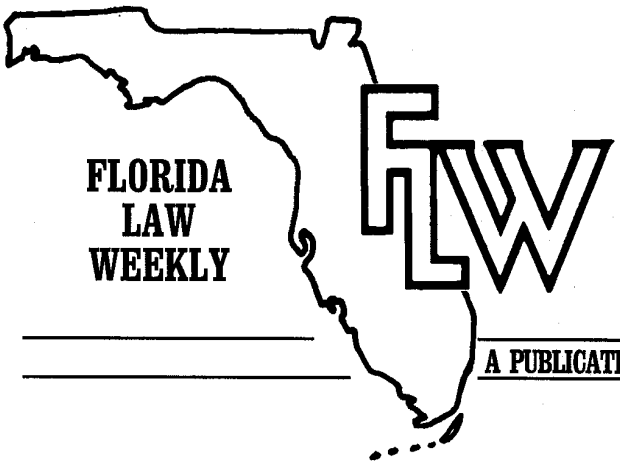
Volume 28, Number 4, August 31, 2020



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 249-364

Reports of Decisions of:

THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
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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.

- **SPECIAL TAXING DISTRICT—CONTRACTS—COMPETITIVE BIDDING—BID PROTEST. An unsuccessful bidder sought relief through a petition for writ of mandamus. The circuit court treated the petition as one seeking certiorari review, finding that mandamus was not appropriate because the petitioner was asking the appellate court to determine disputed facts and because the selection of the successful bid involved the exercise of discretion by the district. Because a special taxing district is not an "agency" within the meaning of the Administrative Procedure Act, it is not subject to the APA's statutory requirements for procurement and is required only to avoid acting in an arbitrary, capricious, illegal, or fraudulent manner. The court concluded that the petitioner received due process where the district investigated the large discrepancy between one-time expenditures in the parties' bids to ensure that they were fairly compared, and all parties were afforded notice and an opportunity to be heard at a bid protest hearing. A fair comparison of the bids demonstrated that the petitioner's bid was not the lowest bid. The district did not depart from the essential requirements of law in denying the bid protest, and the denial was supported by competent substantial evidence.** *BUCCANEER LANDSCAPE MANAGEMENT CORPORATION v. BLOOMINGDALE SPECIAL TAXING DISTRICT. Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed May 19, 2020. Full Text at Circuit Courts—Appellate Section, page 287a.*
- **CREDITORS' RIGHTS. Statutes authorizing a judgment creditor to levy upon "any property" of a judgment debtor "not exempt" from execution authorizes a judgment creditor to execute on choses in action owned by debtor, including the judgment debtor's claim against the creditor.** *LYON FINANCIAL SERVICES, INC. v. NATIONAL MEDICAL IMAGING, LLC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed April 28, 2020. Full Text at Circuit Courts—Original Section, page 311a.*

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Bold denotes decision by circuit court in its appellate capacity.

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TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

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TABLE OF CASES REPORTED (continued)

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TABLE OF STATUTES CONSTRUED

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

TABLE OF STATUTES CONSTRUED (continued)

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TABLE OF CASES TREATED

Case Treated / In Opinion At

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TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

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REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

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DISPOSITION ON APPELLATE REVIEW

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

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Volume 28, Number 4
August 31, 2020
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Criminal law—Driving under influence—Evidence—Breath test—Independent blood test—Reasonable assistance—Officer's mention of prior instance in which another person obtained blood test that revealed higher alcohol level than was measured by breath test was not so egregious as to hinder defendant's decision on whether to obtain blood test where officer also correctly informed defendant that he would have to pay for independent test and that officer would provide him with a list of numbers to call—Denial of motion to suppress is affirmed

THOMAS BRAMMER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 1st Judicial Circuit (Appellate) in and for Santa Rosa County. Case No. 19-AP-42. L.T. Case No. 18-CT-2201. May 5, 2020. On appeal from an order of the Santa Rosa County Court. Jose Giraud, County Judge.

(DUNCAN, J. SCOTT, J.) The Appellant (herein "Brammer") appeals the County Judge's order denying his Motion to Suppress results of a breath test that was administered to Brammer after his arrest for Driving Under the Influence. For the reasons explained below, the Court affirms the trial court's decision to deny the Motion to Suppress.

Brammer was arrested on suspicion of Driving Under the Influence. He filed a Motion to Suppress his breath test results arguing the officer interfered with his right to exercise his statutory right to request a blood test pursuant to Section 1932(1)(f)(3), Florida Statutes. A hearing was held with the videoed encounter being the only evidence received. Neither the officer nor Brammer testified at the hearing.

The record indicates that Brammer was taken into the intoxilyzer room at the Gulf Breeze Police Department. Brammer provided an initial breath sample and was informed by the officer that he was over the legal limit. Brammer then asked the officer whether he had to wait until he got to Milton to do a blood test. The officer explained that if Brammer wanted to receive a blood test he would have to pay for it and that he could give Brammer a list of numbers to call. At this point, the officer mentioned to Brammer a previous case he investigated where a person requested a blood test, underwent the test, and that the blood alcohol level came out higher than what had registered on the intoxilyzer. The officer then told Brammer that he was not trying to deter him from receiving a blood test and that if you "really want to do that, again, I'll give you a list of numbers, if they can be here within like twenty or thirty minutes, we can do that." The trial court denied the motion to suppress. Brammer entered a plea of no contest but reserved his right to appeal the trial court's ruling which was stipulated to as being dispositive.

At the outset it is noted that a trial court's ruling on a motion to suppress comes to an appellate court clothed with a presumption of correctness, and such appellate court must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining that ruling. *State v. Gandy,* 766 So.2d 1234, 1235 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2330a]. Because a motion to suppress presents mixed questions of law and fact "an appellate court must determine whether competent, substantial evidence supports the lower's court factual findings, but the trial court's application of the law to the facts is reviewed de novo." *Id.* (quoting from *State v. Murray,* 51 So.3d 593, 594 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b].

Brammer claims that the officer's comments in the intoxilyzer room interfered with his right to exercise his statutory right to request a blood test pursuant to Section 1932(1)(f)(3), Florida Statutes. Section 316.1932(1)(f)(3) states:

> "The person tested may, at his or her own expense, have a physician, registered nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician, or other person of his or her own choosing administer an independent test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of alcohol in the person's blood or breath or the presence of chemical substances or controlled substances at the time alleged, as shown by chemical analysis of his or her blood or urine, or by chemical or physical test of his or her breath. The failure or inability to obtain an independent test by a person does not preclude the admissibility in evidence of the test taken at the direction of the law enforcement officer. *The law enforcement officer shall not interfere with the person's opportunity to obtain the independent test and shall provide the person with timely telephone access to secure the test, but the burden is on the person to arrange and secure the test at the person's own expense*."

(emphasis added).

The question presented is whether the officer interfered with Brammer's opportunity to obtain an independent test by mentioning a prior instance involving another person where the blood test revealed an alcohol level higher than what the intoxilyzer breath test indicated. The trial court, while noting that the officer should have refrained from making a statement, found that the officer's comment about the results of a prior blood test was not an attempt to dissuade Brammer from requesting a blood test. This Court must accept that finding. *See Gaines v. State,* 155 So.3d 1264, 1268 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D386a] ("(t)he appellate court will accept the trial court's factual findings if they are supported by competent substantial evidence.").

Even with the trial court's finding that there was no intent to interfere, Brammer argues that the officer's comments still constitute interference as a matter of law. In addressing this argument, it is important to note that the statute's plain language focuses on interference with the opportunity to request a blood test. In this case, Brammer's request to receive a blood test was not blocked. Once Brammer mentioned a blood test the officer correctly told him he would have to pay for it and that the officer would provide a list of numbers for Brammer to call. The officer did not refuse Brammer's request for information about blood tests. Nor did the officer make any suggestion that a request for a blood test would not be accepted. The officer's recounting of another experience involving breath test and blood test results was not so egregious that it hindered Brammer's decision of whether to obtain a blood test. The statements may have been a poor choice of words, but such statements cannot be said as a matter of law to constitute interference with Brammer's opportunity to request a blood test under Section 316.1932(1)(f)(3).

Therefore, the trial court's ruling is AFFIRMED.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Officers who observed licensee stop twice in middle of interstate highway ramp to check her cell phone had probable cause to stop licensee for careless driving—No merit to argument that hearing officer erred in relying on conclusory documentary evidence where hearing officer relied on uncontested documents in which officer provided reasons for finding that licensee drove carelessly—Detention—Officers had reasonable suspicion to detain licensee for DUI investigation where, in addition to her driving pattern, licensee had moderate odor of alcohol, flushed face, slurred speech, glassy eyes, and bottle of alcohol on passenger side floor of vehicle—Breath test—No merit to argument that breath test operator was not properly certified—Hearing officer—Departure from neutrality—No merit to argument that licensee was not afforded right to hearing with appearance of impartiality because departmental training allegedly evidences bias in favor of law enforcement and department and against drivers

CHRISTY LYNN SMITH, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY

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AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2018-AP-109, Division AP-A. May 15, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins and Susan Z. Cohen; and John N. Kessenich, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM) Petitioner seeks review of the Department's ruling upholding her driver's license suspension following her arrest for Driving Under the Influence ("DUI"). Petitioner raises four arguments for review: (1) Whether or not the Department failed to comply with the essential requirements of the law and failed to afford due process when the hearing officer determined there was competent, substantial evidence to justify Officers Asaro and Elder's initial stop of Petitioner; (2) Whether or not the Department's order failed to comply with the essential requirements of the law and failed to afford due process when the hearing officer determined there was competent, substantial evidence to detain Petitioner for a DUI investigation; (3) Whether or not the Department complied with the essential requirements of the law and failed to afford due process when the hearing officer found Lieutenant Nye properly certified; and (4) Whether or not the Department failed to comply with the essential requirements of the law and failed to afford Petitioner her due process right to a hearing with the appearance of impartiality.

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

(1)

Petitioner contends the Department failed to comply with the essential requirements of the law and failed to afford due process when the hearing officer determined there was competent, substantial evidence to justify Officers Asaro and Elder's initial stop of Petitioner for Careless Driving.

Section 316.1925(1), Florida Statutes (2018), defines Careless Driving:

> (1) Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances, so as not the endanger the life, limb, or property of any person. Failure to drive in such a manner shall constitute careless driving and a violation of this section.

"[A]ny person" includes pedestrians, other vehicles, and the driver. *See Baden v. State*, 174 So. 3d 494, 496 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b] (finding law enforcement's stop of driver for a careless driving violation was justified because the driver endangered pedestrians, parked cars, *and herself*). An argument similar to Petitioner's also has been rejected by the Fourth Circuit, and this Court finds that opinion's reasoning to be persuasive. *Odom v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 753a (Fla. 4th Cir. May 10, 2006).

In this case, competent, substantial evidence supported the hearing officer's finding that Officers Asaro and Elder had probable cause to stop Petitioner for Careless Driving. The record shows Officer Asaro witnessed Petitioner swerve on the southbound ramp, as well as stop her vehicle two times in the middle of the ramp and impede the flow of traffic. As she stopped the vehicle, Petitioner checked her mobile device. The above facts support a finding that Petitioner failed to operate her vehicle in a careful and prudent manner so as not to endanger the life, limb or property of any person.

Petitioner also takes issue with the hearing officer's reliance on documentary evidence in the absence of Officers Asaro or Elder's testimony. She argues the documentary evidence contains conclusory allegations that Petitioner committed a Careless Driving violation, and conclusions cannot support a finding of competent, substantial evidence.

"[A] formal review may be conducted without any witnesses at all, and a hearing officer's decision may be based solely upon the documents submitted by the arresting agency." *Dep't of Highway Safety and Motor Vehicles v. Saxlehner*, 96 So. 3d 1002, 1007 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1932a] (citing § 322.2615(11), Fla. Stat. (2020)). Further, the hearing officer relied on uncontested, documentary evidence. Officer Asaro provided reasons for finding Petitioner drove carelessly. He observed Petitioner travelling on the southbound ramp of Interstate 95. Petitioner stopped in the middle of the ramp and checked her cell phone.

(2)

Petitioner next argues there was not competent, substantial evidence to detain Petitioner for a DUI investigation.

Law enforcement may temporarily detain a driver for a DUI investigation based on reasonable suspicion. *State v. Taylor*, 648 So. 2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b]. A reasonable suspicion "is one which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience." *State v. Davis*, 849 So. 2d 398, 400 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1477a]. In *Origi v. State*, 912 So. 2d 69, 71, 72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a], the court found the police officer had sufficient reasonable suspicion to detain the driver for a DUI investigation where the latter drove at a high rate of speed, smelled of alcohol, and had bloodshot eyes. *See also Mendez v. State*, 678 So. 2d 388, 390 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1592a] (finding that the officer was justified in conducting a DUI investigation where the driver's face was flushed, she had bloodshot eyes, and her vehicle was illegally parked).

Here, competent, substantial evidence supported the hearing officer's finding that law enforcement had reasonable suspicion to detain Petitioner for a DUI investigation. Petitioner twice stopped her vehicle in the middle of a ramp. In addition to her driving pattern, there is record evidence that Petitioner slurred her words and had a bottle of alcohol on the passenger side floor of the vehicle. Officer Asaro also noted in the DUI Worksheet that Petitioner had a moderate odor of alcohol, a flushed face, and glassy eyes.

(3)

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

(4)

Petitioner's fourth argument regarding the right to a hearing with the appearance of impartiality has been repeatedly rejected by the Fourth Circuit. *See e.g., Meadows v. Dep't of Highway Safety and Motor Vehicles*, 26 Fla. L. Weekly Supp. 699a (Fla. 4th. Cir. Sept. 27, 2018); *Edward Baker Eman v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-AP-000056-XXXX, (Fla. 4th Cir. May 22, 2017); *Spear v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-CA-000579-XXXX (Fla. 4th Cir. June 15, 2017); *Bruschi v. Dep't of Highway Safety and Motor Vehicles*, 16-2017-AP-000065-XXXX

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(Fla. 4th Cir. Oct. 5, 2017). While not binding authority, this Court finds persuasive the reasoning in those opinions. Accordingly, Petitioner's claim is denied.

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

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Evidence—Expert—Exclusion of affidavit

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI-DADE COUNTY MRI CORP., a/a/o Maria Morales, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-275-AP-01. L.T. Case No. 13-119437 SP 23 (04). June 23, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Alexander S. Bokor, Judge. Counsel: Michael Neimand, House Counsel for United Automobile Insurance Company, for Appellant. Chad A. Barr, Law Offices of Chad A. Barr, P.A., for Appellee.

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

OPINION

(PER CURIAM.) (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider. Here, the trial court rejected the conflicting affidavit offered by UAIC of Dr. Edward Dauer. As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to exclude UAIC's conflicting affidavit on whether the medical bills at issue were reasonable in price. Taking UAIC's excluded affidavit into account, it was error to grant summary judgment. *See United Auto. Ins. Co. v. Miami-Dade MRI a/a/o Bermudez*, 2018-164 (Fla. 11th Cir. Ct. June 3, 2020) [28 Fla. L. Weekly Supp. 299a]; *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). Accordingly, the summary judgment and final judgment entered below are hereby **REVERSED**, and this cause is **REMANDED** to the trial court.

Appellee's Motion for Attorney's Fees is **DENIED**. Appellant's Motion for Attorney's Fees is conditionally **GRANTED** (conditioned upon Appellant ultimately prevailing and the enforceability of the proposal for settlement) and **REMANDED** to the trial court to fix amount.

[1]Judge de la O did not participate in oral argument.

* * *

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Municipal corporations—Permits—Conditional use—Docks—Testimony of neighbors of condominium unit owner applying for conditional use permit to build dock was not competent substantial evidence supporting denial of permit where opinion testimony was not backed up by facts—Further, fact that condominium complex is grandfathered nonconformity in area zoned for single-family residential homes has no bearing on compatibility of docks with city land use plan

HARBOR VILLAS AT DUNEDIN CONDOMINIUM ASSOCIATION, INC., et al., Petitioners, v. CITY OF DUNEDIN, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000044AP-88B. UCN Case No. 522019AP000044XXXXCI. April 22, 2020.

ORDER AND OPINION

Petitioners challenge the City of Dunedin's Board of Adjustment and Appeal's decision to deny an application for a permit to install a dock. For the reasons set forth below, the Petition for Writ of Certiorari is granted.

Facts and Procedural History

Petitioner Michael Rega owns two condominium units in the Harbor Villas at Dunedin condominium complex. In May 2019, Petitioner Rega submitted an application for a conditional use permit for the construction of a multi-use dock at the condominium.[1] Harbor Villas is located in a district that is zoned for single-family residential homes; however, the condominium was grandfathered in as a nonconforming use. On May 22, a hearing was held before the Dunedin Board of Adjustment and Appeals ("Board"). The Board heard testimony from the City's Director of Planning and Development, Petitioner Rega, and several neighbors. The Director recommended granting the application. The Board, however, voted 4 to 1 to deny the application. Petitioners then filed the instant Petition for Writ of Certiorari.

Standard of Review

The circuit court reviews a quasi-judicial decision of a local government for three elements: (1) whether the local government provided due process, (2) whether the local government followed the essential requirements of law, and (3) whether the local government's decision was supported by competent, substantial evidence. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC,* 95 So. 3d 1037, 1039 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a].

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Discussion

Petitioners maintain that the Board departed from the essential requirements of law in its decision to deny the application for a dock, and that the Board's decision is not supported by any competent and substantial evidence. We write only to address the lack of competent, substantial evidence.

Determining if competent, substantial evidence supports the Board's decision "involves a purely legal question: whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). Upon certiorari review, a court "is not permitted to go farther and reweigh that evidence . . . or substitute its judgment about what should be done." *Id.* Although this Court must only look for evidence that supports the decision below, that evidence still needs to be competent and substantial. Competent evidence must "be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See Dept of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] (quoting *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence must be "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Id*. "[F]indings must be based on something more than mere probabilities, guesses, whims, or caprices, but rather on evidence in the record that supports a reasonable foundation for the conclusion reached." *Id.*

The order on appeal states that the application does not meet approval criteria numbers 7-10, as required by the City's Code of Ordinances § 104-21.9. Under "Conclusions of Law," the order simply lists the four criteria. The only "finding" is in regard to number 8 where it is stated that "it is a grandfathered nonconformity. The use allows much more intense use of the dock and slip facilities than the desired growth and land use pattern the City's Land Use Plan proposes." The only Board member to attempt to make findings at the hearing stated:

> [I]t doesn't meet the criteria of 7 through 10. I don't believe the use is compatible with the desired growth and land use patterns. It is a grandfathered nonconformity. How can it be—how can it be compatible—compatible with what the coun—the City desires when it's—it's not—the use of the property is not compatible with what the City's plan is for that piece of property. It—if it were not a grandfathered nonconformity, it would be two single-family homes. This use allows much more intense use of the dock and slip facilities than the desired growth and land use patterns that the City land use plan proposes. I don't—yeah, I think the—the neighbors have indicated that in their view it would be detrimental to their use of adjacent properties and that it would adversely affect the surrounding area. I'm convinced by that, at least some of those—those points I think are well taken.

