of jurisdiction upon the filing of a confession of judgment, and this Court will find that the confession is, in fact, valid because the confession is up to the jurisdictional amount as alleged in the Complaint. Further as to Plaintiff's Motion for Leave to Amend its Complaint, this Court will find that the motion is moot since a valid confession of judgment has been filed.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. Defendant's Motion to Enforce its Confession of Judgment is GRANTED; and

2. Plaintiff's Motion to Amend its Complaint is DENIED as moot in light of this ruling.

* * *

Insurance—Coverage—Burden of proof—Policy—Discussion regarding differences between "all-risks" and "named perils" policies—Policy at issue is an "all-risk policy" where the covered perils are not named, but are instead defined by what is not covered—"Naming" perils by saying what they are not does not trigger "named peril" burden—Plaintiff is entitled to summary judgment on issue of coverage where insurer failed to allege an exclusion to all-risk policy as required

ASAP RESTORATION CORP. (a/a/o Elaine Miller), Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 18-17697 COCE (53). June 18, 2020. Robert W. Lee, Judge. Counsel: Aaron Silvers, Fort Lauderdale, for Plaintiff. Otto Espino, Jr., Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR FAILURE TO RAISE ANY EXCLUSIONS BARRING COVERAGE

THIS CAUSE came before the Court on June 18, 2020 for hearing of the Plaintiff's Motion for Partial Summary Judgment for Failure to Raise any Exclusions Barring Coverage, 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, it is hereby

ORDERED and ADJUDGED that the Plaintiff's Motion for Partial Summary Judgment is GRANTED. At dispute in this Motion is whether the Citizens policy at issue in this case is an "all-risks" policy or a "named perils" policy. The distinction is important because under Florida law, where the burden falls at trial is different depending on what type of policy it is.

An "all-risks" policy does not extend coverage for every conceivable loss. Instead it provides coverage for all losses not resulting from misconduct or fraud unless the policy includes a specific provision expressly excluding the loss from coverage. *Kokhan v. Auto Club Ins. Co.*, 45 Fla. L. Weekly D544a, D544 (Fla. 4th DCA), *on rehearing*, 45 FLW D1194 (Fla. 4th DCA 2020). Importantly, the burden is on the insured merely to show that a loss occurred during the policy period. Once this prima facie showing is made, the burden then shifts to insurer to show an exclusion to coverage. *Kokhan*.

On the other hand, however, if the policy were a "named perils" policy, the insured would have the burden of showing the loss falls within one of the named perils. *Citizens Property Ins. Corp. v. Kings Creek South Condo, Inc.*, 45 FLW D597a (Fla. 3d DCA 2020).

The Court agrees with the Plaintiff that the Citizens policy in this case is an "all-risks" policy. In addition to *Kokhan*, the Court finds

Mejia v. Citizens Property Ins. Corp. particularly instructive. 161 So.3d 576 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2471a]. In *Mejia*, the appellate court explained that a named perils policy is one in which the peril is actually named. *Id.* at 578. In the instant case, the covered perils are not named—instead they are defined but what is not covered. In other words, the policy covers everything that is not excluded, which is the essence of an "all-risks" policy. Citizens is attempting to argue that "naming" the perils by saying what they are not, rather than what they are, similarly triggers the "named peril" burden. If Citizens were correct, however, the distinction between an all-risks policy and a named perils policy would practically disappear.

Because an insurer must allege an exclusion to an all-risks policy as an affirmative defense, see *Kings Creek South Condo*, and the Defendant in this case did not do so, the Plaintiff is entitled to summary judgment on the issue of coverage.

The loss in this case is a covered loss. There remains a dispute as to the extent of the damages, as well as the reasonableness of Plaintiff's charges.