A reviewing court "may uphold the decision even in the absence of supportive factual findings, so long as the court can locate competent substantial evidence consistent with the decision." *Alachua Land Inv'rs, LLC v. City of Gainesville,* 15 So. 3d 782 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2163b]. Here, however, no competent, substantial evidence exists in the record to support the legal conclusions drawn by the Board. The only "evidence" in opposition to the dock is neighbor testimony. Opinion testimony of residents that is not backed up by facts is not competent, substantial evidence. *City of Apopka v. Orange County,* 299 So. 2d 657, 660 (Fla. 4th DCA 1974) (reversing the City's decision where "[t]he evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts [and] the Board made no finding of facts [but] simply stated as a conclusion that the exception would adversely affect the public interest"); *see also Conetta v. City of Sarasota,* 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981) ("Their decision appears to be based primarily on the sentiments of other residents . . . . It amounted to no more than a popularity poll of the neighborhood.").

The "finding" concerning the grandfathered nonconformity is likewise not competent, substantial evidence. "The [c]ourts of this State have never questioned the right of a municipality or county to impose reasonable restrictions on the expansion of a non-conforming use. However, justice requires substantial proof of the violation of such restrictions." *Johnston v. Orange County,* 342 So. 2d 1031, 1033 (Fla. 4th DCA 1977). The order states "it is a grandfathered nonconformity. The use allows much more intense use of the dock and slip facilities than the desired growth and land use pattern the City's Land Use Plan proposes." One Board member declared the use could not be compatible with the desired growth and land use patterns because "how can it be compatible . . . when . . . the use of the property is not compatible with what the City's plan is for that piece of property. . . . [I]f it were not a grandfathered nonconformity, it would be two single-family homes." The Board is confusing the compatibility (i.e., nonconformity) of the condominium with the compatibility of the dock.[2] The property is grandfathered in as a 12-unit condominium, while the area is zoned for only single-family residential homes. If that land did not have a condominium on it, the space would allow for two single-family homes. Each home would be allowed one boat dock. If this application was granted, the condominium would have two boat docks. If the condominium was replaced by two single-family homes, the dock would still be allowed.[3] In addition, the City's Planning and Development Director submitted a staff report and testified as follows:

> The nonconformity is the building. And actually if we get very technical, this—the land and water out in the canal is not even under the [single-family] zoning. That is—it has its own zoning district. It's called Marine Park. . . . So in this case the—the dock—the area that the dock is going to be on is conforming.

Accordingly, the nonconforming use of the condominium has no bearing on this application for a conditional use permit.

Conclusion

Because the Board's order is not supported by competent, substantial evidence, it is

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

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[1]There was some discussion about whether the condominium association, not the unit owner, should have been the applicant for the permit. According to the transcript, counsel for the City indicated that the matter could proceed with approval from the condominium association, which the City received prior to the hearing. Harbor Villas at Dunedin Condominium Association joined Mr. Rega as a Petitioner is this case.

[2]While it is true that a nonconforming use cannot be extended or enlarged, nothing in the record or applicable case law indicates that a dock would extend or enlarge the nonconforming use.

[3]Nothing in this opinion is intended to suggest that more than two docks would be improper. As it is not an issue in this Petition, the Court declines to address it.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Second refusal—No merit to argument that hearing officer erred in upholding suspension for second refusal to submit to breath test because licensee's driving record was not entered into evidence—Citation and arrest affidavit referencing prior refusal were competent substantial evidence of prior refusal

STEVEN WAYNE STICKLER, 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. 19-000050AP-88B. UCN Case No. 522019AP000050XXXXCI. May 12, 2020. Counsel: Mark L. Mason, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

(CAMPBELL, ALLAN AND RAMSBERGER, JJ.) Petitioner

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

Facts and Procedural History

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

> On May 28, 2019, Lieutenant Euler observed the Petitioner's vehicle fail to stop at a stop sign at 54th Avenue North and 67th Street North. Lieutenant Euler conducted a traffic step, made contact with the Petitioner, observed signs of impairment and requested further investigation.
>
> Deputy Wede arrived at the stop, made contact with the Petitioner and observed signs of impairment. The Petitioner had bloodshot glassy eyes and had the distinct odor of an alcoholic beverage coming from his breath. The Petitioner was unsteady after exiting his vehicle.
>
> Deputy Wede requested the Petitioner perform Field Sobriety Tests. The Petitioner performed poorly and was placed under arrest for DUI. Deputy Wede asked the Petitioner to submit to a breath test which the Petitioner refused after being read Implied Consent.
>
> Deputy Wede's Complaint/Arrest Affidavit states the Petitioner had a prior refusal to submit on July 3, 2001.

After the Hearing Officer upheld the license suspension, Petitioner filed the instant Petition for Writ of Certiorari.

Standard of Review

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a].

Discussion

Petitioner asserts that the Hearing Officer's order is not supported by competent, substantial evidence because Respondent failed to enter into evidence Petitioner's driving record "or any documentation" to establish Petitioner had previously refused to submit to a breath or urine test. Petitioner contends "[t]he only evidence on the record that indicates that Petitioner's current refusal to submit to a breath test is his second or subsequent refusal is Deputy Wede's Citation and his statement in his Arrest Affidavit." Here, Petitioner was charged with a Driving Under the Influence and Refusal to Submit to Testing under Florida Statutes § 316.1939, which makes a second refusal a misdemeanor. The arrest affidavit for Refusal to Submit to Testing states that "Defendant had a prior refusal to submit on 07/03/2001 (402009X)." The applicable statute and regulations governing these administrative hearings do "not prohibit the admission or consideration of hearsay evidence [or] require that hearsay evidence be corroborated by non-hearsay evidence." *State Dep't of Highway Safety & Motor Vehicles v. Saxlehner,* 96 So. 3d 1002, 1008 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1932a]. Moreover, Florida Statutes § 322.2615(2)(b) states "[m]aterials submitted to the department by a law enforcement agency . . . shall be considered self-authenticating and shall be in the record for consideration by the hearing officer." Accordingly, the citation and arrest affidavit are competent, substantial evidence.

Conclusion

Because the Hearing Officer's order is supported by competent, substantial evidence, it is

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

* * *

Municipal corporations—Historic district designation—City departed from essential requirements of law by counting ballots that did not contain printed date stamp in election to approve historic district where city code provides that only ballots that have been date stamped by city shall be counted—Metadata showing when returned ballots were logged in by city staff is not sufficient where code requires that ballots be date stamped

ELIZABETH SCHUH, as Personal Representative of Daniel Schuh, Deceased, et al., Petitioners, v. CITY OF ST. PETERSBURG, et al., Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000046AP-88B. UCN Case No. 522019AP000046XXXXCI. March 24, 2020.

ORDER AND OPINION

Petitioners challenge an ordinance adopted by the City of St. Petersburg's City Council, which designated the Driftwood neighborhood as a local historic district. While Petitioners raise several challenges to the City's adoption of the ordinance, we find merit in only one. Because the City departed from the essential requirements of law by violating its Code of Ordinances ("Code"), the Petition for Writ of Certiorari is granted.

Facts and Procedural History

In early 2017, Respondent Laurie MacDonald and other residents met with City staff about designating the Driftwood neighborhood as a local historic district. All citizen-initiated applications are required to go through a balloting process before the application is deemed complete and is scheduled for a public hearing before the Community Planning and Preservation Commission ("CPPC"). The CPPC makes a recommendation to approve or deny the application and the matter is scheduled for a City Council public hearing. The resulting decision of the City Council is then memorialized by an ordinance of the City.

According to the City, the initial boundaries of the proposed historic district included the "Gandy House," one of the oldest structures in the City. However, it was sold and demolished in early 2018, shortly after the initial ballots were sent out. Because of this, the applicants requested to downsize the proposed district to exclude that property and a few others. As a result, a second set of ballots was sent out in case anyone was voting to approve the historic district only in an attempt to save the Gandy House. The proposed district required 25 votes in support, and the City asserted that 29 votes were received in favor of the designation. The application was therefore certified complete and a hearing was held before the CPPC, which voted unanimously to recommend approval. On March 7, 2019, the City Council held a public hearing, where Petitioners raised the issue of the ballots lacking the date stamp required by City Code. The historic-district designation was approved in a 6 to 2 vote. However, City staff investigated the ballot issue and moved for a rehearing. On May 16, 2019, a rehearing was held where the City presented evidence of a metadata date stamp. The City Council voted 5 to 2 to approve the historic-district designation. Petitioners then filed the instant Petition for Writ of Certiorari.

Discussion

Petitioners maintain the City violated the essential requirements of law by approving the historic-district designation without the required evidence that a sufficient number of supporting votes were returned by the deadline. The City Code requires "[e]vidence of the support of the historic district from the owners of 50 percent plus one tax parcel." § 16.30.070.2.5(B)(2)(a), Code. The Code states that "only City issued ballots that . . . have been physically received by the POD within 60 days of the date of mailing *and have been date stamped by the City,* shall be counted." § 16.30.070.2.5(B)(2)(a)(2), Code (emphasis added). A City staff member testified that "[t]ypically when a ballot is received by our office, the ballot is stamped . . . [a]nd then the ballot information is registered on a log sheet, and this

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checkmark in the top corner represents that the information has been logged in on the log sheet." However, it is undisputed that out of the 29 ballots in favor of the designation, seven did not have a physical date stamp. Because 25 votes were needed to approve the designation, the application would have been denied if the non-stamped ballots were not counted.

Petitioners contend the ballots must have a physical date stamp, but the City maintains that while the receipt of the ballots must be physical, the manner of date stamp is unspecified and open to interpretation. At the rehearing, the City produced the "log sheet," a Microsoft Excel sheet, which shows the support/nonsupport votes and has a metadata date stamp indicating the date it was last modified on. The City contends this is a sufficient date stamp.[1] In response, Petitioners argue the metadata only shows when the data was entered into the log, not when the ballots were received, which is what the Code requires.

Florida courts have long held that an ordinance must be given its plain and obvious meaning. *See Town of Longboat Key v. Islandside Prop. Owners Coal., LLC,* 95 So. 3d 1037, 1041 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a]. "If the plain and ordinary meaning is clear, then 'other rules of construction and interpretation are unnecessary and unwarranted.' " *Id.* (quoting *Rinker Materials Corp. v. City of North Miami,* 286 So.2d 552, 554 (Fla.1973)). Here, the ordinance states "only City issued ballots that . . . have been date stamped by the City, shall be counted." § 16.30.070.2.5(B)(2)(a)(2), Code. Under a plain language analysis, the ballot itself must have the date stamp. *See Hous. Opportunities Project v. SPV Realty, LLC,* 212 So. 3d 419, 420-21 (Fla. 3d DCA 2016) [42 Fla. L. Weekly D44a] (citation omitted) ("If the statute is plain and unambiguous and admits of but one meaning, the courts in construing it will not be justified in departing from the plain and natural language employed by the Legislature.").

Moreover, case law indicates that when a term in an ordinance lacks a definition, a court "utilize[s] the proper rules of statutory construction [by] turning to the dictionary meaning to find the plain and ordinary meaning of undefined terms." *Town of Longboat Key,* 95 So. 3d at 1041. Here, Black's Law Dictionary defines date stamp as "[a] device used for printing the date on documents [or] . . . [t]he mark that such a device makes." (11th ed. 2019). Accordingly, the City departed from the essential requirements of the law because the Code requires both a date stamp be used and that each ballot be stamped. *See Ocean's Edge Dev. Corp. v. Town of Juno Beach,* 430 So. 2d 472,474 (Fla. 4th DCA 1983) (citing *Rinker Materials Corp.,* 286 So. 2d at 554)) (opining that "property owners are entitled to rely upon the clear and unequivocal language of municipal ordinances"); *Carroll v. City of Miami Beach,* 198 So. 2d 643, 645 (Fla. 3d DCA 1967) ("[T]he City is bound by the express terms of its own ordinance . . . . If the City desires a different meaning for its ordinance in the future, it may amend, modify, or change the same by legislative process.").

Conclusion

Because the City departed from the essential requirements of law, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED**. (PAMELA A.M. CAMPBELL, THOMAS M. RAMSBERGER, and AMY M. WILLIAMS, JJ.)

[1]The City also had several of the residents testify that they supported the designation and that they physically delivered the ballot to the City prior to the date shown on the metadata date stamp.

* * *

Contracts—Student loans—Breach by borrower—Standing—Trial court erred in granting summary judgment in favor of plaintiff in action to enforce educational loan where affidavit and exhibits filed with plaintiff's motion for summary judgment failed to provide evidence of any transfers of defendants' educational loan from predecessor in interest to plaintiff

JEREMY LOY, and KARYN LOY, Appellants, v. NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-46. L.T. Case No. 17-CC-760. UCN Case No. 512019AP000046APAXWS. June 2, 2020. On appeal from Pasco County Court, Honorable Frank Grey. Counsel: Brendan R. Riley, Riley Law Group, New Port Richey, for Appellants. Michael P. Schuette and Jocelyn C. Smith, Sessions, Fishman, Nathan & Israel, PLLC, Tampa; and Kenneth Louis Salomone, South Deerfield Beach, for Appellee.

ORDER AND OPINION

(BABB, CAMPBELL, and WESTINE, JJ.) Because the affidavit and exhibits filed with the Motion for Summary Judgment failed to provide evidence of any transfers of Appellants' educational loan, there was a disputed issue of material fact regarding Appellee's standing to bring suit against Appellants. Accordingly, the final summary judgment must be reversed.

STATEMENT OF THE CASE AND FACTS

Appellee National Collegiate Student Loan Trust 2007-3 filed a Complaint against Appellants Jeremy Loy and Karyn Loy claiming breach of a loan agreement. Appellee asserted that Appellants entered into an educational loan agreement with Appellee's predecessor-in-interest and that Appellee now owned the Note under a Pool Supplement and Deposit and Sale Agreement. Attached to the Complaint was a copy of the promissory note signed by Appellants and titled "Cosigned Loan Request/Credit Agreement."[1] It refers to an agreement between Appellants and Bank of America, National Association (BOA).

Also attached to the Complaint was a "Pool Supplement." Based upon its language, the Pool Supplement was a supplemental agreement to a "Note Purchase Agreement" between BOA and the "Depositor" under the supplement: The National Collegiate Funding, LLC (NCF). The Pool Supplement transferred certain loans from BOA to NCF. The Pool Supplement stated that NCF would sell the transferred loans to a "Purchaser Trust." The Pool Supplement did not identify the Purchaser Trust.

The body of the Pool Supplement stated that its agreement date was September 20, 2007. It stated that BOA was transferring "each student loan set forth on the attached "Schedule 1." Schedule 1 was also attached to the Complaint. Critically, however, that document was blank except for the heading "Schedule 1."

The Pool Supplement stated that the amounts paid pursuant to the Pool Supplement from NCF to BOA "are those amounts set forth on 'Schedule 2.' " Schedule 2 was also attached to the Complaint but did not contain any information about specific loans.

Also attached to the Complaint was a spreadsheet with the heading "National Collegiate Student Loan Trust 2007-3." It contained information from the original loan agreement between BOA and Appellants. However, it made no reference to any other documents such as the Pool Supplement, or Schedule 1 or Schedule 2 of the Pool Supplement. In fact, the spreadsheet made no reference to any transfers to NCF or Appellee.

Finally, attached to the Complaint was a "Deposit and Sale Agreement. The agreement was for the sale and transfer of student loans from NCF to Appellee. Per the agreement, it "sets forth the terms under which the Seller is selling and the Purchaser is purchasing the student loans listed on *Schedule 1 or Schedule 2 to each of the Pool Supplements* set forth on Schedule A attached hereto. (Emphasis added.) The list of pool supplements in Schedule A of the Deposit and Sale Agreement included the September 20, 2007 Pool Supplement between BOA and NCF.

Appellants filed an Answer and Affirmative Defenses. The Answer denied that Appellee was the owner of the Note under to the

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Pool Supplement and Deposit and Sale Agreement. The Affirmative Defenses raised the defense of standing, asserting that Appellee did not have standing because the Complaint and attachments "do not show that any loan connected with [Appellants] was assigned or otherwise legally conveyed or transferred to [Appellee] before" the Complaint was filed.

Appellee filed a Motion for Summary Judgment arguing that no genuine issues of material fact existed. Appellee's motion referenced an Affidavit and Verification of Account (the affidavit) that was filed contemporaneously with the motion.

In paragraph 2 of the affidavit, the affiant stated that she is employed by Transworld Systems, Inc. (TSI), the "subservicer" for Appellee. Paragraph 3 stated that TSI has been contracted to perform the duties of the subservicer for Appellee by U.S. Bank, National Association who is itself the "special servicer" of Appellee.

Paragraph 11 of the affidavit stated that Appellants' educational loan was "transferred, sold and assigned to [NCF], who in turn transferred, sold and assigned [Appellants'] educational loan to [Appellee]." Paragraph 7 of the affidavit asserted that the basis of the affiant's knowledge of the loan and its transfers was "personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to [Appellants'] educational loan, and the business records attached to this affidavit." Exhibits attached to support the assertions in paragraph 11 included the same Promissory Note, Pool Supplement, blank Schedule 1 of the Pool Supplement, Schedule 2 of the Pool Supplement, Deposit and Sale Agreement, and spreadsheet previously attached to the Complaint.

Appellants filed an "Opposition to Plaintiff's Motion for Summary Judgment and Motion to Strike Plaintiff's Affidavit in Support of Summary Judgment." In the filing, Appellants argued that Appellee's motion and affidavit failed to respond to Appellants' standing defense, arguing that "[Appellee] has not shown that they have standing to enforce this debt" and "has provided no evidence that they had standing to enforce this debt on or before the date the debt became due." The opposition further argued that there was no evidence of transfer of the loan from BOA to Appellee and that without evidence of such transfer, Appellee does not have standing to sue.

The hearing on the Motion for Summary Judgment was held on April 2, 2019. Neither party had the hearing transcribed for the record on appeal. Later that same day, the trial court issued a Final Summary Judgment that granted Appellee's motion. Appellants timely-appealed.

STANDARD OF REVIEW

"The standard of review of a summary judgment order is *de novo* and requires viewing the evidence in the light most favorable to the non-moving party." *Skelton v. Real Estate Sols. Home Sellers, LLC,* 202 So. 3d 960, 961 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2466a] (quoting *Sierra v. Shevin,* 767 So.2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a].