* * *

Criminal law—Begging for money—City ordinance prohibiting begging at bus stops and on public transportation is not unconstitutional facially or as applied to defendant—Ordinance is content-neutral, and government has significant interest in providing safe and pleasant environment at bus stop—Ordinance that does not completely prohibit all begging does not restrict more speech than necessary to achieve that interest

STATE OF FLORIDA, Plaintiff, v. DAVID WATROUS, Defendant. County Court, 20th Judicial Circuit in and for Lee County, Criminal Division. Case Nos. 19-MO-20125 and 19-MM-23981. April 29, 2020. James R. Adams, Judge. Counsel: Brian K. Morrison, Assistant State Attorney, for Plaintiff. Dylan Rettig, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE comes before the Court on Defendant's "Motion To Dismiss Trespass Order Is Unconstitutional As Applied," filed by counsel on December 13, 2019. Having reviewed the motion, the State's motion in opposition, the case file, the applicable law, and having heard argument on February 24, 2020, the Court finds as follows:

1. Defendant was charged by information in 19-MO-20125 with begging or soliciting alms in violation of Fort Myers municipal ordinance MO54-297. Defendant was charged by information in 19-MM-23981 with trespass.

2. In the the motion to dismiss, Defendant argued that the trespass order was an unconstitutional violation of his right to travel. The Court notes that the record reflects that 19-MM-23981 was dismissed on February 11, 2020, and Defendant's argument related to the trespass order is moot.

3. The State argued that the municipal ordinance is constitutional, citing *Smith v. City of Fort Lauderdale,* 177 F.3d 954 (11th Cir. 1999).

4. The standard for considering a motion to dismiss is whether there are no material facts in dispute and whether in a light most favorable to the State, the evidence establishes a prima facie case of guilt.

5. Fort Myers municipal ordinance MO54-297(b) provides that a person is prohibited from asking, begging or soliciting alms in any public transportation vehicle, or at any bus stop.

6. A court reviews the constitutionality of a statute by presuming it to be constitutional, construing its provisions to effect a constitutional outcome where possible. *Abdool v. Bondi,* 141 So.3d 529, 538 (Fla. 2014) [39 Fla. L. Weekly S421a]. A facial challenge requires the court to consider only the text of the statute, and the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied. *Id.* A statute cannot be invalidated as facially unconstitutional simply because it could operate unconstitutionally under hypothetical circumstances. *Id.*

7. The ordinance's limitations on begging restricts speech in a public forum because begging is speech entitled to First Amendment protections. *Smith,* 177 F.3d at 956. "Even in a public forum, the government may 'enforce regulations of the time, place, and manner of expression which [1] are content-neutral, [2] are narrowly tailored to serve a significant government interest, and [3] leave open ample alternative channels of communication.' " *Id. quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 400 U.S. 37, 45 (1983).

8. A statute is content neutral if its purpose is unrelated to the content of the speech. *State v. O'Daniels,* 911 So. 2d 247, 251 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2283a], *citing Ward,* 491 U.S. at 791 (*citing Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48 (1986)). Since the ordinance here is not based on the content of speech, then an intermediate scrutiny standard is applied such that the government may impose reasonable restrictions on the time, place or manner of protected speech as long as the restrictions are narrowly tailored to serve a significant state interest and leave open ample alternative channels for communication of the information. Id. Under intermediate scrutiny, a law need not be the least restrictive means of achieving the state interest as long as the interest would be achieved less effectively absent the regulation, and the law does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.*

9. The first prong is met, since the ordinance is content neutral. As to the second prong, the government has a significant interest in providing a safe, pleasant environment for individuals waiting at a bus stop, and in eliminating nuisance activity such as begging. *Smith,* 177 F.3d at 956. As to the third prong, since the ordinance does not completely prohibit begging, the Court finds that the ordinance does not restrict more speech than necessary to achieve the government's interest. The Court declines to find the ordinance unconstitutional, facially or as applied to Defendant.