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Jackson v. State,* 107 So. 3d 328, 339 (Fla. 2012) [37 Fla. L. Weekly S683a]. However, that discretion is limited by the rules of evidence. *Id.* If the reviewing court finds that the trial court abused its discretion, the error is subject to harmless error analysis. *Id.* at 342-43.

LAW AND ANALYSIS

"Summary judgment is proper only where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Coral Wood Page, Inc. v. GRE Coral Wood, LP,* 71 So. 3d 251, 253 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2233a] (citing *Holl v. Talcott,* 191 So. 2d 40, 43 (Fla. 1966)). Where a plaintiff moves for summary judgment after a defendant has asserted an affirmative defense, the plaintiff must provide summary judgment evidence that conclusively refutes the factual bases for the affirmative defense or establishes that the defense is legally insufficient. *Coral Wood Page, Inc.,* 71 So. 3d at 253 (citing *Morroni v. Household Fin. Corp. III,* 903 So. 2d 311, 312 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1448b]). Summary judgment evidence includes "affidavits, answers to interrogatories, admissions, depositions, and other materials that would be admissible in evidence." Fla.R.Civ.P. 1.510(c). "The burden of proving the existence of genuine issues of material fact does not shift to the opposing party until the moving party has met its burden of proof." *Coral Wood Page, Inc.,* 71 So. 3d at 253 (quoting *Deutsche v. Global Fin. Servs., LLC,* 976 So. 2d 680, 682 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D781a]) (internal quotation marks omitted).

Appellee asserted in their Motion for Summary Judgment before the trial court and their Answer Brief before this Court that the educational loan between Appellants and BOA was transferred to NCF and then Appellee. Appellee's summary judgment evidence was the sworn affidavit of the TSI employee and, exhibits attached thereto. Paragraph 11 of the affidavit stated that "[Appellants'] educational loan was transferred, sold and assigned to [NCF], who in turn transferred, sold and assigned [Appellants'] educational loan to [Appellee] for valuable consideration, in the course of the securitization process."

Per paragraph 7 of the affidavit, the TSI employee stated that the basis of this knowledge is "personal knowledge of the business records maintained by TSI as custodian of records, including electronic data provided to TSI related to [Appellants'] educational loan, *and the business records attached to this affidavit*." (Emphasis added.) Thus, the basis of the affiant's knowledge of the asserted transfer of the loan from BOA to NCF and then NCF to Appellee are the business records attached to the affidavit filed contemporaneously with the Motion for Summary Judgment.

However, those business records fail to provide conclusive evidence of a transfer of Appellants' loan to either NCF or Appellee. Included in the affidavit exhibits were some of the same documents attached to the Complaint: the Promissory Note, the Pool Supplement, Schedule 1 and Schedule 2 of the Pool Supplement, the spreadsheet, and the Deposit Loan Agreement. The Pool Supplement, which was executed on September 20, 2007, stated that certain loans were transferred from BOA to NCF. The Deposit Loan Agreement transferred loans listed in multiple pool supplements from NCF to Appellee. This included the loans referenced in the September 20, 2007 Pool Supplement.

The problem is that the Pool Supplement itself does not contain any mention of Appellants' loan. The Pool Supplement stated that the specific loans being transferred were listed in Schedule 1. The Deposit Loan Agreement stated that depending on the pool supplement, the specific loans could be listed in either Schedule 1 or Schedule 2 of any particular pool supplement. However, Schedule 1 of the September 20, 2007 Pool Supplement was blank and Schedule 2 does not contain any specific loan information, let alone information about Appellants' loans. While the spreadsheet that was also attached to the affidavit contained specific information about Appellants' original loan agreement with BOA, the spreadsheet makes no reference to the Pool Supplement, Schedule 1, Schedule 2, or any transfer whatsoever. And neither the Pool Supplement, Schedule 1, nor Schedule 2 refers to the spreadsheet. Thus, there is absolutely no evidence of a transfer of Appellants' loan from BOA to NCF or NCF to Appellee in the business records from which the affiant asserts she derived her personal knowledge of said transfers.

Appellee appears to argue in the Answer Brief that the spreadsheet

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is, in fact, an excerpt from Schedule 1. However, there are two problems with this argument. First, the Answer Brief to this Court is the first time Appellee has made that assertion in any filing before either the trial court or this Court. Thus, the trial court record does not support that assertion.

Second, even if Appellee had argued before the trial court that the spreadsheet was an excerpt from Schedule 1, the spreadsheet itself conclusively refutes the assertion. The top of the spreadsheet is titled with Appellee's name: "National Collegiate Student Loan Trust 2007-3." Thus, it could not have been an excerpt from Schedule 1 because Schedule 1 was originally part of the Pool Supplement showing the transfer of loans from BOA to NCF. Appellee was not a party to the supplement. Appellee was not involved until the loans referenced in the Pool Supplement were transferred from NCF to Appellee in the Deposit Loan Agreement.

Schedule 1 of the Pool Supplement is the basis of Appellee's evidence of the loan's transfer from BOA to NCF and NCF to Appellee. It is from this that the TSI affiant derives her personal knowledge of the transfers. However Schedule 1 itself was blank and the spreadsheet could not have been an excerpt from Schedule 1. Therefore, Appellee's summary judgment evidence did not conclusively refute the factual assertions supporting Appellants' standing affirmative defense.

As for the spreadsheet itself, without any connection to the Pool Supplement, Schedule 1 of the Pool Supplement, or the Deposit Sale Agreement, it is at most weak circumstantial evidence of the transfer from NCF to Appellee and only that because Appellee's name is at the top of the spreadsheet. The spreadsheet does not reference NCF, the Deposit Sale Agreement, or any transfer whatsoever. And the spreadsheet does not provide even circumstantial evidence of a transfer from BOA to NCF.

Had Schedule 1 listed Appellants' loan, the result may have been different. Without Schedule 1, there is no evidence that Appellants' loan was transferred from BOA to anyone else and little evidence of a subsequent transfer to Appellee. Therefore, the summary judgment evidence filed by Appellee failed to conclusively refute Appellants' standing affirmative defense and there remained a disputed issue of material fact regarding whether Appellants' loan was transferred to Appellee. Accordingly, the trial court should have denied the motion for summary judgment.

Because Appellee's motion should have been denied regardless of whether the trial court properly admitted evidence under the business records hearsay exception, this Court does not address Appellants' claim that the trial court erred in admitting the records in question.

A Note on Lack of Transcript

While not raised by either party in their briefs, this Court takes a moment to address something that is common in county-to-circuit civil appeals in Pasco County. For proper appellate review, a transcript of the hearing or trial that resulted in the trial court order being appealed is usually necessary. This is because a trial court's decisions are presumed to be correct. Therefore, the appellant must demonstrate that a reversible error was made. *Hirsch v. Hirsch,* 642 So. 2d 20 (Fla. 5th DCA 1994); *Casella v. Casella,* 569 So. 2d 848 (Fla. 4th DCA 1990).

Without a transcript, an appellant cannot overcome the presumption of correctness of the trial court's actions and rulings because an appellate court cannot determine whether the trial court made an error during the hearing or trial. *Id.* In such cases, an appellate court can only reverse a trial court if there is an error apparent on the face of the trial court's written order and that error resulted in a miscarriage of justice. *Harris v. McKinney,* 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2077a] (citations and quotations omitted).

In this particular appeal, this Court was able to conduct appellate review because Appellee did not argue for affirmance based upon the lack of a transcript. And even if it had, there is an exception applicable to this appeal where an appellant appeals a summary judgment order issued after affirmative defenses are raised. *See, e.g., Johnson v. Deutsche Bank Nat'l Trust Co. Ams.,* 248 So. 3d 1205, 1210-11 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1071a]; *Houk v. PennyMac Corp.,* 210 So. 3d 726, 731 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D384b]; *Misha Enters. v. GAR Enters.,* 117 So. 3d 850, 853-54 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1493c]. However, even in a summary judgment appeal, preparation of a transcript would be prudent because the exception only applies on a case-by-case basis. *See id.* (all holding that appellate review was possible despite the lack of a transcript but only because there was sufficient evidence in the parties' pleadings, motions, exhibits, and affidavits to conduct appellate review).

Parties in county civil trial court proceedings that may end up appearing before this Court are advised to either have relevant hearings and trials transcribed or recorded for later transcription, or prepare a Statement of Evidence or Proceedings under Florida Rule of Appellate Procedure 9.200(b)(5). Otherwise, civil appellants risk affirmance based upon the presumption of correctness applicable to every trial court order.

CONCLUSION

While the sworn affidavit attached to Appellee's Motion for Summary Judgment asserted that the educational loan between Appellants and BOA had been transferred to Appellee, neither the Complaint, Motion for Summary Judgment, nor the attachments thereto, provided evidence showing the actual transfer of the loan. Thus, a genuine issue of material fact remained and Appellee failed to conclusively refute Appellants' affirmative defense that Appellee did not have standing to bring suit. Therefore, the trial court should have denied Appellee's Motion for Summary Judgment.

It is therefore ORDERED and ADJUDGED that the final summary judgment of the trial court is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion.

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[1]During the trial court proceedings, Appellee alternately referred to the document as an agreement and as a promissory note. In the Answer Brief before this Court, Appellee refers to it as the promissory note. Appellants did not challenge Appellee's assertion that the document is a promissory note before this Court. Thus, it is treated as such for the purpose of this appeal.

* * *

Criminal law—Prohibition—Petition for writ of prohibition preventing prosecution that is allegedly barred by statute of limitations is dismissed as moot where state has already entered nolle prosequi in case

PAUL CASTONGUAY, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2020-CA-5038-O. May 18, 2020.

ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION AS MOOT

(JANET C. THORPE, J.) THIS MATTER came before the Court for consideration of the Petition for Writ of Prohibition, filed on May 13, 2020. The Court finds as follows:

Petitioner is a prison inmate in the Nebraska Department of Correctional Services. He has been serving a 30 year sentence for sexual assault since December 18, 2009, and his projected release date is March 23, 2026.

Petitioner alleges that in April 2001, a warrant was issued for his arrest, presumably on charges from Orange County. Petitioner further alleges that he moved away from Florida, and did not know about the arrest warrant "until many years had passed." He claims that he "just

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recently found out" about the arrest warrant after he was in a car accident in Nebraska. Law enforcement ran his driver's license, informed him about the arrest warrant, and also informed him that it involved theft charges.

Petitioner now seeks a writ of prohibition. For support, he argues that under Florida law, he is entitled to have the theft charges dismissed on statute of limitation grounds, since the arrest warrant was issued 19 years ago and he was "never properly served within a reasonable time." *See Beyer v. State*, 76 So. 3d 1132, 1134 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D136b] ("A petition for writ of prohibition is a proper remedy to prevent a prosecution that is barred by expiration of the statute of limitations."). *See also* §§ 775.15 & 812.014, Fla. Stat.

This Court's records reflect that Petitioner was charged with third degree theft in Orange County circuit court case number 2001-CF-5377-A-O. The information was filed on April 16, 2001, and a capias was issued on April 25, 2001. However, the capias was returned as unexecuted. The State then entered an administrative nolle prosequi "due to the age of the case" on January 11, 2012, and the capias was recalled. The clerk then closed the case.

Under Florida law, a nolle prosequi is "self-executing upon its announcement and immediately terminates the proceeding." *State v. Aguilar*, 987 So. 2d 1233, 1235 (Fla. 5th DCA 2008). [33 Fla. L. Weekly D1948d]. Additionally, "No approval of the trial court is required." *Id*. Also under Florida law, prohibition is not available when the proceedings have already been completed and there is nothing to prohibit. *Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986) (prohibition not available when proceedings have already been completed); *McKay v. State*, 984 So. 2d 608, 609 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1534a] (prohibition not available when "there is nothing further to prohibit"). When the State entered its administrative nolle prosequi, the proceedings in 2001-CF-5377-A-O were terminated under *Aguilar*. As a result, prohibition is not available to Petitioner pursuant to *Sparkman* and *McKay*, and the instant Petition must be dismissed as moot.

Accordingly, it is ORDERED and ADJUDGED that the Petition for Writ of Petition is DISMISSED AS MOOT, and the above-styled case shall be CLOSED. (YOUNG and BLECHMAN, JJ., concur.)

* * *

Counties—Code enforcement—Due process—Notice—No merit to argument that property owner was denied notice and opportunity to be heard because his copy of notice of violation allegedly did not include hearing date and time—Copy of notice provided to special magistrate included hearing date and time, owner had ample time prior to hearing to reach out to code enforcement to verify hearing date and time, and there is nothing in record to suggest that magistrate would not have allowed owner to present his case if he had appeared at hearing—Magistrate did not depart from essential requirements of law by finding that owner violated county code by operating business and having abandoned, inoperative, or discarded vehicles in residential zone—Magistrate's findings are supported by competent substantial evidence—Claim that code enforcement officer violated owner's Fourth Amendment rights by trespassing on his property was not preserved for appellate review where issue was not raised during code enforcement hearing

ROBERT E. BURGETT, Appellant, v. ORANGE COUNTY, FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CV-000007-A-O. May 5, 2020. Appeal from a Final Administrative Order from the Orange County, Code Enforcement Division. Counsel: Robert E. Burgett, pro se Appellant. Adolphus A. Thompson, Assistant Orange County Attorney, Orange County Attorney's Office, for Appellee.

(Before DOHERTY, O'KANE, WEISS, JJ.)

(**PER CURIAM**.) Robert E. Burgett ("Appellant") appeals the Final Administrative Order, entered on January 7, 2019, at a Code Enforcement Hearing by the Special Magistrate for Orange County ("Appellee"), finding that he violated several Chapters of the Orange County Code. We have jurisdiction. *See* § 162.11, Fla. Stat. (2019); Fla. R. App. P. 9.030(c)(3). For the reasons discussed herein, we affirm.

BACKGROUND

On or about October 12, 2018, Orange County Code Enforcement Officer Jemoral Jackson ("OCEO Jackson") first went to the Appellant's property located at 2229 Hiawassee Rd., Orlando, Florida, 32818, and observed multiple vehicles in the driveway, most of which did not have license plates to identify the vehicles. OCEO Jackson also observed that the Appellant was using the property for a commercial use in connection with the multiple different vehicles that were being serviced at the property. The Appellant was cited for using the property to fix vehicles and the Appellee presented photographs at the hearing which depicted vehicles with their hoods up and equipment to assist in the repair of vehicles.

The notice of violation was written as a repeat violation against the property because the Appellant had been previously cited for this same exact violation within a year. On October 12, 2018, the repeat notice of violation and notice of hearing was sent certified mail to the Appellant pursuant to section 162.06(3), Florida Statutes (2019).[1] The specific violations were cited and the compliance date of October 29, 2018, was set for the Appellant to come into compliance or be subject to a fine. The Appellee contends that the notice of hearing set forth the date and time for the hearing before the Special Magistrate: January 7, 2019, at 9:00a.m.; however, the Appellant contends that the hearing date and time was omitted from the notice of hearing.[2]

Subsequently, the Appellant did not appear for the January 7, 2019 Special Magistrate Code Enforcement hearing. The hearing was held and the Special Magistrate found that the Appellant violated Chapter 38-3, 38-74 and 38-77 of the Orange County Code for having abandoned, inoperative or discarded motor vehicles that are not a permitted or an ancillary use on a residential and or agricultural zoned property. The Special Magistrate also found that the Appellant violated Chapter 38 for conducting a business or commercial activity in a residential district.

The Appellant was ordered to come into compliance on or before January 22, 2019, and to refrain from repeating the violation. His failure to comply would result in a fine of $300 per day for each day the violation is repeated after January 22, 2019. A re-inspection of the property was made on January 23, 2019 by OCEO Jackson and he determined the property was still not in compliance with the Special Magistrate's Order. An affidavit of non-compliance was completed on January 23, 2019. The Appellant timely seeks review of the Final Administrative Order.

STANDARD OF REVIEW

Under section 162.11, an appeal of the Special Magistrate's order to the circuit court "shall not be a hearing de novo but shall be limited to appellate review of the record created before the [Special Magistrate]." When the circuit court in its appellate capacity reviews local government administrative action, it must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Broward Cnty. v. G.B.V. Intl, Ltd.,* 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S389a]; *Bencivenga v. Osceola Cnty.,* 140 So. 3d 1035 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1078c]. This Court may not reweigh the evidence or substitute its judgment for that of the agency, for it is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the

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witnesses, resolve any conflicts in the evidence, and make findings of fact. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Instead, this Court's function is to review the record to determine whether the decision is supported by competent substantial evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs ,* 794 So. 2d 1270, 1273-75 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1093-94 (Fla. 2000) [25 Fla. L. Weekly S461a]. Competent substantial evidence is defined as such relevant evidence as a reasonable person would accept as adequate to support the findings and decision made. *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). As long as the administrative hearing officer's findings of fact are supported by competent and substantial evidence, then the reviewing Court must accept them. *Kany v. Fla. Eng'rs Mgmt. Corp.,* 948 So. 2d 948, 953 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D487a].

STATUTORY BACKGROUND

There are Florida Statutory and Orange County Code provisions that come into play in the instant case and it is prudent to briefly set forth the relevant provisions. Chapter 162 of the Florida Statutes and Orange County Code Sections 11 and 38 provisions explicitly allow for Code Enforcement of a local governing body to cite violators of the code provisions and allow them to have a hearing before a neutral body to determine whether a violation exists and whether to impose an appropriate fine based on the evidence presented at the hearing. The intent of section 162.02, Florida Statutes (2019), is set forth as follows:

> "It is the intent of this part to promote, protect and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide equitable, expeditious, effective, and inexpensive method of enforcing any coeds and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist."

Additionally, section 162.03(2) states that: "A special magistrate shall have the same status as an enforcement board under this chapter. References in this chapter to an enforcement board, except in s. 162.05, shall include a special magistrate if the context permits." Further, section 162.06, Florida Statutes (2019), provides the relevant enforcement procedure:

> (3) If a repeat violation is found, the code inspector shall notify the violator but is not required to give the violator a reasonable time to correct the violation. The code inspector, upon notifying the violator of a repeat violation, shall notify an enforcement board and request a hearing. The code enforcement board, through its clerical staff, shall schedule a hearing and shall provide notice pursuant to s. 162.12. The case may be presented to the enforcement board even if the repeat violation has been corrected prior to the board hearing, and the notice shall so state. If the repeat violation has been corrected, the code enforcement board retains the right to schedule a hearing to determine costs and impose the payment of reasonable enforcement fees upon the repeat violator. The repeat violator may choose to waive his or her rights to this hearing and pay said costs as determined by the code enforcement board.

Moreover, section 162.07, Florida Statutes (2019), sets forth the conduct of the hearing:

> "(1) Upon request of the code inspector . . . the [special magistrate] may call a hearing . . . (2) Each case before an enforcement board shall be presented by a . . . member of the administrative staff of the local governing body . . . (3) A [special magistrate] shall proceed to hear the cases on the agenda for the day. All testimony shall be under oath and shall be recorded. The [special magistrate] shall take testimony from the code inspector and alleged violator. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern proceedings . . . (4) At the conclusion of the hearing, the [special magistrate] shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted therein . . . the order may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under the conditions specified in s. 162.09(1) . . ."

Lastly, section 162.12, Florida Statutes (2019), provides the relevant notice requirements:

> (1) All notices required by this part shall be provided to the alleged violator by:
>
> (a) Certified mail, return receipt requested, provided if such notice is sent under this paragraph to the owner of the property in question at the address listed in the tax collector's office for tax notices, and at any other address provided to the local government by such owner and is returned as unclaimed or refused, notice may be provided by posting . . . and by first class mail directed to the addresses furnished to the local government with a properly executed proof of mailing or affidavit confirming the first class mailing . . .

The applicable Orange County Code Sections are 38-3 General Restrictions on land use:

> (a) Land use and/or building permits. No building . . . land, structure or premises[shall] be used . . . for any purpose or in any manner other than a use designated in this chapter, or amendments thereto, as permitted in the district in which such land [or premises] is located, without obtaining the necessary land use and/or building permits.

Orange County Code Section 38-74—Permitted uses, special exceptions and prohibited uses:

> (a) "Use of buildings, structures, lands and premises. Except as provided otherwise . . . lands and premises shall be used only in accordance with the uses and conditions contained in the "Use Table" set forth in section 38-77 . . ."

Orange County Code Section 38-77 sets forth the table used to show what specific uses are allowed in different zoned areas throughout the County. The applicable table and section relevant to this case is labeled as Junk, sales and storage of wrecked or inoperable vehicles SIC# 5093, and shows this type of storage is not a permitted use in Al zone property.

DISCUSSION

The Appellant argues for reversal and presents three main points: 1) he was not afforded procedural due process from the improper statutory notice under section 162.12 because the notice of hearing did not include the hearing date and time; 2) no competent and substantial evidence supports the Special Magistrate's findings because the documents and notices presented contain inconsistencies and the photographs presented fail to demonstrate any violations, show that they could only have been taken from locations on the Appellant's property and on his neighbor's property, and show that OCEO Jackson trespassed on both the Appellant's and his neighbor's properties; and 3) OCEO Jackson trespassed on the Appellant's property which constituted a violation of his Fourth Amendment rights against improper search and seizure.[3]

The Appellee asks this Court to affirm and argues four main points: 1) the Appellant was afforded procedural due process because the notice of hearing presented to the Special Magistrate, sent a couple months in advance of the January 7, 2019 hearing which the Appellant signed for, included the appropriate date and time, and had he been present at the hearing, there was more than enough time and opportunity for him to ask OCEO Jackson any questions and present his case to defend against the violations; 2) the Special Magistrate's Final Order observed the essential requirements of law because the notice

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of hearing and the actual code enforcement hearing were conducted in conformity with the relevant Florida Statutes and Orange County Code Sections; 3) there was competent and substantial evidence to support the Special Magistrate's findings because the record shows that OCEO Jackson presented the case by entering photographs, testimony, and the previous case showing the instant offense was a repeat offense, as well as a description of the conversation he had with the Appellant; and 4) the alleged Fourth Amendment violation claim is procedurally barred because it was not raised at the lower administrative level and may not be raised for the first time on appeal.

I. The Appellant was afforded procedural due process because he received adequate notice of the hearing under section 162.12 and an opportunity to be heard.

It is well established that procedural due process is afforded in a quasi-judicial proceeding if the party is provided with notice of the hearing and a fair opportunity to be heard. *Seminole Entm't, Inc. v. City of Casselberry,* 811 So. 2d 693, 696 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2822a]. Regarding the required notice, the record shows and the Special Magistrate found that the Appellee sent a proper copy of the notice of hearing, with the hearing date and time, via certified mail with the return receipt requested to the Appellant's address, which was signed and received from the Appellant. We again note that the Appellant admits in his Initial Brief that he received the notice of hearing. Regardless of his allegation that the hearing date and time was omitted from his copy, we will not second guess the Appellee's copy that was provided to the Special Magistrate because we are not permitted to reweigh or question the credibility of the evidence presented to the Special Magistrate. If the Appellant was concerned about when the hearing was that he was sent notice about, he could have reached out to Code Enforcement to verify the hearing date and time. *See generally Neder v. Greyhound Financial Corp.,* 592 So. 2d 1218 (Fla. 1st DCA 1992) ("For a party to sit back, do nothing and then seek relief, asserting that he lacked notice of the consequences of his actions, is repugnant to us."); *Sunstream Jet Center, Inc. v. Lisa Leasing Corp.,* 423 So. 2d 1005, 1007 (Fla. 4th DCA 1982) (same). Regarding his opportunity to be heard, he was given a fair opportunity because he was sent the notice almost three months before the hearing. Had he been present, there was more than enough time and opportunity for him to present his case and ask OCEO Jackson any questions. There is nothing in the record that leads this Court to believe that the Special Magistrate would not have allowed him to present his case had he attended the hearing. In light of the uncontested evidence presented at the hearing and the Appellant's own admission that he was absent, we find that his argument that he was denied an opportunity to be heard is without merit.

Accordingly, based on the record, we find that the Appellant received adequate notice of the hearing under section 162. 12 with ample time and opportunity to retrieve any alleged missing information from the notice and the opportunity to be heard at the hearing; however the Appellant failed to avail himself of that opportunity.

II. The Special Magistrate's Final Order observed the essential requirements of law.

A ruling constitutes a departure from the essential requirements of law when it amounts to "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a]. Application of the correct law is synonymous with observing the essential requirements of law and a departure from observing the essential requirements of law means something far beyond legal error: it means an "inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Heggs,* 658 So. 2d at 527, 530.

Our function in evaluating this case requires that we peruse the record to find evidence which supports the local government's decision. *G.B.V.,* 787 So. 2d at 843. We can only make a determination regarding the hearing itself based on the record and it would be improper to make a determination on information that is not a part of the record. The only appropriate action is to quash a decision of the local government that amounts to a miscarriage of justice. *Id.* Based on the record here, we cannot say that the Special Magistrate's final order amounted to such an abuse of judicial power that it constitutes a miscarriage of justice. We find that the steps required by the aforementioned statutory and code provisions were followed in order to set the hearing before the Special Magistrate, and the manner in which the hearing was conducted was also in conformity. The Appellant's absence does not automatically mean that the procedures followed were invalid. The record indicates that the hearing was held in conformity with the applicable statutory and code provisions and that the Special Magistrate made the final determination of whether a violations occurred based on the evidence presented. Thus, we find that the Special Magistrate's determination was based on a complete and thorough reading of the applicable statutes and county ordinance, and the essential requirements of law were observed.

III. Competent and substantial evidence supports the Special Magistrate's findings in the Final Order.

The competent and substantial evidence standard cannot be used by the reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of a local agency. *Dusseau,* 794 So. 2d at 1275. "Where competent and substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency's determination." *Cohen v. Sch. Bd. of Dade Cnty.,* 450 So. 2d 1238, 1241 (Fla. 3rd DCA 1984). "It is not the role of the appellate court to re-weigh the evidence anew." *Young v. Dep't of Educ., Div of Vocational Rehab.,* 943 So. 2d 901, 902 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D3016d]. "When the facts are such as to give an agency the choice between alternatives, it is up to that agency to make a choice, not the circuit court" *Miami-Dade Cnty. v. Reyes,* 772 So. 2d 24, 28 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2014b].

This Court's review of the record indicates that the Special Magistrate's findings are supported by competent substantial evidence. The record clearly shows that OCEO Jackson presented the case to the Special magistrate entering photos, testimony, and the previous case showing the offense was a repeat violation, as well as a description of the conversation OCEO Jackson previously had with the Appellant. In his descriptions, OCEO Jackson detailed the inappropriate remedial action taken by the Appellant of enclosing his yard to hide the work he was doing and the possession of vehicles without appropriate license plates. We find that the evidence relied upon at the hearing was sufficiently relevant and material, such that a reasonable mind would accept it to support the conclusion reached. It is the Special Magistrate's job to determine if there are any inconsistencies in the evidence and to determine credibility of witnesses.

Where competent substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency's determination. *Cohen v. Sch. Bd of Dade Cnty.,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). The hearing officer, as the trier of fact, was responsible for resolving any conflicts in the evidence and was free to weigh and reject any testimony, as long as that decision was based on competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Wiggen,* 152

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So. 3d 773, 776 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2532b]. It is not this Court's task to reweigh evidence presented to the hearing officer, evaluate the pros and cons of conflicting evidence, and reach a conclusion different from that of the agency. *Id.* Accordingly, we find that it is clear from the record that there was enough evidence presented to the Special Magistrate to pass the competent and substantial evidence burden.

IV. The Appellant's Fourth Amendment violation claim is procedurally barred because he failed to preserve the issue during the Code Enforcement Hearing.

It is axiomatic that a specific legal issue, argument or ground must be presented to the trial court in order to preserve the issue for appellate review. *Kokal v. State,* 901 So. 2d 766, 779 (Fla. 2005) [30 Fla. L. Weekly S21a]. The Florida Supreme Court has held that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court" *Williams v. State,* 967 So. 2d 735, 750 (Fla. 2007) [32 Fla. L. Weekly S347a] (citation omitted). Importantly, constitutional issues are waived unless they are first presented in the trial court. *Thompson v. Napotnik,* 923 So. 2d 537, 540 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D431a]. Accordingly, because the Appellant did not raise the Fourth Amendment issue until he filed his Initial Brief, we find that the claim is procedurally barred.

Accordingly, based on the foregoing, the Special Magistrate's Final Administrative Order is affirmed. (O'KANE and WEISS, JJ., concur.)

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[1]The Appellant does not dispute receiving the notice of violation and notice of hearing.

[2]There are two notices of hearing in the record: the Appellant's submission, which does not show the date and time for the hearing before the Special Magistrate, and the Appellee's submission, which was presented to the Special Magistrate and sets forth the date and time for the hearing in bold in the first paragraph.

[3]Notably, the Appellant does not address whether the essential requirements of the law were observed in either his Initial Brief or his Reply Brief.

* * *

Criminal law—Driving under influence—Discovery—Intoxilyzer source code and software—Due process—Notice—Where notice of hearing on motion to produce limited scope of hearing to production of Intoxilyzer source code and schedule of items that did not include Intoxilyzer software, trial court abused its discretion by ordering production of software—Trial court abused its discretion by overruling hearsay objection to testimony from prior case and admitting that testimony under section 90.803(22), which has been found to be unconstitutional—To extent trial court's findings regarding materiality of software and source code and state's ownership or possession of those items are based on testimony from prior case, those findings are not supported by competent substantial evidence—State possession or ownership of source code—Where there is no express language in Intoxilyzer purchase order referencing source code or licensing rights, and purchase order only makes reference to terms and conditions sheet that is available on website, language of purchase order is insufficient to incorporate terms and conditions sheet therein—Incorporating language on terms and conditions sheet is insufficient to incorporate sheet into purchase order where there is no evidence that sheet was attached to purchase order or that Intoxilyzer vendor was provided with copy of sheet at time of transaction—Abuse of discretion to order production of source code where finding that Florida Department of Law Enforcement possessed or owned source code was not supported by competent substantial evidence

STATE OF FLORIDA, Appellant, v. MICHAEL NOVOSELAC, et al., Appellees. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2014-AP-56-A-O. L.T. Case Nos. 2011-CT-13182-A-O, 2011-CT-13345-A-O, 2011-CT-14979-A-O, 2012-CT-458-A-O1, 2012-CT-700-A-E, 2012-CT-905-A-E, 2012-CT-5491-A-O, 2013-CT-282-A-E, 2013-CT-1123-A-E, 2013-CT-1338-A-E, 2013-CT-1345-A-E, 2013-CT-1452-A-O, 2013-CT-1511-A-E, 2013-CT-3760-A-O, 2013-CT-4524-A-O, 2013-CT-4940-A-O, 2013-CT-5583-A-O, 2013-CT-6606-A-O, 2013-CT-7221-A-O, 2013-CT-7265-A-O, 2013-CT-8418-A-O, 2013-CT-8666-A-O, 2013-CT-9838-A-O, 2013-CT-9954-A-O, 2013-CT-11175-A-O, 2013-CT-11326-A-O, 2014-CT-3769-A-O, 2014-CT-6496-A-O, 2014-CT-6519-A-O, 2014-CT-6624-A-O, 2014-CT-6690-A-O. October 3, 2018. Appeal from the County Court for Orange County. Martha Adams, Deborah Ansboro, Kenneth Barlow, Maureen Bell, Jeanette Bigney, Deb Blechman, Carolyn B. Freeman, Steve Jewett and W. Michael Miller, County Court Judges. Counsel: Aramis Ayala, State Attorney, William Jay, Cherish R. Adams, and David A. Fear, Assistant State Attorneys, for Appellant. Stuart I. Hyman, for Appellees Casey Banigan, Pedro Carral, Christopher Caslow, Mary Coleman, Donna Fiegel, Joseph Flynn, Patricia Freling, Edward Frye, Taurean Green, William McDow, Karla Radvak and Anthony Wirz. Robert Wesley, Public Defender and Lisa J. Ramsey, Assistant Public Defender, for Appellees Colm Nolan and Elizabeth York-Williams. Whitney S. Boan, for Appellees Joseph M. Graham and Robert Taylor. Ileana Azcunaga, for Appellee Svetlana Kryzhanovskaya. No Appearance for Appellees Casey Abraham, Lucas Acosta-Vega, Mario Corchado, Bryan Davis, Heather Frietsch, Taylor Garrard, David Gauck, Kathleen Herald, Johnny Long, Erica Pajotte, Deborah Pate, Brittany Papalini, Joshua Ross, and Michael Novoselac.

EN BANC

(O'KANE, J.) The State of Florida ("State") appeals the trial court order granting Appellees' motions to produce the source code and software for the Intoxilyzer 8000, updates, release notes relating to the original code and updates, and related documents. This Court has jurisdiction pursuant to Florida Statutes section 924.07(1)(h). For the reasons set forth below, we reverse.

FACTS AND PROCEDURAL HISTORY

This is a consolidated appeal of thirty-one (31) lower court cases).[1] In each case, Appellees were arrested and charged with Driving under the Influence ("DUI") after submitting to breath tests on a CMI, Inc. Intoxilyzer 8000 using software version 8100.27. The breath test results were all in excess of .08.

Appellees sought inspection of the electrical and computer components of the Intoxilyzer 8000, its source code and software in support of its assertion that the breath test results were unreliable, warranting their exclusion from evidence in these cases.[2] A joint hearing on Appellees' Motion to Produce I (Schedule "A" Items paragraph 18 and 23) and Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results was held on December 5, 6, and 9, 2013, before several county court judges to address multiple cases with the same issues.[3]

Although the December 2013 hearing was scheduled as an evidentiary hearing, the presiding judge announced at the outset that he was suspending the rules of evidence. He informed counsel that all evidence was being admitted, that hearsay evidence was "fine" and that he did not "expect to hear many objections or any objections." The presiding judge also indicated that "anything and everything can be thrown against the wall here and will be considered." (T. 7).

Against this backdrop, the hearing proceeded.[4] The State and Appellees stipulated to the admissibility of a transcript of proceedings held before a county judge in Seminole County, Florida. Appellees called Florence DeWeist, Stephen Daniels, Thomas Workman, Jr., and Dr. Harley Myler to testify. Appellees further introduced the transcript and exhibits from *State v. Atkins,* 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. 2008). (Tr. 10). The State did not call any witnesses.

After considering the evidence, the trial court ordered the State to produce the source code and software for the Intoxilyzer 8000, updates, release notes relating to the original code and updates, and related documents. The trial court determined that:

> 1. The source code for all software versions of the Intoxilyzer 8000 and revision histories or release notes and supporting documents and the Intoxilyzer 8000 software versions 26 and 27 and supporting documents are material under Florida Rules of Criminal Procedure

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3.200(f).

2. FDLE owns the Florida Specific Software operating the Intoxilyzer 8000.

3. FDLE and the prosecution possess the Intoxilyzer 8000 source code and software versions 26 and 27 in the laptop computers of agency inspectors.

4. The defense shall be allowed effective access to the source code for all versions of the software and supporting documents within 21 days of the order and the prosecution may request a continuance for the production upon a showing of good faith.

5. The prosecution is precluded from introducing any results from the Intoxilyzer 8000 breath test through the Implied Consent shortened predicate or a traditional scientific predicate until the Intoxilyzer 8000 software versions 26 and 27 and the supporting documents are provided.

The State appealed and advanced the following arguments: (1) the trial court erred by ordering the production of the Intoxilyzer 8000 software because the production of the software, as opposed to the source code, was not noticed for hearing and was not the subject of the hearing; (2) the trial court erred by admitting the *Atkins* record pursuant to Florida Statutes section 90.803(22) because that section is an unconstitutional infringement on the Florida Supreme Court's rule making authority; (3) the trial court abused its discretion in compelling the State to make the source code available to Appellees because there was no competent substantial evidence that it owned or possessed the source code; 4) the trial court abused its discretion in finding that the source code, software, and supporting documents are material pursuant to Rule 3.220(f); and 5) the trial court abused its discretion in finding that further litigation of the Order would not be a basis for receiving additional time to comply. We find merit to several of the State's arguments.

STANDARD OF REVIEW

The order under review is a discovery order. A trial court's ruling on a discovery matter is discretionary and should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella,* 580 So. 2d 154, 155 (Fla. 1991). "If reasonable men could differ as to the propriety of the action taken by the lower court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris,* 382 So. 2d 1197, 1203 (Fla. 1980).

In this case, the trial court conducted an evidentiary hearing and made specific findings of fact in fashioning the order under review. We review those findings of fact to determine whether they are supported by competent substantial evidence. *Wright v. State,* 161 So. 3d 442, 447 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1143d]. Competent substantial evidence is "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." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). "[E]vidence 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." *Id.* Whether a finding is supported by competent substantial evidence necessarily entails a consideration of whether evidence is "legally sufficient." *Florida Power and Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]; *see Dusseau,* 794 So. 2d at 1273-74. "Sufficient evidence is 'such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.' " *Tibbs v. State,* 397 So. 2d 1120, 1123 (Fla. 1981) (quoting *Black's Law Dictionary* 1285 (5th ed. 1979)).

ANALYSIS

I. Lack of Notice - Software.

The State argues that the trial court erred by ordering production of the Intoxilyzer 8000 software because software was not the subject of the hearing and was not specifically delineated in the Notice of Hearing. The State argues it was denied due process on this basis.