ORDERED AND ADJUDGED that the motion to dismiss is DENIED.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Stop was lawful where deputy acting on information that defendant had intentionally struck another vehicle at drive-thru of fast food restaurant and fled scene located defendant in different vehicle approaching his home, defendant drove at patrol vehicle in manner requiring deputy to take evasive action, and deputies observed that defendant had bloodshot eyes, slurred speech, flushed face, and strong odor of alcohol—Motion to suppress evidence or statements stemming from stop is denied—Medical records—Investigative subpoena—Motion to suppress subpoenaed medical records from hospital to which defendant was taken because of complaint of chest pains is denied—State demonstrated sufficient nexus between records and DUI investigation, and defendant failed to demonstrate any bad faith on part of law enforcement warranting suppression of records

STATE OF FLORIDA, Plaintiff, v. RONALD ZUL, Defendant. County Court, 20th Judicial Circuit in and for Lee County, Criminal Action. Case No. 19-CT-502727. May 7, 2020. Archie B. Hayward, Jr., Judge. Counsel: Brandon M. Greenberg, Assistant State Attorney, Office of State Attorney, Fort Myers, for Plaintiff. Daniel J. Garza, for Defendant.

ORDER DENYING DEFENDANT'S MOTIONS TO SUPPRESS

THIS CAUSE comes before the Court on Defendant's "Motion to Suppress for Lack of Reasonable Suspicion," and "Motion to Suppress Medical Records" filed December 20, 2019. Having reviewed the motions, the case file, the applicable law, and having

heard argument by the parties on February 17, 2020 and February 24, 2020, the Court finds as follows:

1. Defendant was charged with driving under the influence (DUI) 0.15 or more.

2. The State moved to subpoena Defendant's medical records from his treatment in the hospital following his arrest. Defendant objected, and following a hearing, the Court granted the State's motion.

3. Defendant argued in the motions to suppress that there was no reasonable suspicion to conduct a DUI investigation, such that any evidence, including the medical records, must be suppressed. As it relates to the medical records, Defendant argued that because he was not at the hospital for injuries related to a crash, the State could not use a medical blood draw to prove DUI and must have gotten a legal blood draw from law enforcement. Defendant cited to Fla. Stat. §316.1933(1) and (2)(a)(1); *State v. Burnett,* 536 So. 2d 375 (Fla. 2d DCA 1988); *State v. Kutik,* 914 So. 2d 484 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2534b].

4. The State argued that there was sufficient reasonable suspicion for the DUI arrest. As it relates to the medical records, the State argued that a crash was not required under Fla. Stat. §395.3025, citing *Thomas v. State,* 820 So. 2d 382 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1251a].

5. At the February 17, 2020 hearing, the State presented testimony by Deputy Hollow and Deputy Smith. Defendant presented no evidence.

6. Deputy Hollow testified that he was currently a K-9 officer and had been with the Lee County Sheriff's Office since 2004. He had extensive experience with DUI stops. In this case, he was dispatched to locate a green vehicle that had been involved in a crash at a fast food drive through, intentionally hitting and pushing the vehicle in front of it. A witness had followed the green vehicle to where it turned onto Williams Street, off of McGregor Boulevard. The witness obtained the license number of the green vehicle. Deputy Hollow responded to the address listed for the registered owner, Defendant, and observed the green vehicle at the residence. Defendant's wife stated that she believed Defendant had come home and taken her white vehicle. Deputy Hollow was about to start looking for that vehicle when he observed it coming towards him down Williams Street. He activated his lights, but Defendant did not stop and kept driving towards him, so he had to put his patrol vehicle in reverse in order to avoid getting hit. Defendant tried to drive around his patrol vehicle, but the street was too narrow and Defendant had to stop. Deputy Hollow testified that when he made contact with Defendant, Defendant was belligerent, Defendant's eyes were glossy, a strong odor of alcohol came from Defendant, and Defendant did not follow directions. Defendant denied being at the drive through, although a fast food bag was observed beside him. Defendant denied hitting any vehicles. Defendant was on the phone the entire time with someone he said was his attorney. Defendant admitted that he had been drinking, but stated that was hours ago. After about six minutes, Deputy Smith arrived, and took over because he has advanced training in DUI investigations. Defendant became more irate and belligerent. Defendant was allowed to remain on the phone with the attorney. Defendant then complained of chest pains.

7. On cross-examination, Deputy Hollow testified that he turned on his lights and spotlight when he observed the white vehicle. There was no other traffic on that street, so Defendant should have known he was being stopped, or at least have pulled over for an emergency vehicle, but Defendant did not. Deputy Hollow stated that Defendant's eyes were glossy, his face was red and flushed, he was repeating himself, and he was belligerent. He did not know if Defendant's physical symptoms could be signs of a medical emergency. He had observed other people pretend to have a medical emergency in an attempt to avoid an arrest. He did not know if Defendant had a real medical emergency because he did not go to the hospital with Defendant.

8. Deputy Smith testified that he had been with the Lee County Sheriff's Office for seven years. He works in the traffic unit, responding to crashes or DUIs within the county. He was not yet a Drug Recognition Expert (DRE), but had taken the beginning courses. In this case, he was dispatched to where Defendant was stopped. He was informed by Deputy Hollow about the incident at the drive through and that Defendant had fled. When he made contact with Defendant, Defendant had bloodshot, watery eyes, slowed and slurred speech, and a strong odor of alcohol emanating from his face. Defendant was on the phone with his attorney. Defendant denied knowing why he was stopped. Deputy Smith stated that he learned while at the scene that the complainant at the drive through did not wish to pursue a crash report or investigation. Defendant admitted he had been drinking, but said it was about five hours ago. Defendant became more agitated as time went on. Deputy Smith testified that he made his own observations, and Deputy Hollow's observations had no bearing on his determination to begin a DUI investigation. On cross-examination, Deputy Smith stated that Defendant's physical symptoms could individually have other reasons than impairment. Defendant claimed a medical issue, and was taken to the hospital. Deputy Smith did not know of any medical issue that would cause an odor of alcohol.

9. In determining whether a stop should be suppressed, the only determination is generally whether probable cause existed for the stop. *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. A violation of a traffic law provides sufficient probable cause to render any subsequent search and seizure reasonable. *Id.* The reasonableness of the stop does not depend on the subjective motivations or beliefs of the officer conducting the stop. *State v. Thomas,* 109 So.3d 814, 817 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D372a]. The probable cause standard does not require that the belief be correct, but only requires a practical probability as understood by law enforcement. *State v. Coley,* 157 So.3d 542, 544 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D511a] (internal citations omitted).

10. The Court has reviewed the testimony and finds the testimony of the officers to be credible. Deputy Hollow had information from fellow officers that Defendant had intentionally struck and attempted to push the vehicle ahead of him at a drive through, then fled. A witness followed Defendant and obtained his license plate number. Defendant attempted to evade discovery by switching vehicles. When Deputy Hollow located Defendant, Defendant did not stop for Deputy Hollow, and kept driving at his patrol vehicle. Upon contact with Defendant, Deputy Hollow and Deputy Smith testified they observed glossy, red, bloodshot eyes, slurred speech, red and flushed face, and a strong odor of alcohol from his face. These are sufficient indicia of DUI to constitute probable cause. *State v. Kliphouse,* 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. Defendant denied the drive through incident despite having a fast food bag beside him. Defendant did not allege any medical issue to either officer the entire time they spoke to him prior to beginning the DUI investigation, and only alleged a medical issue when he was being arrested. Under the totality of the circumstances, the Court finds that the stop was lawful, there was probable cause of DUI, and that there is no basis for suppression of evidence or statements stemming from that stop.

11. As to the medical records, the Court finds there is also no basis for suppression of Defendant's records obtained by the State through the subpoena. The State presented record evidence to demonstrate a compelling state interest, and that Defendant's medical records were relevant to the DUI investigation. *See Guardado v. State,* 61 So.3d 1210, 1214 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1087a]. Thus, the State demonstrated a sufficient nexus between the medical records and the DUI investigation. There was no legal blood draw here

pursuant to Fla. Stat. §316.1933, so Defendant's arguments are misplaced. The State sought Defendant's medical blood records pursuant to Fla. Stat. §395.3025, and the motion was granted after notice to Defendant, Defendant's objection, and a full and fair hearing. Defendant failed to demonstrate any bad faith on the part of law enforcement or the State would require suppression of the properly obtained medical blood records. *See, e.g. State v. Salle-Green,* 93 So.3d 1169, 1173 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1853d].