The denial of due process is fundamental and procedural due process "requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Luckey v. State,* 979 So. 2d 353, 355-56 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1017a] (quoting *Boddie v. Connecticut,* 401 U.S. 371 (1971)). This includes the opportunity to testify and to present evidence. *Vazquez v. Vazquez,* 626 So. 2d 318 (Fla. 5th DCA 1993). "[A]s a general rule, a violation of due process occurs when a court determines matters not noticed for hearing[.]" *Kanter v. Kanter,* 850 So. 2d 682, 685 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1844a]; *Winddancer v. Stein,* 765 So. 2d 747 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1298a].

Appellees filed motions seeking production of various items prior to the hearing. However, the Notice of Hearing below limited the scope of the hearing to Defendant's Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results and Defendant's Motion to Produce I (Schedule "A" Items paragraphs 18-23).[5] (3rd Supp. R., 4th Supp. R1.-R6.). At the outset of the December 2013 hearing, the trial court reiterated that the motions to be considered were Defendant's Motion to Produce Schedule A items, paragraphs 18-23 and Defendant's Motion for Production of the Source Code, or in the Alternative Exclusion of the Breath Test Results. (T. 5).

The items described in paragraphs 18-23 of Schedule A to the Motion to Produce I did not include the Intoxilyzer software. Rather, the materials sought were the source code, schematics for the Intoxilyzer 8000, and other documents not including the software. Although the attorneys and witnesses repeatedly referenced the software and source code during the hearing, those references alone could not expand the scope of materials sought without an express agreement of the parties. Appellees' counsel never argued for the production of the software in his closing argument, and the State never argued against its production. Rather, the focus of both parties' argument was the source code—whether the State owned or possessed it and whether it should it be produced to allow Appellees to explore whether the source code was the reason for the errors in breath test results.

Finally, the trial court clarified the subject of the hearing during Appellees' closing argument: "you're asking us to compel or ask that—ask the State to produce the source code. . . . I mean, that—that's what you're asking. All right. That's what the motion says." (T. 871-872). The trial court then acknowledged in its order that "the issue before the court is whether the State should be required to produce the source code." (R. 81). Having failed to provide the State notice that software was included as part of the hearing, the trial court abused its discretion by ordering its production. *Luckey,* 979 So. 2d at 355-56; *Kanter,* 850 So. 2d at 685.

II. Consideration of the *Atkins* testimony.

The trial court considered the record from *Atkins* when it concluded that the Intoxilyzer 8000 software and source code are material under Rule 3.220(1) and that that State owns and possesses the software and source code. The State argues that the trial court abused its discretion in overruling its hearsay objection and admitting the *Atkins* testimony under section 90.803(22), Florida Statutes. This Court agrees.

Section 90.803(22), Fla. Stat. (2016) provides that former testimony of a witness is admissible in a proceeding if the testimony was given in another proceeding and the party against whom the testimony is given had an opportunity and similar motive to develop the testimony. Section 90.803(22) does not require that the witness be unavailable for the former testimony to be admissible. The trial court determined here that the State had the opportunity and similar motive to develop the witness testimony in *Atkins,* and therefore that testimony was admissible.

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The Florida Supreme Court refused to adopt section 90.803(22) as a procedural rule expressing grave concerns about the statute's constitutionality. *In re Amendments to the Florida Evidence Code,* 782 So.2d 339, 342 (Fla. 2000) [25 Fla. L. Weekly S909a]. In that opinion, the Court cited several reasons why section 90.803(22) should not be adopted. They included the following: (1) the amendment violated a defendant's constitutional right to confront adverse witnesses; (2) this expanded former-testimony hearsay exception would result in "trial by deposition," thereby precluding the fact-finder from evaluating witness credibility; (3) the amendment strips the section 90.804(2)(a) former testimony exception of its "unavailability" requirement, thereby making the section 90.804 exception obsolete; (4) the amendment is inconsistent with several rules of procedure, including when depositions can be used in civil and criminal court proceedings and trials, thereby causing confusion as to which rule should control. *Id.* In a later appeal, the Supreme Court addressed the State's use of testimony from a prior proceeding in a criminal prosecution. *State v. Abreu,* 837 So.2d 400 (Fla. 2003) [28 Fla. L. Weekly S80a]. In *Abreu,* the Supreme Court held the statute unconstitutional because it violated the defendant's confrontation rights. *Id.* at 406.

The First District later examined the exception in *Grabau v. Department of Health, Board of Psychology,* 816 So. 2d 701, 709 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D913a]. The *Grabau* court held that section 90.803(22) was unconstitutional as it infringed on the Supreme Court's rule making authority conferred by article V, section 2(a), of the Florida Constitution; and as a violation of article II, section 3, of the Florida Constitution, because it obviates and conflicts with section 90.804, Florida Statutes, which requires a witness be unavailable for the use of former testimony, and finally because it denies due process. There are no other court opinions specifically addressing the constitutionality of the statute.[6]

As *Grabau* is the only district court opinion addressing the constitutionality of section 90.803(22) as it relates to the infringement on the Supreme Court's rule making authority, we are bound to follow it. *See, Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts); *Stanfill v. State,* 384 So. 2d 141, 143 (Fla. 1980) ("The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Supreme] Court."). Applying *Grabau* to this case, we conclude that the trial court abused its discretion in admitting the *Atkins* testimony. To the extent that any of the trial court's findings of fact were based upon the *Atkins* testimony, those findings of fact are not supported by competent substantial evidence.

III. State's ownership or possession of the software and source code.

The State next argues that the trial court erred by finding that it owns and possesses the software and source code to the Intoxilyzer 8000 because there was no evidence to support that finding. The State claims that the trial court improperly relied on the contract between FDLE and CMI which does not mention the transfer of ownership of any intellectual property including the software or source code.

Appellees argue that the trial court properly found that the State owns the software and source code based on the testimony of Ms. DeWeist and the purchase order documenting the transaction. Appellees argue that the language of the purchase order identifying the item purchased as "Florida Specific Software" and the testimony of Ms. Barfield from *Atkins* that FDLE received and retained copies of the software version and successive software versions demonstrates that FDLE purchased and owns the software.[7] Appellees also argue that the "Purchase Order Conditions and Instructions," which they maintain were incorporated by reference into the purchase order, is evidence that the State received the rights and ownership to the source code, software, and revision histories with the purchase of the Intoxilyzer 8000. An examination of this evidence is therefore necessary.

Order No. D0113360 created June 17, 2005 is FDLE's purchase order of the Intoxilyzer 8000 from CMI. (Tr. 29, 30, Defense Exhibit 101). The purchase order describes the item purchased as the "Intoxilyzer 8000 with Badge Reader, Modem, and Internal Printer." The purchase order states that "[e]ach Intoxilyzer 8000 package" includes "Florida Specific Software" among other components. The following additional language appears on the first page of the purchase order:

> Additional Item Info: Terms and Conditions:
> http://marketplace.myflorida.com/vendor/po_tou.pdf.

The purchase order does not expressly include any mention of the Intoxilyzer source code or other intellectual property rights.

The document titled "Purchase Order Conditions and Instructions" (hereafter "conditions sheet") is attached to the purchase order submitted into evidence by Appellees.[8] Paragraph 13 of that document states: "[b]y accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions." The conditions sheet includes various codes and descriptions seemingly unrelated to each other and the issue under consideration here. The condition sheet includes the following:

> CY Copyrights and right to data
>
> Where activities supported by the contract produce original writing, sound recordings, pictorial reproductions, drawings or other graphic representation and works of any similar nature, the department has the right to use, duplicate and disclose such materials in whole or in part, in any manner, for any purpose whatsoever and to have others acting on behalf of the department to do so. If the materials so developed are subject to copyright, trademark or patent, legal title and every right, interest claim or demand of any kind in and to any patent, trademark, or copyright or application for the same, will vest in the state of Florida, department of state for the exclusive use and benefit of the state. Pursuant to § 286.021 Florida statutes, no person, firm or corporation, including parties to this contract, shall be entitled to use the copyright, patent or trademark without the prior written consent of the department of state.
>
> The department shall have unlimited rights to use, disclose, or duplicate, for any purpose whatsoever, all information and data developed, derived, documented, or furnished by the contractor under this contract. All computer programs and other documentation produced as part of the contract shall become the exclusive property of the state of Florida, department of state and may not be copied or removed by any employee of the contractor without express written permission of the department.

The only testimony relating to the purchase order came from Ms. DeWeist, a purchasing specialist for FDLE. She first became involved in the process of purchasing the Intoxilyzer in 2002. As a data entry employee, she prepared the purchase order at issue here in June 2005. Ms. DeWeist was not involved in the discussions between CMI and FDLE concerning this purchase, nor was she aware of the registration process for a vendor, or whether the State bought any licensing agreements or intellectual property rights to the software with the purchase of the Intoxilyzer 8000. (T. 16, 18, 33). In connection with the language of the purchase order, Ms. DeWeist testified that the web address noted after the "Terms and Conditions" section on the purchase order is an address where the vendor can access terms and conditions that are part of the purchase order. She stated that code CY was part of the terms and conditions of the purchase order "if it applied." She explained that the conditions sheet does not go out with the purchase order but the vendor can access it at the web address. Ms. DeWeist had never seen the conditions sheet before and did not know whether any of the terms set forth therein applied to the purchase order

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in this case. She did not know if a vendor was required to agree to the terms and conditions to sell to the State. She stated she did not know if the vendor here accepted the terms and conditions, but she did not handle any discussions about the terms with the vendor. (T. 25-28, 39-45).

In the order under review, the trial court found that the conditions sheet was incorporated into the purchase order by the parties and that the State owned the software and source code to the Intoxilyzer 8000 because of the language of code CY. The Court disagrees. To incorporate a collateral document by reference, the collateral document must be sufficiently described or referred to in the incorporating document. *OBS Co., Inc. v. Pace Const. Corp.,* 558 So. 2d 404, 406, (Fla. 1990); *BGT Group, Inc. v. Tradewinds Engine Services, LLC,* 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1207a]. A mere reference to the collateral document is not sufficient to incorporate the collateral document into the contract. *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.,* 705 So. 2d 983, 984 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D346a]. In addition, the incorporating document must include some expression of an intent to be bound by the collateral document. *BGT Group,* 62 So. 3d at 1194; *Temple Emanu-El,* 705 So. 2d at 984. The words "subject to" or a similar phrase generally indicates the intent of the parties to be bound by the collateral document. *St. Augustine Pools, Inc. v. James M. Barker, Inc.,* 687 So. 2d 957, 958 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D432a]. However, the phrase "subject to" or a similar phrase, without more, is insufficient to bind the parties to the collateral document. *Affinity Internet, Inc. v. Consol. Credit Counseling Services, Inc.,* 920 So. 2d 1286, 1288 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D662a].

In *Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc.,* the court found no evidence that the parties intended to incorporate the terms of the collateral document into their service contract. *Id.* at 1288. The service contract between the Affinity and Consolidated stated "[t]his contract is subject to all of SkyNetWEB's terms, conditions, user and acceptable use policies located at http://www.skynetweb.com/company/legal/legal.php." *Id.* at 1287. Affinity's vice-president stated in her affidavit that the contract expressly incorporated the user agreement located at http://www.skynetweb.com/company/legaliuser-agreement.php. The court found that the service contract contained no clear language of an intent of the parties to incorporate the terms of the user agreement because the user agreement was not expressly referred to nor sufficiently described in the service contract. *Id.* at 1288. The court also noted that Consolidated was never provided a copy of the user agreement or its contents. *Id.*

In *Access Telecom, Inc. v. Numaxx World Merchants, LLC,* the Court found that a contract stating "[p]lease visit our website for terms and conditions at www.numaxx.com that govern this transaction," was sufficient to incorporate by reference those terms and conditions into the parties' contract. *Access Telecom, Inc. v. Numaxx World Merchants, LLC,* 1:13-CV-20404, 2013 WL 12108129, at *7 (S.D. Fla. Nov. 25, 2013). The court found that the purchase order specifically provided that it is subject to the incorporated collateral document. The court also determined that because the purchase order uses the language "terms and conditions," the collateral document entitled "Terms and Conditions" was sufficiently described or referred to in the purchase order.

In this case, there is no express language in the purchase order referencing the source code, licensing rights or code CY. The purchase order lacks any language, such as "subject to," "governed by" or the like, demonstrating the parties' intent to be bound by code CY or any other conditions set forth in the conditions sheet. The purchase order simply states "Additional Item Info: Terms and Conditions: http://marketplace.myflorida.com/vendor/po_tou.pdf." This language is insufficient to support the incorporation of the conditions sheet into the purchase order. *BGT Group.* 62 So. 3d at 1194; *Temple Emanu-El,* 705 So. 2d at 984.

The incorporating language contained in the conditions sheet does not alter the Court's conclusion. Although paragraph 13 of the conditions sheet states "[b]y accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions," there is no evidence that the conditions sheet was attached to the purchase order or that CMI was provided a copy of such document at the time of the transaction. The trial court's determination that the condition sheet was incorporated into the purchase order is simply unsupported by this record. *Affinity,* 920 So. 2d at 1289 *citing Gustavsson v. Washington Mut. Bank, FA.,* 850 So. 2d 570, 574 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1323b].

The trial court determined that FDLE both owned and possessed the software and source code by virtue of the purchase order, conditions sheet and Ms. DeWeist's testimony. The language of the documents themselves and Ms. DeWeist's testimony do not support that conclusion. The trial court abused its discretion by ordering production of the source code where its finding that FDLE possessed or owned the source code is not supported by competent substantial evidence.

CONCLUSION

Based on the record in this case, we reverse the order under review. The trial court denied the State due process of law when it ordered the State to produce the software for the Intoxilyzer 8000 without giving the parties notice that the production of the software, as opposed to the source code, would be the subject of the December 2013 hearing. The trial court abused its discretion by admitting the *Atkins* testimony pursuant to section 90.803(22) because that section is unconstitutional. The trial court's admission of the *Atkins* testimony was error. Lastly, the trial court's finding that the State owned or possessed the source code was not based upon competent substantial evidence. For these reasons, the trial court abused its discretion by entering the order under review. Given our ruling on these issues and the record before us, we need not address whether the source code is material and subject to discovery pursuant to Rule 3.220(f) or whether the trial court abused its discretion by precluding the State from seeking additional time to comply with its order if it proceeded with further litigation.

REVERSED AND REMANDED. (G. ADAMS, J. KEST, MYERS, JR., ROCHE, STROWBRIDGE, THORPE, and WHITE, JJ., concur. HIGBEE, J., dissents with an opinion, in which BARBOUR, BLECHMAN, SHEA, and TENNIS, JJ, concur.)

(HIGBEE, J., dissenting.) This a consolidated appeal of thirty-one (31) lower court cases as referenced in the Majority Opinion. This appeal specifically addresses a joint discovery hearing wherein the Appellees had moved the Appellant to allow inspection of the electrical and computer components of the Intoxilizer 8000, the source code, and software of the Intoxilizer 8000.

On appeal a trial court's ruling on a discovery matter is discretionary and should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella,* 580 So.3d 154, 155 (Fla. 1991). "If reasonable men could differ as to the propriety of the action taken by the lower court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris,* 382 So. 2d 1197, 1203 (Fla. 1980).

A lower court's findings of facts supported by competent substantial evidence are accepted as correct. *Wright v. State,* 161 So. 3d 442, 447 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1143d]. Competent

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substantial evidence is "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." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). "[E]vidence 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." *Id.* Whether a finding is supported by competent substantial evidence necessarily entails a consideration of whether evidence is "legally sufficient." *Florida Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]; *see also Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270, 1273-74 (Fla. 2001) [26 Fla. L. Weekly S329a]. "Sufficient evidence is 'such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.' " *Tibbs v. State,* 397 So. 2d 1120, 1123 (Fla. 1981) (quoting Black's Law Dictionary 1285 (5th ed. 1979)).

At the December 2013 hearing, the lower court judge announced there were several defense and State exhibits that were already accepted by the court for review including the transcript of the testimony and exhibits from *State v. Atkins,* 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008) provided by the defense. (R. Transc. 10). Defense witnesses Florence DeWiest, Stephen Daniels, Thomas Workman, Jr., and Dr. Harley Myler testified. (R. Transc. 11-54, 55437, 438-653, 656-781).

Appellant did not present any witnesses at the hearing. Appellant presented a report from an expert who examined the source code and determined that he did not find any errors that could lead to invalid breath test readings; CMI's Statement of Corporate Policy stating that the Intoxilyzer 8000 software, including the source code and object code, are confidential and a trade secret owned by CMI; and several other documents to support its position that the State does not possess or own the source code or software and that access to the source code and software is not necessary to challenge the breath test results.

Both sides also stipulated that proceedings held before a county judge in Seminole County should be submitted, this transcript was not included in the record at bar. It is unknown whether some or all of the record at issue was duplicative of this record that was considered by the lower court upon the agreement of all parties.

As this was a discovery hearing, the Court relaxed the rules of evidence, and both the appellants and appellees submitted their information to the En Bane Panel for its' consideration regarding the requested inspection.

The first issue we address is whether the lower court abused its discretion in admitting into evidence the *Atkins* testimony along with all of the other items, transcripts and testimony. Per *State v. Abreu,* 837 So. 2d 400 (Fla. 2003) [28 Fla. L. Weekly S80a], the Court found that section 90.803(22) violates the confrontation clause in criminal proceedings to the extent that it allows a prosecutor to use a trial witness testimony from a previous proceeding without a showing that the witness is unavailable to be applicable. There are no cases in which the Florida Supreme Court has found that a statute authorizing the admission of hearsay evidence was unconstitutional under Article V, Section 2(a) and *Grabau* can be distinguished. The issues argued in this case are the same as some of the issues argued in *Atkins* and Appellant had an opportunity to cross examine the witnesses in *Atkins* whose testimonies were relevant for this case. That combined with the nature of the hearing; again, a discovery hearing; the manner in which both sides presented their information and argument, and the other materials stipulated by both sides for consideration, causes us to decide, in dissent of the majority opinion, that the lower court appropriately considered the *Atkins* transcript.

Secondly, we address Appellant's argument that the lower court erred by ruling on the issue of the software because it was not noticed for hearing and not the subject of the hearing.

While the notices of hearing that are incorporated in the record state "*Defendant's Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results and Defendant's Motion to Produce I* (Schedule "A" Items paragraphs 18-23). (3rd Supp. R., 4th Supp. R.1.-R6.), the record includes numerous references to both "software" and "source code".

Throughout the motions, records, and transcripts under review, the record is replete with instances where the words "software" and "source code" have been interchangeably used in testimony, records and argument; by the State, witnesses, and by the Appellees.[9] As such, we find that the Intoxilizer software 8100.26 and 8100.27, revision histories and source code were raised in the motions to produce and the lower Court did not abuse their discretion in considering them to be at issue in the hearing.