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motions to suppress are DENIED.

* * *

Volume 28, Number 3
July 31, 2020
Cite as 28 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, disqualification—Family member affiliations—A judge may write a foreword to a memoir written by a family member as long as the judge is not identified as a judge

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-11. Date of Issue: May 8, 2020.

ISSUE

Whether a judge may write a foreword to a memoir written by a family member.

ANSWER: Yes.

FACTS

A family member of the inquiring judge asked the judge to write a foreword for the family member's memoir. The foreword will not state that the judge is a judge. The memoir will be self-published through an online publishing company and will be available for sale on commercial websites.

DISCUSSION

Several times, including recently, we addressed inquiries asking whether a judge may write a book. *See* Fla. JEAC Ops. 20-01 [27 Fla. L. Weekly Supp. 1055a] and 19-18 [27 Fla. L. Weekly Supp. 336a]. In those opinions we explained that a judge may do so subject to certain limitations.

This inquiry asks whether the inquiring judge can write the foreword to a book written by another person. We believe a judge may do so subject to the same limitations discussed in our prior opinions and certain other considerations.

Those other considerations were succinctly discussed by the Connecticut Committee on Judicial Ethics. *See* Conn. Comm. On Jud. Ethics Op. 2010-15 [17 Fla. L. Weekly Supp. 859a] (available at **https://www.jud.ct.gov/Committees/ethics/sum/2010-15.htm** (last visited May 6, 2020)). That committee included three specific conditions when responding to a judge asking whether the judge could write a foreword to a book.

First, they stated the judge should, and we suggest must, "maintain editorial control over the content of the foreword and should retain the right to review any biographical information that may be published in connection with the book even though in this case his/her official title will not appear in the book." Similarly, in a prior opinion we discussed the need to maintain editorial control even after submission of a writing. *See* Fla. JEAC Ops. 12-34 [20 Fla. L. Weekly Supp. 190a]. Additionally, as with the Connecticut opinion, the inquiring judge stated that the foreword and memoir will not identify the inquiring judge as a judge. If it did our answer may be different. In that situation, it could be considered using the prestige of judicial office to promote another's private interests, contrary to Canon 2B.

Second, they stated the judge must "review the entire contents of the book and satisfy him/herself that authoring a foreword to the book would not cast doubt on his/her impartiality in future cases or reflect a predisposition with respect to particular cases or issues or regarding any party or witness that may appear before the Judicial Official."

Third, they suggested the judge must, at a minimum, disclose the relationship if the author appears as a party in a judicial proceeding before the judge.

If the judge satisfies these three conditions, and those we stated in prior opinions about judicial authors, the judge may write a foreword to a book. Of course, the judge must be mindful of the Florida Code of Judicial Conduct when doing so.

REFERENCES

Fla. Code Jud. Conduct, Canons 2B
Fla. JEAC Ops. 20-01, 19-18, 12-34.
Conn. Comm. On Jud. Ethics Op. 2010-15.

* * *

Judges—Judicial Ethics Advisory Committee— Letters— Recommendations—A judge is permitted to use judicial letterhead to submit a letter to law school on behalf of a student explaining unique family circumstances of which judge has knowledge so student may maintain financial aid

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-12. Date of Issue: May 8, 2020.

ISSUE

May a judge submit a letter to a law school on behalf of a student explaining unique family circumstances of which the judge has knowledge so that the student can maintain his financial aid?

ANSWER: Yes.

If the judge is permitted to write the letter, may it be done on judicial letterhead?

ANSWER: Yes.

FACTS

The inquiring judge was previously in private practice. During that time the judge represented a woman in family law proceedings that involved the woman's husband and father of her son. Because of this representation, the judge has personal knowledge that husband/father became estranged from the family and his whereabouts are currently all but unknown. The son is now attending law school but to maintain his financial aid the school requires detailed information from both parents. Although the situation regarding the father has been explained to the school by the family, they still require letters from "objective" individuals outside the family confirming the father's absence. The judge has been asked by the family to write such a letter to the law school so that the financial aid can continue.

DISCUSSION

Canon 2 of the Code of Judicial Conduct governs this inquiry. Canon 2B of the Code provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." However, the commentary to Canon 2B creates an exception for letters of recommendation or reference. It provides in relevant part, as follows:

> Although a judge shall be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

This commentary has led the JEAC to opine that judges may, based upon personal knowledge, write letters of recommendation or those of a similar nature for a variety of reasons. These include to a potential employer or as commendation to an employee's personal file, Fla. JEAC Op. ***10-29*** [18 Fla. L. Weekly Supp. 132a], for applicant for law school fellowship, Fla. JEAC Op. ***07-06*** [14 Fla. L. Weekly Supp. 591a], applicant for law school, Fla. JEAC Op. ***79-03***, letters of commendations, Fla. JEAC Op. ***94-45***, to judicial nominating commissions, Fla. JEAC Ops. ***86-02***, ***89-15***, ***91-28***, ***03-09*** [10 Fla. L. Weekly Supp. 1065a], and to the Florida Department of Elderly Affairs acknowledging that a professional guardian has demonstrated competency, intended to be sent by the guardian seeking waiver of a competency examination, Fla. JEAC Op. ***05-04*** [12 Fla. L. Weekly Supp. 507a].

Judges, however, are not allowed by the judicial code to write such letters for investigatory and/or adjudicatory proceedings where legal

rights, duties, privileges, or immunities would be decided. Fla. JEAC Op. ***94-45***. Therefore, the JEAC has opined that a judge could not write a letter of recommendation or good character to the Department of Business and Professional Regulation where the privilege of obtaining a professional license would ultimately be determined, Fla. JEAC Op. ***13-08*** [20 Fla. L. Weekly Supp. 733a], in criminal sentencing proceedings, Fla. JEAC Op. ***10-34*** [18 Fla. L. Weekly Supp. 321a]; *see also In re Fogan*, 646 So. 2d 191 (Fla. 1994); *In re Able*, 632 So. 2d 600 (Fla. 1994), recommending parole to the Parole and Probation Commission, Fla. JEAC Op. ***77-17***, attorney disciplinary action by the Florida Bar, Fla. JEAC Op. ***04-22*** [11 Fla. L. Weekly Supp. 761a], to the Florida Bar in connection with disciplined lawyer seeking re-admission to the Bar, Fla. JEAC Op. ***88-19***, to Clemency Board or Board of Bar Examiners, Fla. JEAC Op. ***82-15***, or for judge's personal business interests or matters, Fla. JEAC Ops. ***81-08***, ***92-02***, ***96-14***.

The type of letter involved in this inquiry, while not one of recommendation, is more akin to those letters that are allowed by the Code and by the JEAC opinions referred to above. This letter will contain the judge's recollections of why the student's father was not active in his son's life at the time of representation, but will not speculate on anything outside the judge's personal knowledge. This letter will not be sent in a matter where there is an adjudicatory or investigative proceeding involving legal rights. Although the letter may qualify a student for continued financial aid funds from private or public organizations, this is not the type of "privilege" or "rights" contemplated by either the Code or the JEAC opinions. The prohibited type of privileges are those which will benefit an individual or ongoing business interest who may be seeking to be granted a benefit or license the likes of which, if awarded, would bestow on petitioner a legal right. *See, e.g.*, JEAC Op. ***13-08*** [20 Fla. L. Weekly Supp. 733a].

As to whether the judge may write the letter on judicial letterhead, the commentary to Canon 2B states:

> Similarly, judicial letterhead must not be used for conducting a judge's personal business, although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.