Finally, with regard to materiality, Appellant argues that the trial court erroneously determined that the source code, software, and supporting documents are material pursuant to Rule 3.220(f) because section 316.1932(1)(f)4, Florida Statutes (2011), specifically exempts these items from disclosure when they are not in the State's possession. Appellant claims that the record demonstrates that those items are not in its possession. Appellees claim that the items are discoverable upon showing of materiality under Rule 3.220(f). The Majority opinion eliminates consideration of Ms. Barfield's testimony or any other evidence from *Atkins* on this issue, finds that to the extent that the trial court relied upon Atkins to support any of its findings that they are not supported by competent substantial evidence and as a result fails to address whether the source code is material and subject to discovery pursuant to Rule 3.220(F).

As we find that the admission of the Atkins record was permissible, we engage in further analysis as to the materiality of the source code, software, and what is subject to discovery pursuant to Rule 3.220(F)

Section 316.1932(1)(f)4 states:

> Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney.
>
> ....
>
> Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

Rule 3.220(f) states "[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require."

As Appellees argue, section 316.1932(l)(f)4 does not define material. Fla. Stat. §316.1932(1)(f)4. It only defines full information. *Id.* Items that constitute full information are listed in the statute. *Id.* However, full information is not equivalent to material information and section 316.1932(l)(f)4 does not determine whether information is material. *Id.* Instead, "material" is defined as information reasonably calculated to lead to admissible evidence. *Demings v. Brendmoen,* 158 So. 3d 622, 625 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D815a] (citing *Franklin v. State,* 975 So. 2d 1188, 1190 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D687a]). The trial court was not prohibited by section 316.1932(l)(f)4 from finding that the software, source code, and supporting documents are material if those items are reasonably calculated to lead to admissible evidence. Fla. Stat. § 316.1932(l)(f)4.

Furthermore, DeWeist's testimony that the State purchased the Intoxilyzer 8000 with the Florida Specific Software that **includes the source code** and Barfield's testimony that FDLE had the software on their laptops and on discs constitute competent substantial evidence

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that those items are in the State's possession. Dr. Myler's and Workman's testimony stating that examination of the source code and software is necessary to determine the cause of the anomalies identified in the defense exhibits is competent substantial evidence that the source code is material.

Appellant argues that only less than 50 tests of out of over 450,000 tests showed anomalies, the opinions of defense witnesses Daniels and Workman should not have been considered because they do not meet the *Daubert*[10] standard, and the trial court gave improper weight to Workman's testimony because the trial court improperly referred to him as Dr. Workman. The trial court's error in identifying Workman as Dr. Workman was insignificant. There is no evidence that the trial court gave Workman's testimony improper weight because it mistakenly referred to him as doctor. The trial court accurately identified Workman's credentials and experience in its order. In addition, Daniels did not testify as an expert and the trial court acknowledged that he was not an expert. Requiring a *Daubert*-type hearing prior to discussing what information and materials may be needed to make a *Daubert* claim is putting the cart before the horse.

By considering all the testimony at the hearing, the Defense and State exhibits, the testimony provided in *Atkins*, and giving greater weight to the testimony of the expert witnesses who testified at the hearing, the trial court did not abuse their discretion. Based on the testimony of Mr. Workman and Dr. Myler and the evidence submitted at the hearing, there was competent substantial evidence to support the trial court's finding that the source code is material because there were numerous anomalies with the Intoxilyzer 8000 results and the anomalies may be caused by the source code.

Appellant argues that the trial court erred by finding that it owns or possesses the source code and software because there was no evidence that FDLE is in possession of the source code or software. Appellant claims that the trial court improperly interpreted the contract between FDLE and CMI because there is no mention in the contract of ownership of the intellectual property rights to the software or source code. Appellant also argues that FDLE's act of returning the software in its possession to CMI demonstrates the parties' intent that the software was to be used, not owned, by FDLE. In addition, Appellant claims that collateral estoppel applies because of the Second Circuit Court's declaratory judgment in *FDLE v. CMI* No. 2008-CA-3619 (Fla. 2nd Cir. Ct. Sept. 10, 2009), finding that CMI owns the software and source code. Appellant also argues that it was determined in *Moe v. State,* 944 So. 2d 1096 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2887a], that the State does not own source code. *Moe* was based upon the specific facts in that case, upon a record which has not been demonstrated is identical to the facts and record in this case. *Id.*

The language used in a contract is the best evidence of the intent and meaning of the contracting parties. *Gendzier v. Bielecki,* 97 So. 2d 604, 605 (Fla. 1957); *Republic Services, Inc. v. Calabrese,* 939 So. 2d 225 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2543a]; *Whitley v. Royal Trails Prop. Owners' Ass'n, Inc.,* 910 So. 2d 381 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2207a]. If the language of a contract is clear and unambiguous, there is no need to look outside the four corners of the contract to determine the intent. *Gowni v. Makar,* 940 So. 2d 1226 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2758a]; *Garcia v. Tarmac American Inc.,* 880 So. 2d 807 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1852a]; *Harris v. School Bd. of Duval County,* 921 So. 2d 725 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D545a].

The Defense introduced the original purchase order for the Intoxilyzer 8000 for FDLE use in Florida created on June 17, 2005. (Tr. 29, 30, DE. 101). The description of the items purchased listed the Intoxilyzer 8000 with Badge Reader, Modem, Internal Printer, Florida Specific Software, and other items. Paragraph 13 of the contract states, "By accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions." Following paragraph 13 are four pages of conditions and instructions that include "CY Copyrights and right to data" which states:

> If the materials so developed are subject to copyright, trademark or patent, legal title and every right, interest claim or demand of any kind in and to any patent, trademark, or copyright or application for the same, will vest in the state of Florida, department of state for the exclusive use and benefit of the state. Pursuant to § 286.021 Florida statutes, no person, firm or corporation, including parties to this contract, shall be entitled to use the copyright, patent or trademark without the prior written consent of the department of state.
>
> All computer programs and other documentation produced as part of the contract shall become the exclusive property of the state of Florida, department of state and may not be copied or removed by any employee of the contractor without express written permission of the department.

(emphasis added).

Appellant claims that the CY is not part of the purchase order because it was not "checked." Only two of the 28 conditions have handwritten check marks on the right side. Appellant argues that the fact that these two areas were checked and that the CY was not checked demonstrates that the CY is not part of the purchase order.

There is no area in the listed conditions to include or exclude any of the conditions by making a check mark. DeWiest testified that the computer system does not put check marks on the documents. (Tr. 39). When the State asked DeWiest about the items with check marks, she stated, "But we did not do that. [I] assumed they were Mr. Hyman's checks." (Tr. 34). She also testified that the CY was part of the purchase order if it applied. (Tr. 28). The CY refers to computer programs. The description of the item purchased in the purchase order is Florida Specific Software. Therefore, there was competent substantial evidence to support the trial court's findings that the CY was part of the purchase order and the State owns the Intoxilyzer 8000 with Florida Specific Software, which includes the source code and software. *De Groot,* 95 So. 2d at 916 (determining that competent substantial evidence is relevant evidence as a reasonable mind would accept as adequate to support a conclusion).

In addition, the trial court's finding that FDLE possessed copies of the Intoxilyzer software is supported by Laura Barfield's testimony in Atkins acknowledging that FDLE had copies of the Intoxilyzer software on its laptops and on compact discs. (AB. 18, 25, R3. 206, AT. 287-286, Feb. 4, 2008). As such, the trial court did not abuse its discretion in concluding that the State owns and possesses the Florida Specific Software that includes the source code because there was competent substantial evidence to support the trial court's findings.

The trial court determined that the State owns and possesses the source code and software and thus may require the State provide material evidence in its possession. *See* Fla. R. Crim. P. 3.220(f); *State v. Coney,* 294 So. 2d 82, 85 (Fla. 1973). Appellant argues that Appellees must first exert their own efforts and resources to obtain the requested information citing to *Coney,* and argues that another panel of this Circuit in *State v. Burton* found that the *Atkins* record does not show that the defense is unable to obtain the source code by other means.

In *Coney,* 294 So. 2d at 85, the Court agreed with the First District Court that found:

> A determination should first be made as to whether all or any part of the information sought by defendant is readily available to him by the exercise of due diligence through deposition, subpoena, or other means. If so, the motion should be denied; if not, the court should then proceed to a determination as to whether the information sought may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory. If this determination

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is resolved in the affirmative, the motion should be granted; otherwise, denied.

So long as the pertinent and relevant information requested by a defendant is readily available to the state attorney from other state governmental agencies for his use in the prosecution of the case even though not reduced to his actual possession, then it should likewise be made available to the defendant upon his timely demand.

(citing *State v. Coney,* 272 So. 2d 550 (Fla. 1st DCA 1973)).

Dr. Myler testified that he went to CMI four times to inspect the Intoxilyzer 8000 source code for other defendants. (R. Transc. 660-61). Dr. Myler stated he was forbidden from removing his notes from the testing facility and CMI disassembled and destroyed the hard drive of the laptop he used to conduct the testing. *Id.* Dr. Myler testified that without his notes he could not prepare a report necessary to provide testimony about his observations because of the complex nature of the testing. (R. Transc. 661-62). In contrast, CMI did not apply this same restrictive access to FDLE employees. The trial court noted Patrick Murphy, an FDLE employee, inspected the Intoxilyzer source code and was permitted to retain his notes that were stored in his desk at FDLE.[11] (R3. 189, DE. 107, Tr. 662-65). Dr. Myler testified that Murphy's notes would have no value to him because they were Murphy's analysis, did not provide the information that he would be looking for in his analysis of whether the machine worked properly, and was a static analysis, not a dynamic analysis that he performed. (R. Transc. 664-67).

Based on Dr. Myler's testimony about CMI's restrictive access applied to defense experts, the trial court did not abuse its discretion in finding that the source code was not readily available to Appellees. However, the source code was readily available to the State, through FDLE as demonstrated by evidence of Patrick Murphy's unrestricted access. Since the source code was not readily available to Appellees, the next step as explained in *Coney* is to determine whether the information may reasonably be considered admissible and useful to the defense because it is probably material and exculpatory. *Coney,* 294 So. 2d at 85. As stated above, the trial court did not abuse its discretion in finding that the source code is material and possibly exculpatory if it is determined that the Intoxilyzer 8000 is not functioning as it should. Therefore, as stated in *Coney,* the source code should be made available to the Defense upon a timely demand because the trial court's finding that the State possesses the source code is supported by competent substantial evidence. *Id.*

As to the issue that further litigation of the request to produce would not be a basis for additional time to comply was an abuse of discretion because the outcome of the appeal would profoundly affect the remainder of the proceedings, this argument is moot.

"An appeal by the state from a pretrial order shall stay the case against each defendant upon who application the order was made until the appeal is determined." § 924.071, Fla. Stat. (2011). Therefore, once the State filed an appeal, the lower court cases were automatically stayed. However, section 924.071 does not prevent the trial court from enforcing its order prior to the State filing a notice of appeal or if the State pursued other litigation such as a petition for extraordinary relief that does not automatically stay a pretrial order. *Id.; Byrd-Green v. State,* 40 So. 3d 848 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1565c]. Therefore, the trial court's statement that, "Further litigation of this Request to Produce or this Order will not be considered a basis for additional time," is not an abuse of discretion unless the trial court proceeded with the cases while this appeal was pending.[12] The State has not alleged that the trial court has proceeded with the cases while this appeal was pending. Therefore, it was not an abuse of discretion to include this statement if the trial court stays the proceedings while an appeal is pending.

Based on the record in this case. we dissent. finding that the lower court did not abuse its discretion in finding that the State was provided sufficient notice that the software would be at issue at the hearing, that considering the *Atkins* testimony was constitutionally permissible, the software and source code are material and are owned or in possession of the State. As such, we agree with the lower court's ruling, that same should be made available to Appellees in order to introduce the breath test results under section 316.1934. Florida Statutes (2008).

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[1]Initially, the State improperly filed petitions for writ of certiorari to review the lower court orders. § 924.07(1)(h), Fla. Stat. (2016). We treated the timely filed petitions as notices of appeal. Fla. R. App. P. 9.040(c).

[2]For lower court cases 2014-CT-6519-A-O (Corchado) and 2014-CT-6690-A-O (Abraham) there is no record that defense motions for production of the source code or the software were filed. Generally, every pretrial motion must be in writing and signed by the party or the attorney for the party, unless waived by the court for good cause. Fla R. Crim. P. 3.190(a). A violation of due process occurs when a trial court address issues that are not the subject of appropriate pleadings. *Kanter v. Kanter,* 850 So. 2d 682, 685 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1844a]; *Todaro v. Tadaro,* 704 So. 2d 138, 139 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2621a]. However, the State did not object to the trial court addressing the issues on appeal in the Corchado and Abraham cases and consented at oral argument to review of the orders in those cases as if the motions had been properly filed.

[3]Prior to the December 2013 hearing, defense motions for production of the source code were denied in 2013-CT-282-A-E (Gerrard) and 2013-CT-3760-A-O (Acosta-Vega) by a different county court judge based on the evidence before the lower court at that time. (R9. 127-142, R10. 79-94). No motions for rehearing were filed by the defendants in those cases.

[4]Although the December hearing was a joint hearing, the exhibits considered by the lower courts were not filed in all the lower court cases. Several exhibits were filed in *State v. Ganuelas,* 2011-CT-3092-A-O; however, *Ganuelas* is not part of this consolidated appeal because the notice of appeal was not timely filed. This Court allowed the record to be supplemented with the exhibits filed in *Ganuelas* because those exhibits were reviewed by the lower courts when they rendered the decisions on appeal. Fla. R. App. P. 9.200(f)(2); *Poteat v. Guardianship of Poteat,* 771 So. 2d 569, 571 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2421b] (stating that the purpose of rule 9.200(f) is to allow supplementation of the record with an item considered by the lower court, but omitted from the record on appeal, recognizing that pleadings are sometimes considered by the court but not placed in the record prior to entry of the final judgment).

[5]The record only contains notices of hearing filed in the following seven lower court cases on review: 2012-CT-700-A-E (Novoselac), 2013-CT-282-A-E (Garrard), 2013-CT-1123-A-E (Long), 2013-CT-4524-A-O (Pate), 2013-CT-8418-A-O (Pajotte), 2013-CT-8666-A-O (Davis), and 2013-CT-9838-A-O (Gauck).

[6]Appellees and the trial court point out that the court in *Alvarez v. Crosby,* 907 So.2d 1231 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1701a] did not address the statute's constitutionality. They infer from that omission that the statute is therefore constitutional. In *Alvarez,* the court mentions section 90.803(22) in one sentence of the opinion, stating in *dicta* that although the issue was not raised by the parties, a proffer of prior testimony could be made by the defendant under section 90.803(22). It is clear from the opinion that the parties in *Alvarez* did not raise the statute itself or its constitutionality in their appeal.

[7]For the reasons discussed *supra,* reliance on the *Atkins* transcript was error.

[8]Although the purchase order and conditions sheet were admitted below as a single document, there is no evidence that the conditions sheet was actually attached to the purchase order when it was submitted to CMI by FDLE in 2005. It is unclear whether the conditions sheet was ever attached to the purchase order or, additionally, the circumstances under which several check marks were placed on the conditions sheet.

[9]The Court uses the term "source code" at the beginning of the hearing T page 5 line 11-14, and in closings pages 840-842. Multiple software references are found on page 10 line 6 and page 29 lines 19 and 22. Witnesses referred to software and source code together; page 72 lines 18-25 and 27, page 105 lines 7-12, page 129 lines 4-7, page 130 lines 9-11, page 374 lines 6-16. References to the "software source code issue" are found on pages 132 lines 119-21 and page 186 lines 6-7. Experts discuss the differences conceptually between software, source code and even "object code" on page 471 lines 6-25, page 472 lines 1-25 and further on pages 492, 494-497, page 505 and page 565 lines 4-10. "Software" is used as a euphemism for source code without clear delineation of terms on pages 670 and 671. The State refers to software in cross examination; page 33 lines 11-13, page 376 lines 16-18, page 378 lines 3-10, page 379 lines 3-6 and 7-11 and refers to the concepts together; page 33 lines 19-23, page 34 line 1, page 374 lines 2-5, page 378 lines 13-18 (where there is a reference to 8100.27 but means software), and page 732 lines 2-5, "various versions of software and the source code".

[10]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[11]Patrick Murphy has a B.S. in General Studies and a M.S. in Forensic Toxicology and Forensic Science. He is the Department Inspector for FDLE Alcohol Testing Program and testified about the Intoxilyzer 8000 in several counties throughout Florida.

[12]The statement "Further litigation of this Request to Produce or this Order will not be considered a basis for additional time," is not included in all the orders on appeal.

* * *

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Liens—Assessment lien—Foreclosure—Trial court abused its discretion when it denied motion seeking rehearing and setting aside order of dismissal entered when homeowners association failed to appear at status conference where affidavits of association's counsel and legal assistants attesting to lack of notice of conference were unrebutted—Further, notice that indicated only that status conference would be held was insufficient notice of hearing at which trial court reviewed evidence—Fact that defendants were representing themselves did not relieve them from requirement to comply with rules of civil procedure regarding motion practice, rather than seeking dismissal through ex parte letters to court—Trial court went beyond four corners of complaint when it dismissed complaint based on evidence of alleged payments by defendants

LENNAR SPANISH LAKES HOMEOWNERS ASSOCIATION, INC., Appellant, v. MARIE B. DESTIN and WILSON DESTIN, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-354-AP-01. L.T. Case No. 2018-15960-CC 25 (03). May 14, 2020. An appeal from the County Court in and for Miami-Dade County. Counsel: Robert E. Page, Page Law Group, P.A., for Appellant. Leslie W. Langbein, Langbein & Langbein, P.A., for Appellee.

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

(TRAWICK, J.) Lennar Spanish Lakes Homeowners Association, Inc. ("Lennar") appeals an order of dismissal entered by the trial court on October 23, 2018. The Order dismissed an Amended Complaint to Foreclose on a Homeowners' Association Lien against Marie B. Destin and Wilson Destin (the Destins). Lennar also appeals the trial court's denial of their motion for rehearing and reconsideration, entered on November 28, 2018.

On July 30, 2018, Lennar filed a "Complaint to Foreclose Homeowners Association Lien" against the Destins, which incorrectly identified Marie B. Destin. In response, the Destins filed a *pro se* letter claiming that the allegation that they owed money was false. The trial court treated their letter as a motion to dismiss and noticed a hearing on the motion and for a status conference. At the hearing, the trial court reviewed evidence of payments presented by the Destins and suggested that Lennar review the Destins' alleged payments as well as its own ledgers to confirm the amounts allegedly owed. The trial court then granted the Destins' motion to dismiss without prejudice.