In the past, this committee has allowed the use of judicial letterhead for a number of reasons including for a clerk's commendation letter, Fla. JEAC Op. 94-45, in support of a school districts application for a federal grant, JEAC Op. 12-35 [20 Fla. L. Weekly Supp. 191a], and to recommend a former staff attorney for a law school scholarship, JEAC Op. 07-06 [14 Fla. L. Weekly Supp. 591a]. In the 07-06 we noted specifically:

> Again, Canon 2B of the Code of Judicial Conduct states that a judge should not lend the prestige of judicial office to advance the private interests of others. However, even though letters of recommendation written by a judge are intended to advance the private interests of another, the Commentary to Canon 2B specifically permits judges to write reference letters based on the judge's personal knowledge, and the judge may use official stationery for the purpose.

While this situation cannot be said to be a letter of personal "recommendation," it is comparable in that the judge will be sharing personal knowledge of an individual's situation in order to assist that person in some endeavor not related to a judicial or administrative proceeding. For this reason we find no prohibition under the Canons that would prevent the judge from using judicial letterhead to respond to a request for information about a student's predicament related to financial aid as long as it is based on personal knowledge. Further, the inquiring judge may write that letter to the school on judicial letterhead.

REFERENCES

In re Fogan, 646 So. 2d 191(Fla. 1994); *In re Able*, 632 So. 2d 600 (Fla. 1994).
Fla. Code of Jud. Conduct, Canons 2, 2B.
Fla. JEAC Ops. , 13-08, 12-35, 10-34, 10-29, 07-06, 05-04, 04-22, 03-09, 96-14, 94-45, 92-02, 91-28, 89-15, 88-19, 86-02, 79-03, 77-17

* * *

Judges—Judicial Ethics Advisory Committee— Elections— Fundraising—A judicial candidate may record a video describing qualifications and asking for voter support to be placed on an official campaign website where candidate's official campaign committee will be including a link for donations, so long as candidate's own words do not extend to asking for financial support

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion No. 2020-13. Date of Issue: May 13, 2020.

ISSUE

May a judicial candidate include on a campaign website (a) a video of the candidate personally describing experience, qualifications, and similar subjects; (b) an invitation to potential followers to watch the campaign website for updates and to submit questions to the candidate; and (c) personal requests for support in both English and Spanish?

ANSWER: Yes, so long as the candidate's own words do not extend to asking for donations or other financial support, and the content of the candidate's answers to voters' questions do not intrude into promises of future conduct or other areas disfavored by the Code of Judicial Conduct.

FACTS

The inquiring candidate and the candidate's campaign committee are following the modern trend of setting up a website. A total of four questions have been put to us, all regarding proposed content for that site. First, the candidate asks if it is permissible to post videos explaining the candidate's "background, experience, and why [the candidate] is seeking election." The candidate assures us that these videos themselves will not make any request for or mention of financial contributions. However, the website where they are to be posted will.

The inquiring candidate also wants to know whether it would be acceptable, in the course of composing the videos, to "invite viewers . . . to follow the campaign on social media and to ask questions of the candidate to be responded to in later videos." Third, the inquiring candidate asks whether it would be permissible for the candidate to employ the word "support" in the presentations. The candidate has taken care to distinguish between asking for *financial* support, which the candidate knows not to do, and more generalized support—requests to vote for the candidate, telling friends to do so, and similar activities. Finally, the candidate contemplates making a video in Spanish, and asks if it would be permissible to substitute the word *apoyo,* which translates as "support."

DISCUSSION

What judicial candidates seeking electoral support may and may not say or do is the subject of Canon 7 of the Florida Code of Judicial Conduct. The inquiring candidate in this case clearly understands that a judicial candidate cannot "personally solicit campaign funds or solicit attorneys for publicly stated support." Fla. Code Jud. Conduct, Canon 7C(1). Instead, such matters must be delegated to "committees of responsible persons." *Id.* However, as we made clear in Fla. JEAC Op. 16-13 [24 Fla. L. Weekly Supp. 583a], this does not mean that the candidate cannot ask for voter support *per se.* There we saw no reason to preclude the inquiring candidate from "only . . . encourag[ing] voters to vote generally, and to cast their ballot for the candidate

specifically. In this sense, a Facebook page is no different from a billboard or a television commercial. The heart of the democratic process is candidates stumping for votes. 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."[1] *See also* Fla. JEAC Ops. 14-04 [21 Fla. L. Weekly Supp. 459a] and 19-22 [27 Fla. L. Weekly Supp. 493a].