Subsequently, Lennar filed an amended "Complaint to Foreclose Homeowners Association Lien." However, Lennar stood by its ledgers and did not amend any information regarding the amount owed. A notice of hearing for a second status conference was served on both parties by U.S. Mail on October 18, 2018, for a hearing scheduled for October 23, 2018. Notably, this notice of status conference did not notify the parties of any evidentiary hearing or that the motion to dismiss would be heard. At the status conference, the trial court again treated another letter from the Destins as a motion to dismiss and immediately held a hearing on the motion. An exhibit list from that hearing reflects the submission of three exhibits by the Destins: 1) Exhibit A "Check Summary & Checks Paid 03/06 & 03/19;" 2) Exhibit B "Checking Summary & Checks Paid 06/27:" and, 3) Exhibit C "Chase Summary Chase Total Checking."[1]

In its order dismissing the amended complaint, the trial court stated:

> Based upon the Defendant providing proof of HOA payments which were alleged in the Complaint to have not been paid, this matter is hereby dismissed. Plaintiff has failed to appear after being properly noticed of todays [sic] hearing.

Lennar then filed "Plaintiff's Motion for Rehearing and Reconsideration." In the motion, Lennar argued that they did not receive notice of the October 23, 2018 hearing. In addition, they maintained that the notice failed to mention that there would be an evidentiary hearing on the motion to dismiss and was thus insufficient. After a hearing on November 28, 2018, the trial court denied the motion. This appeal followed.

We first address the issue of notice of the October 23, 2018 hearing. The notice was allegedly sent by U.S. Mail to Lennar's address. "[M]ail properly addressed, stamped and mailed creates a rebuttable presumption of receipt and that proof of general office practices satisfies the requirement of showing due mailing." *Home Ins. Co. v. C & G Sporting Goods, Inc.*, 453 So. 2d 121, 123 n.3 (Fla. 1st DCA 1984).

Lennar countered this rebuttable presumption by filing affidavits of its counsel and two of his legal assistants attesting to lack of notice. They thus alleged that their absence from the hearing was due to excusable neglect pursuant to Florida Rule of Civil Procedure 1.540(b). "Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir." *Suntrust Mortgage v. Torrenga*, 153 So. 3d 952, 954 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2552a] (citations omitted). In *City of Pembroke Pines v. Zitnick*, 792 So. 2d 677, 678 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2106a], the court found that a secretarial scheduling error constituted excusable neglect."[2] Similarly here, the affidavits attesting to a lack of notice were sufficient to meet Lennar's burden to establish excusable neglect. There was no evidence admitted at the hearing on Lennar's motion to rebut these affidavits. Instead, there was a discussion regarding evidence the trial court considered at the October 23rd hearing. Accordingly, the trial court abused its discretion by denying the motion for rehearing and reconsideration and not setting aside the order of dismissal. *See Benefit Administrative Systems, LLC. v. West Kendall Baptist Hospital, Inc.,* 274 So. 3d 480, 483 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1387a]; *Suntrust Mortgage v. Torrenga,* 153 So. 3d 952, 954-55 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2552a].

Even if Lennar had received the hearing notice, it only indicated that a status conference was being held. "[I]f the court is to allow testimony in disputed motion calendar hearings, specific notice of such intention must be given, with a sufficient interval to prepare and adequate opportunity to present contrary testimony prior to ruling." *Herranz v. Siam*, 2 So. 3d 1105 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D400d]; *Juliano v. Juliano*, 687 So. 2d 910, 911 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D352i]. Despite the fact that the hearing was only noticed for a Status Conference, the court reviewed evidence presented by the Destins. Lennar should have had notice that evidence was to be taken, as well as a sufficient interval to prepare and an adequate opportunity to present contrary testimony.

> Every party litigant is entitled to his "day in court," and this includes the right of a plaintiff to present admissible evidence in an attempt to prove the cause of action he has alleged. . . .

Kelley v. Webb, 676 So. 2d 538, 539 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1663a] (citing *Sapp v. Redding*, 178 So. 2d 204, 206 (Fla. 1st DCA 1965). Lennar was deprived of that right due to the insufficiency of the notice for the October 23rd hearing.

Additionally, "a party's self-representation does not relieve the party of the obligation to comply with any appropriate rules of civil procedure." *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992). The Destins' filing of *pro se* letters rather than complying with Florida Rule of Civil Procedure 1.100(b)[3] and 1.090(d)[4] led to confusion and inadequate notice.

> [I]t is a mistake to hold a pro se litigant to a lesser standard than a reasonably competent attorney. Section 454.18, Florida Statutes (1991) clearly provides 'any person . . . may conduct his own cause in any court of this state . . . subject to the lawful rules and discipline of such court.'

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Id. at 540 (citing *Carr v. Grace*, 321 So. 2d 618 (Fla. 3d DCA 1975), *cert. denied*, 348 So. 2d 945 (1977)).

While our findings regarding the sufficiency of notice to Lennar require reversal, we also address the trial court's order granting the Destins' motion to dismiss, as the issues related to it may reoccur upon remand. The standard of review for orders granting motions to dismiss is *de novo*. *Cornfeld v. Plaza of the Americas Club, Inc.*, 273 So. 3d 1096, 1098 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1157a]; *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLP*, 137 So. 3d 1081, 1088 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a].

In considering a motion to dismiss, the trial court is confined to the four corners of the complaint. *Minor v. Brunetti*, 43 So. 3d 178, 179 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2013a]. " '[A] trial court may not rely upon depositions, affidavits, or other forms of evidence or speculation as to whether the allegations in the complaint 'will ultimately be provable.' " *Enlow v. E.C. Scott Wright, P.A.*, 274 So. 3d 1192, 1193 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1543a]. "A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues." *Brunetti*, 43 So. 3d at 179 (citing *The Fla. Bar v. Greene,* 926 So. 2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S212a]).

At the July 30, 2018 hearing, the trial court reviewed evidence of payments presented by the Destins and told Lennar that they should review these payments and confirm the amounts owed. Then again at the October 23, 2018 hearing, the trial court also indicated that it considered matters outside of the complaint:

> THE COURT: I mean, there might be some payments owed, sir, but you know, he did show me proof of payment for monies that you are requesting.

(R. 153). The Court also stated the following in its order of dismissal after that hearing:

> Based upon the Defendant providing proof of HOA payments which were alleged in the Complaint to have not been paid, this matter is hereby dismissed. Plaintiff has failed to appear after being properly noticed of todays [sic] hearing.

The consideration by the trial court of the alleged payments by the Destins went beyond the constraints of the four corners of the complaint. This was error.

The order of dismissal is hereby **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion. (WALSH and SANTOVENIA, JJ. concur.)

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[1]Exhibit A showed two payments of $106.53 totaling $213.06; Exhibit B showed a payment of $106.53; and, Exhibit C showed a check paid in the amount of $106.53.

[2]The cases cited by the Destins are distinguishable and do not constitute excusable neglect: *Emerald Coast Utils. Auth. v. Bear Marcus Pointe, LLC*, 227 So. 3d 752, 757 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2131a] (conscious decision to utilize a defective email system); *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 385 (Fla. 4th DCA 1980) (failure to comprehend the legal obligations attendant to service); *City of North Bay Village v. Guevara*, 129 So. 3d 1100, 1102 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2318a] (failure to open casemail notice of hearing).

[3]"Motions. An application to the court for an order must be by motion which must be made in writing unless made during a hearing or trial, must state with particularity the grounds for it, and must set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All notices of hearing must specify each motion or other matter to be heard." Fla. R. Civ. P. 1.100(b).

[4]"For Motions. A copy of any written motion which may not be heard *ex parte* and a copy of the notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing." Fla. R. Civ. P. 1.090(d)

* * *

Criminal law—Resisting officer without violence—Lawful execution of legal duty—Officer's order to "move along" addressed to defendant who stood outside vehicle complaining loudly after receiving speeding ticket did not constitute lawful execution of legal duty—Because defendant was entitled to resist order, conviction is vacated

LAZARO RODRIGUEZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-122-AC-01. L.T. Case No. M16-1296. April 28, 2020. An Appeal from the County Court in and for Miami-Dade County, Hon. Andrew S. Hague, County Court Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and John Eddy Morrison, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Wesley W.E. Stafford, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and REBULL, JJ.)

(WALSH, J.) Lazaro Rodriguez appeals his conviction and jail sentence on a charge of resisting an officer without violence. He argues that because the police officers were not engaged in the lawful execution of a legal duty, the State failed to prove the charge. We agree and reverse.

The information charged Mr. Rodriguez as follows:

> LAZARO MANUEL RODRIGUEZ, on or about December 17, 2015, ...did unlawfully resist, obstruct, or oppose OFFICER N. AMORES (sic) AND/ OR OFFICER A. LEON, . . . in the lawful execution of a legal duty or process then being performed by said officers, to wit: the detention and/ or arrest of said defendant without said defendant offering or doing violence to the person of said officers, in violation of s. 843.02, Fla. Stat. . . . .

The State presented the following testimony at a bench trial. On December 17, 2015 at almost 3:00 a.m., several officers were conducting a stationary radar and training operation on the corner of 18th avenue and 1st Street. Officer Amoris stood on the street checking the speed of passing cars with a radar gun. When he detected cars exceeding the speed limit, he would direct the drivers to stop, request license, registration and insurance and direct the drivers to park in an adjacent parking lot. Mr. Rodriguez's car was traveling 43 miles per hour, in excess of the speed limit. Officer Amoris directed Mr. Rodriguez to pull into the adjacent parking lot to be processed for a speeding ticket. Meanwhile, other officers remained on the street about 15 feet away from the parking lot and continued to conduct radar speed checks.

After Mr. Rodriguez parked, he got out of the car to smoke a cigarette. Officer Leon, who was processing Mr. Rodriguez's stop, ordered him to get back into the car. Although Mr. Rodriguez complied, he began to yell obscenities at the officer. Officer Tobin walked toward Mr. Rodriguez's car and saw Mr. Rodriguez visibly upset and complaining about receiving a speeding ticket at 3:00 in the morning. Mr. Rodriguez's wife, also in the car, urged him to calm down. Officer Leon motioned for Officer Amoris to come over. Officer Tobin, who was watching the interaction, testified,

> Officer Leon kind of, sort of motioned for Officer Amoris. I came closer, and I think the Lieutenant came closer. And when we came closer, he was good. He got back in the car, he put on his seatbelt. I thought he was going to go about his business.
>
> When Officer Amoris got there, there was an exchange between Officer Amoris and Mr. Rodriguez, where he was again complaining about the ticket, and why are you out here giving tickets. And you shouldn't be giving tickets.
>
> Officer Amoris said to him a few times, hey, look, this isn't court. Take it to court. I'm working here. And there were four cars lined up in the, sort of in the cube that we were working on.
>
> Mr. Rodriguez went back and forth with Officer Amoris regarding getting tickets at 2:00 in the morning for a minute or two. Mr. Rodriguez was upset.
>
> At some point Officer Amoris starts to leave. They're still having sort of an exchange.
>
> As Amoris gets further away from the car, he undoes his seatbelt and he gets out of the car.
>
> Officer Amoris is telling him, get back in your car. You're gonna go to jail, get back in your car. I told you to leave.

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After several of those Amoris says, hey, put your hands behind your back, you're going to jail.

He puts. He puts the handcuffs on him.

Officer Amaris described the interaction as follows:

I explained this to him about three to four times. At which time I started to walk away, and I told him that he can leave. He needs to leave.

Q. Could you describe the Defendant's actions after you gave him this instruction?

A. The Defendant then became extremely irate and started cursing more. And as I'm walking away I have a visual of him. I'm walking away, the Defendant rapidly exits, takes off his seatbelt, kicks the door open and exits the vehicle.

Q. Did the Defendant approach you after that?

A. The Defendant—the Defendant clenched his fist, at which time I told him sir, you need to put your hands back on top of the vehicle. That you're impeding an investigation, and all my concentration from all the other vehicles being stopped at the time, it's all focused on you right now.

Other officers had to come and assist us.

Q. What were his actions after you told him to get back in the vehicle?

A. He did not comply.

Q. At that point what did you do?

A. At that point I told him that he was under arrest, to put his hands behind his back. And I grabbed his right arm.

Analysis

At issue is whether the Defendant's actions in disobeying Officer Amoris' order to leave after being issued a speeding ticket established the misdemeanor offense of resisting an officer without violence.

There was no challenge to the sufficiency of the evidence below. Unpreserved claims challenging the sufficiency of the evidence below may only be addressed where " 'there is insufficient evidence that a defendant committed any crime.' " *Aquino v. State,* 276 So. 3d 464, 468 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1834a] (quoting *Monroe v. State,* 191 So. 3d 395 (Fla. 2016) [41 Fla. L. Weekly S192a]). The Court in *Monroe* explained:

Challenges to the sufficiency of the evidence inherently question the conclusions of the fact-finder, a process that we, as an appellate court, are reluctant to undertake. Appellate courts should more closely concern themselves with the legal sufficiency of the evidence, rather than the weight assigned to or the credibility of the evidence before the trial court. Therefore, when an appellate court conducts a sufficiency review, it deferentially reviews all of the evidence in the record in the light most favorable to the government to determine whether a rational trier of fact could have reached the verdict.

Id. at 401-02.

To constitute the crime of resisting an officer without violence, the State was required to offer proof of the following elements: "(1) the officer was engaged in the lawful execution of a legal duty and (2) the defendant's action constituted obstruction or resistance of that lawful duty." *C.W. v. State,* 76 So. 3d 1093, 1095 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D34a], *citing J.P. v. State,* 855 So. 2d 1262, 1265-66 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2376a]; *Jay v. State,* 731 So. 2d 774 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D956b]; § 843.02, Fla. Stat. (2015). Here, applying the above deferential standard of review of this unpreserved challenge, the State failed to prove the crime of resisting an officer without violence.

To sustain Mr. Rodriguez's conviction, the State was required to prove that Officers Amoris and/ or Leon were engaged in the lawful execution of a legal duty. If not, then even if the Defendant did resist the officers' command to get in his car and leave, he has not committed the crime of resisting an officer without violence. This is because the common law rule remains that a person may resist an illegal arrest without violence. *See Lobb v. State,* 2020 WL 499708 (Fla. 2d DCA Jan. 31, 2020) [45 Fla. L. Weekly D238a]; *K.Y.E. v. State,* 557 So. 2d 956 (Fla. 2d DCA 1990).[1]

Mr. Rodriguez resisted or opposed Officer Amoris' order to get back in his car and leave after being issued a citation.[2] To justify why this order constituted a legal duty, Officer Amoris testified that Mr. Rodriguez's actions distracted him from his duty in processing the remaining stopped vehicles for speeding.

While it is reasonable that a police officer on the job might order a ticketed speeder to leave an area, Officer Amoris' order, is not the lawful execution of a legal duty which compels compliance. In *C.W.*, the court describes the term "legal duties" in the context of the charge of resisting an officer as follows:

"legal duties" include (1) serving process; (2) legally detaining a person; or (3) asking for assistance in an emergency situation, or (4) impeding officers' undercover activities by acting as a "lookout" during the commission of a criminal act. *See, e.g., Davis v. State,* 973 So.2d 1277 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D540a]; [*Jay v. State,* 731 So.2d 774, at 775 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D956b]]; *Porter v. State,* 582 So.2d 41, 42 (Fla. 4th DCA 1991). Although this is not an exhaustive list, it is clear that there is a difference between an officer who is engaging in the lawful execution of a legal duty, and a police officer who is merely on the job. *See, e.g., Jay,* 731 So.2d at 776; *D.G. v. State,* 661 So.2d 75, 76 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1477a].

76 So. 3d at 1095. In *C.W.*, the police arrested a juvenile who refused to obey an order to move off of the street and on to the unpaved swale. The court noted that "[t]he officer's initial request that C.W. move a de minimus distance out of the road was a reasonable part of the job as community safety officers. But the officers had no legal duty to insist on compliance and to enforce that insistence with arrest where the record shows that there were no circumstances warranting this." *Id.* at 1095-96. *Citing K.A. v. State,* 12 So. 3d 869 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1165a] (no evidence of trespass to justify arrest for refusing to leave a skating rink).

In a number of cases, Florida's appellate courts have similarly concluded that a suspect resisting an order—made while the officer is on the job but not exercising a legal duty that compels compliance—is not a crime. *See R.E.D. v. State,* 903 So. 2d 206 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2339b] (Defendant telling unnamed males who approached a target house in drug sting operation, "99 that's the police there" is not crime of obstruction); *D.L.S. v. State,* 192 So. 3d 1273 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1381d] (ignoring police order to stop when walking away after telling a crowd not to disperse is not obstruction of lawful order); *Jay v. State,* 731 So. 2d 744 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D956b] (defendant warning female suspects not to get in the car interrupting police prostitution sting operation did not constitute resisting an officer); *K.A. v. State,* 12 So. 3d 869 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1165a] (refusing to obey officer's order to stop yelling at a dispersing crowd is not resisting lawful order); *W.W. v. State,* 993 So. 2d 1182 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2624a] (lying to police about suspect's whereabouts during officer's search for suspect did not constitute resisting a lawful order); *D.A.W. v. State,* 945 So. 2d 624 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D93a] (defendant refusing to obey order to desist verbally harassing suspect being arrested for throwing beer bottle and refusing to obey order to leave did not constitute resisting a lawful order).

The State argues that the officers were engaged in the lawful execution of a legal duty because Mr. Rodriguez's belligerence impeded their ability to complete ticketing the three or four other stopped vehicles in the parking lot. The State cites to *M.M. v. State,*

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674 So. 2d 883 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1882a], *H.A.P. v. State,* 834 So. 2d 237 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2392b] and *Wilkerson v. State,* 556 So. 2d 453 (Fla. 1st DCA 1990). *Wilkerson* is not applicable to our determination whether the officers were engaged in the lawful execution of a legal duty. The sole issue raised in *Wilkerson* was whether an obstruction ordinance was overbroad and whether a defendant's conduct violated free speech. The defendant in *Wilkerson* did not challenge the lawfulness of the police order. Moreover, the defendant's conduct in *Wilkerson*—yelling and cursing at the police attempting to handcuff other suspects—was described in the opinion as physically obstructive. *Id.* at 455.

H.A.P. and *M.M.* addressed defendants' conduct which either physically impeded the arrest of another person or created safety concerns. These cases do not control whether ordering a ticketed speeder to leave a parking lot is the lawful execution of a legal duty.

In *H.A.P.,* a juvenile loudly protested a S.W.A.T team's execution of a narcotics warrant directly across the street. H.A.P refused to obey the S.W.A.T officers' order to leave to protect his and others' safety. In the opinion, the court explained,

> H.A.P. was not arrested for merely cursing at law enforcement officers. H.A.P. was arrested because he refused to leave the nearby area where the SWAT team was attempting to execute a narcotics search warrant. It is important to remember that H.A.P. was standing directly across the street from the front door of the residence that the police were going to search. Therefore, he was in the direct line of fire if the occupants of that residence would have fired weapons upon the SWAT team's execution of the narcotics search warrant. As such, prior to the execution of the search warrant, the police, in an attempt to secure the outer perimeter, believed, and rightfully so, that it was necessary for H.A.P. to leave the area.