In the present case this Committee believes that the information the candidate seeks to broadcast is consistent with what is to be expected from campaign literature or public speeches given at "meet the candidates" forums. Fla. JEAC Op. 16-13's acknowledgment that candidates may ask people to vote for them would offer very little if they could not also give voters reasons why they should consider doing so. Needless to say, this does not change regardless of what languages may be employed. As for the inquiring candidate's proposal to invite readers of the website to ask questions, nothing in Canon 7 prohibits this either. We think such periodic updates are inherent in the nature of political advertising. The only restrictions that Code and case law would pose would be on the *content* of the answers. We encourage the inquiring candidate to become familiar with Canon 7A(3)(e), which does hold that certain subjects are off limits.

The candidate's inquiry mentions such familiar social media sites as Facebook, Twitter, Instagram, and YouTube. We note that in Fla. JEAC Op. 18-16 [26 Fla. L. Weekly Supp. 253a] we did not preclude a judicial candidate from personally utilizing such services *if* only asking for non-monetary support. We are given the impression, however, that the inquiring candidate's "committee of responsible persons" will be maintaining any campaign-related websites or pages, and *will* be using them to solicit financial support. Fla. JEAC Ops. 14-04 [21 Fla. L. Weekly Supp. 459a] and 18-16 [26 Fla. L. Weekly Supp. 253a] authorize this procedure. In essence the current inquiry is whether the candidate may personally contribute to that sort of website by offering biographical information and personal requests for votes rather than dollars.

Fla. JEAC Op. 19-22 [27 Fla. L. Weekly Supp. 493a] cautioned candidates against personally "promoting" any campaign-related links that ask for money. "[T]he candidate may not 'promote' the campaign's website." However, apart from requiring disclaimers if the site were to publish pictures of the candidate interacting with other elected officials, the opinion did not elaborate upon the permissible extent of a candidate's personal behind-the-scenes involvement in the forma of the site. We believe, however, that Fla. JEAC Op. 20-21provides sufficient guidance and would allow the candidate to make the videos.

The question asked in Fla. JEAC Op. 10-21 [18 Fla. L. Weekly Supp. 123a] was specifically worded as follows: "Does Canon 7 . . . allow the placement of the word 'contribute' underneath the words 'volunteer, endorse, education, experience, family and photos' on the candidate's committee's home page on the internet?" We answered in the affirmative, provided that "the site is clearly managed by the committee established under Canon 7C(1) and the site does not give the appearance that the candidate is managing the site or its content." The reference to education, experience, and family photos contemplates materials and information that a candidate would be expected to provide personally. We can perceive no meaningful distinction between a still photo and a video, which might be analogized to a television commercial. The use of commercials does not violate the Code, so long as the candidate carefully crafts the language to be used therein. *See* Fla. JEAC 98-27.

In sum, we determine, first, that the website or page must make clear to the viewing public that it is maintained by a committee working *on behalf of* the candidate and that the candidate is not the one making the solicitation. *See* Fla. JEAC Op. 10-21 [18 Fla. L. Weekly Supp. 123a]. To be effective, however, any such site must provide information favorable to the candidate that is likely to assist potential voters in making their selection. Common sense dictates that this may not easily be done without personal input from the candidate. Successful advertising contemplates "putting a face with a name" to try and persuade the public that a candidate has an appealing personality, a professional demeanor, the background to perform official duties capably, and any other attributes voters may reasonably deem important.

REFERENCES

Fla. Code Jud. Conduct, Canons 7A(c)(3) and 7C(1)
Fla. JEAC Ops. 19-22, 18-16, 18-04, 16-13, 14-04, 10-21, 98-27

[1]We have gone so far as to approve of a judicial candidate personally asking voters to sign a petition which would allow the candidate to qualify for election without paying a filing fee. *See* Fla. JEAC Op. 18-04 [25 Fla. L. Weekly Supp. 991a].

* * *