Id., at 238-39. Likewise, in *M.M.,* the defendant not only verbally but physically interfered with the police's attempt to apprehend another individual for trespassing. The witnesses believed that M.M.

> was going to jump on the officer's back from the way she came at him. The officer told the appellant that she needed to back off, get away and leave him alone; he was taking care of an investigation and she should not interfere. She did not comply and continued to approach as the officer put out his hand to further indicate she should stop. A by-stander became involved, and the situation threatened to escalate. The campus monitor then approached and assisted in controlling the trespasser. When the officer turned to the appellant and advised her that she was under arrest, she began to struggle with him.

Id. at 884. As in *H.A.P.,* the police ordering M.M. to leave and desist her *physical* interference was the lawful execution of a legal duty.

Mr. Rodriguez, in contrast, after receiving his speeding ticket, belligerently and profanely protested the ticket, kicked open his door and stood outside his car with a clenched fist. There is no doubt that his behavior was irritating, distracting and bothersome to the officers engaged in writing tickets for other drivers stopped in the parking lot. But there was no testimony that Mr. Rodriguez approached the officers, interfered with the remaining drivers' receiving their tickets, or was physically obstructive in any manner. Nor was Mr. Rodriguez blocking traffic or impeding a highway—he was standing in a parking lot. Had Mr. Rodriguez approached the officers or the other drivers or done more than merely shout obscenities after receiving his ticket, had he created circumstances endangering himself or the public, the result might be different.

Thus, while it was certainly appropriate police conduct to direct Mr. Rodriguez to "move along," this order does not constitute the lawful execution of a legal duty to elevate the Defendant's loud protest into an arrestable offense. *C.W.*, 76 So. 3d at 1095-96 ("The officers' initial request that C.W. move a de minimus distance out of the road was a reasonable part of their job as community safety officers. But the officers had no legal duty to insist on compliance and to enforce that insistence with arrest where the record shows that there were no circumstances warranting this").

Accordingly, because the police were not engaged in the execution of a legal duty, Mr. Rodriguez was entitled to resist and there was no crime of resisting an officer without violence.

For the foregoing reasons, we reverse and remand with directions to vacate the Defendant's conviction for resisting and officer without violence and dismiss the charge. (TRAWICK, J., concurs.)

(REBULL, J., specially concurring.) A person who loudly, irately, and profanely complains to—and argues with—police officers who have given him a speeding ticket in the midst of an ongoing speed trap does not commit the crime of obstructing an officer without violence. As a result, I agree that the judgment and sentence in this case should be reversed, and the case remanded with directions that the charge for resisting arrest without violence be dismissed. While I respectfully disagree with the majority's conclusion that the police officers here were not engaged in the lawful execution of a legal duty; even in the light most favorable to the State, Mr. Rodriguez's words and actions did not "obstruct" or "oppose" the officers in the execution of their duty.

I.

Is a police officer operating a radar gun to enforce the speed limit engaged in the execution of a legal duty? How about a police officer writing a speeding ticket for one of several drivers lined up in a parking lot waiting to be processed? Because I think the answers to these questions is "yes," I conclude that Officers Leon and Amores were engaged in the execution of a legal duty.

Officer Amores was in the street with a radar gun. After clocking him going 43 miles per hour in a 30 mile per hour zone, the officer stopped Mr. Rodriguez. He directed him to drive over to a parking lot where he was sending all of the vehicles he stopped for speeding. In that parking lot, other officers would process the drivers by checking their license, insurance, and registration, and write up their tickets.

Officer Leon attended to Mr. Rodriguez. There were about three or four other vehicles lined up in the parking lot. In sum, Mr. Rodriguez was "extremely irate," and "cursing" about the fact that he received a speeding ticket. Even after Officer Leon successfully gave him his speeding ticket, Mr. Rodriguez was still upset and angrily arguing with Officer Leon.

Unfortunately, at that point, Officer Leon was unable to de-escalate the situation. He called over Officer Amores to help him. As a result, Officer Amores stopped what he was doing with the radar gun, and came over to speak with Mr. Rodriguez. Regrettably once again, the interaction did not de-escalate.

The exchange between Mr. Rodriguez and Officer Amores became increasingly heated. Mr. Rodriguez continued to argue with Officer Amores, instead of driving away. When Mr. Rodriguez got out of his car to continue arguing, he ignored Officer Amores's order to get back in his car and leave, which ultimately led to the officer arresting him and taking him into custody. It is especially important to note that there was absolutely no testimony presented that at any time any officer felt threatened by Mr. Rodriguez or feared for his safety.

II.

Section 843.02 makes it a first degree misdemeanor for a person to "resist, obstruct, or oppose any officer . . . in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer . . . ." Thus, the State has to prove that "(1) the officer was engaged in the lawful execution of a legal duty; and (2) the defendant's action, by his words, conduct, or

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a combination thereof, constituted obstruction or resistance of that lawful duty." *C.E.L. v. State,* 24 So. 3d 1181, 1185-86 (Fla. 2009) [34 Fla. L. Weekly S663a].

The majority characterizes the "legal duty" element in this case as Officer Amores's order to Mr. Rodriguez that he get in his car and drive away. But that characterization completely divorces that order from the context in which it was made. Of course a police officer walking down the street—or simply driving around on patrol - cannot order a person standing in a parking lot to get in their car and drive away. That is the holding of *C.W.*, where the court (while noting that its list of "legal duties" was not exhaustive) held that there was "a difference between an officer who is engaging in the lawful execution of a legal duty, and a police officer who is ***merely on the job***." *C.W. v. State,* 76 So. 3d 1093, 1095 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D34a] (emphasis added).

In *C.W.*, the majority noted that the officers were merely driving around and there was no record evidence to support their order to C.W. to move off the street and on to the sidewalk; since there was no evidence he was actually interfering with traffic (as there was no vehicular traffic on the street at that time). *See C.W.*, 76 So. 3d at 1094, 1096. In this case, Officers Amores and Leon were plainly not "merely on the job." Leon was processing drivers who were waiting in the parking lot; and Amores was operating the radar gun. They were engaged in the execution of their legal duties.

This case turns instead on the utter lack of evidence that Mr. Rodriguez's complaints about his ticket, and his failure to drive out of the parking lot, in any way obstructed or interfered with what Officers Leon and Amores were doing. What would have happened if Officer Leon had stopped arguing with Mr. Rodriguez and walked away to the next driver? If Officer Amores had done the same and went back to operating the radar gun? More importantly, who or what prevented them from doing so? Certainly not Mr. Rodriguez.

This case falls under the line of cases, typified by *D.G. v. State,* 661 So. 2d 75 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1477a] and *D.A.W. v. State,* 945 So. 2d 624 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D93a], holding that the evidence of the defendants actions did not constitute "obstruction" under the statute. In *D.G.,* the officers were investigating a car burglary. They knocked on the door of D.G.'s home between 3 and 4 in the morning. D.G. came outside "protesting loudly and obnoxiously," refused to answer any questions, "but never threatened anyone." He also flouted the officers' orders to stop yelling.

The *D.G.* Court reversed the trial court's finding that "D.G.'s protests rose to the level of a violation of section 843.02.

> These cases, and other Florida cases, seem to support the following general proposition: If a police officer is not engaged in executing process on a person, is not legally detaining that person, or has not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to person or property, the person's words alone can rarely, if ever, rise to the level of an obstruction. Thus, obstructive conduct rather than offensive words are normally required to support a conviction under this statute. . . . Such obstructive conduct was not established in this case.

D.G. v. State, 661 So. 2d 75, 76-77 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1477a].

Similary, in *D.A.W.* the Court held that there was insufficient evidence to support a finding that "D.A.W. opposed or obstructed an officer." *D.A.W. v. State,* 945 So. 2d 624, 625 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D93a]. There, an officer was arresting an adolescent. D.A.W. stood with another person about 15 to 30 feet away and was harassing, antagonizing, and making threats towards the adolescent. D.A.W. disregarded more than three of the officer's orders to leave.

While the officer was unquestionably engaged in the lawful execution of a legal duty, the court held that D.A.W.'s words or actions did not amount to "obstruction" of the officer.

> [A] person's exercise of free speech, without more, in an open public place while an officer is engaged in the execution of a legal duty must do more than merely irritate, annoy, or distract the officer to constitute a crime.
>
> * * *
>
> The evidence from the police officer in this case did not establish that D.A.W. had committed a crime. D.A.W. remained at a distance and did not approach the officer or physically threaten the officer or arrestee . . . .

D.A.W. v. State, 945 So. 2d 624, 627 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D93a].

Lastly, in *State v. Legnosky,* 27 So. 3d 794 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D428b], the Court surveyed the case law regarding when words alone (as opposed to physical conduct—or words *and* physical conduct) can satisfy the "obstruction element" of 843.02. In sum, none of those scenarios is present in this case.

> In such circumstances, the defendant's words are intended to interfere with and impede police officers in the execution of their legal duties. Similarly, words alone support obstruction charges when the defendant gives a police officer a false name during his arrest, because that act hinders the officer's performance of his arrest duties. The focus, thus, should be on whether the defendant's [words] were intended to hinder the police officer in the exercise of his duties . . . .
>
> * * *
>
> As in the cases cited above, Legnosky's words were intended to hinder, prevent, or obstruct Deputy Darst's legal duties of serving process and taking Coteral into custody for substance evaluation. Legnosky's words were not mere verbal expression challenging police action, but rather, on their face, were intended to impede the officer [ ] in the execution of [his] duties.

State v. Legnosky, 27 So. 3d 794, 797-98 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D428b] (internal quotations and citations omitted).

Without a doubt, Mr. Rodriguez's words were irritating, annoying, and distracting; but they were also patently not intended to hinder, prevent, or obstruct the officers from engaging in their legal duties with other drivers. They were instead intended to complain about the speeding ticket he had received.[3]

III.

Being a police officer is very difficult for a number of reasons. Officer safety is paramount. It is critical to my analysis in this case that no officer ever testified that Mr. Rodriguez threatened them, or that they ever feared for their safety. Among the many difficult things we ask an officer to do, is to be calm and polite when faced with a knucklehead. When an obnoxious hothead attempts to provoke them, we ask officers to be diplomatic and patient. That is not easy for any human being.

Mr. Rodriguez was fuming and bent out of shape because he got caught by a speed trap at about 3am, with his wife and baby in the car. He made several bad decisions during that early morning. What he didn't do, however, was obstruct the officers in their ability to continue going about performing their duties in enforcing the speed limit. No evidence was presented below that if they had simply walked away from Mr. Rodriguez, they would not have been able to resume executing their duties.

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[1]The State argues that because this issue was unpreserved, failure to prove a single element does not merit reversal because it does not constitute fundamental error. *State v. Smith,* 241 So. 3d 53 (Fla. 2018) [43 Fla. L. Weekly S177a]. However, the crime of resisting or obstructing an officer is unique in that failure to prove a lawful order renders the crime itself nonexistent, because a person is permitted to resist or obstruct an unlawful order. Thus, error here is not merely the failure to prove an element, but the failure to prove the crime itself.

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[2]This theory differs from the charging document, which alleged that Mr. Rodriguez obstructed Officer Amoris or Leon by resisting his detention or arrest. However, the testimony at trial did not establish that Mr. Rodriguez was arrested on some other charge and then resisted that arrest. Rather, the evidence at trial established that he resisted or opposed the police's repeated orders to get back in his car and leave. No objection was made to this altered theory of prosecution (as Mr. Rodriguez was self-represented because the trial judge discharged his lawyer), and this altered theory therefore was tried by consent. *See Federal Home Loan Mortg. Corp. v. Beekman,* 174 So. 3d 472 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1927a] (An issue is tried by consent "when there is no objection to the introduction of evidence on that issue.") (quoting *Scariti v. Sabillon,* 16 So. 3d 144, 145-46 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D901a]) (citation omitted). Alternatively, this issue is waived because there was no objection below.

[3]In *C.W.*, on which the majority relies, in addition to the "legal duty" element, the court also held that evidence failed to support a finding of the obstruction element. *See C.W. v. State,* 76 So. 3d 1093, 1096 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D34a] (C.W.'s refusal to step out of the street and use of profanity was not an "obstruction").

* * *

Real property—Unlawful detainer—Settlement agreement—Implied covenants—Property sold to family member at below market value subsequent to agreement between the parties requiring appellee property owner either to let appellant resident reside at the property rent free or to sell the property and disburse 15% net profit of the sale proceeds to resident—No error in finding that property owner was under no obligation to sell the property, have the property appraised, or have property sold to a third-party non-family member—Agreement's requirements regarding retention of a realtor and placement of a lockbox on the property do not either expressly or impliedly include an obligation for property owner to sell property or any limitation on a sale price—Agreement does not give resident any input on sales price—Trial court did not err in failing to consider implied covenant of good faith and fair dealing where there was no express provision in agreement obligating property owner to sell property or imposing a limitation on the sale price

JOHN EDWARDS, Appellant, v. GRACE BELLAMY a/k/a GRACE MAXWELL, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000062-AP-01. L.T. Case No. 2018-006879-CC-05. June 16, 2020. An Appeal from the County Court in and for Miami-Dade County, Tanya Brinkley, County Court Judge. Counsel: Gary Gostel, for Appellant. Michael S. Bloom of Michael S. Bloom, P.A., for Appellee.

(Before TRAWICK, SANCHEZ-LLORENS and REBULL, JJ.)

(SANCHEZ-LLORENS, J.) On or about March 28, 2018, Appellee Grace Bellamy/Maxwell ("**Appellee**") filed a three-count Complaint against her Nephew, John Edward ("**Appellant**") based upon his refusal to vacate the residence. Counts I and II for Eviction and Ejectment were voluntarily dismissed. Count III for Unlawful Detainer remained the sole cause of action. In response to the Complaint, Appellant alleged that he made or contributed to all payments of real estate taxes for the property, and that he paid other bills and costs related to the maintenance and upkeep of the property. In addition, Appellant alleged that Appellee waived her right to claim legal ownership and that he had established actual ownership by continuously residing at the property along with his mother and maternal grandmother.

On February 25, 2019, the lower court entered Final Judgment in favor of Appellee for Unlawful Detainer. The trial court also dissolved the Notice of Lis Pendens.

BACKGROUND

It is undisputed that Appellee is the lawful owner of the subject property, a single-family residence. Ola Lee Edwards ("**Appellant's grandmother**") and Appellee were deeded the property in 1979 as joint tenants with right of survivorship. Eight years later, Appellant's grandmother and Appellee recorded another deed reflecting that Appellant's grandmother would retain a life estate while Appellee retained the remainder of the interest in the property.

Appellant had no vested interest in the property and no lawful right to reside there. At certain times he lived at the property with his grandmother until she passed away in late 2017, at which time complete title to the property passed by operation of law to Appellee. Appellant continued to reside at the property after his grandmother passed away and refused to pay rent or to vacate the premises.

In July 2018, the trial court ordered the parties to participate in an "in-house mediation." The mediation resulted in the following fully executed "Stipulation and Order of Dismissal." [Editor's note: Printed below.]

The Stipulated Settlement Agreement ("**Agreement**") between the familial parties was clear and unambiguous. In the Agreement, Appellee had only two options: 1) retain the property—allowing Appellant to live there rent free, or 2) sell the property. Appellee was under no obligation to sell the property, have the property appraised, list the property, or have the property sold to a third-party non-family member. Instead, the sale of the property was a condition that triggered each party's obligation, to wit: that Appellant vacate the property and that Appellee disburse 15% net profit of the sale proceeds to Appellant.

But for the familial relationship, this Agreement would not exist, as a property owner generally has no duty to pay an unlawful resident anything. Despite the language in the Agreement referring to Appellant as Defendant/Tenant and Appellee as Plaintiff/Landlord, there was never a landlord tenant relationship between the parties. The parties never entered into either a written or an oral lease agreement to pay rent.[1] Moreover, Appellant has never tendered rent to Appellee.

LEGAL ANALYSIS

Florida's public policy "highly favors settlement agreements," and courts should "enforce them whenever possible." *Hernandez v. Gil*, 958 So. 2d 390, 391 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D451b] (quoting *Sun Microsystems of Cal., Inc. v. Eng'g & Mfg. Sys., C.A.,* 682 So. 2d 219, 220 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2379a]); *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985). Settlement agreements are governed by contract law. *Id.* The interpretation of a contract involves a pure question of law. *All Seasons Condominium Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438, 445 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1036a]. Under Florida law, " '[t]he actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls.' " *Wells v. Wells*, 239 So. 3d 179, 181 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D346a] (quoting *Ebanks v. Ebanks*, 198 So. 3d 712, 715 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D291g]. "In interpreting a contract, 'the words used by the parties must be given their plain and ordinary meaning.' " *Aristech Acrylics, LLC v. Lars, LLC*, 116 So. 3d 542, 544 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1367a] (quoting *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1592a]). As the Third District Court of Appeal explains:

> We begin with the longstanding principle that contracts "must be construed according to their plain language." *St. Johns Inv. Mgmt. Co. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2354a]. Ambiguity exists only when contractual language "is susceptible to more than one reasonable interpretation." *Penzer v. Transp. Ins. Co.,* 29 So. 3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a]. But "[a] true ambiguity does not exist [in a contract] merely because [the] contract can possibly be interpreted in more than one manner." *BKD Twenty-One Mgmt. Co. v. Delsordo*, 127 So. 3d 527, 530 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2541c]. "[I]n the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Real Estate Value Co., Inc. v. Carnival Corp.*, 92 So. 3d 255, 260 (Fla. 3d DCA 2012) [37 Fla. L.

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Weekly D1461a] (citation omitted); *see also Walgreen Co. v. Habitat Dev. Corp*., 655 So. 2d 164, 165 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1132a] ("When a contract is clear and unambiguous, the court is not at liberty to give the contract any meaning beyond that expressed.").

Dirico v. Redland Estates, Inc., 154 So. 3d 355, 357 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1941a].

"Courts . . . are not authorized to rewrite clear and unambiguous contracts." *Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1214 (Fla. 3d DCA 2008) [34 Fla. L. Weekly D12a]; *see also Hill v. Deering Bay Marina Ass'n*, 985 So. 2d 1162, 1166 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1654d]. Such contracts must be enforced as written. *Id*. In *Anderson,* a settlement agreement required testing windows that were to be installed, and a representative sample of the windows would be tested as determined by a named inspector. *Andersen,* 997 So. 2d at 1213. When one out of the three windows tested leaked, the petitioners demanded that the respondent test "all of the windows" to determine the problem and correct the deficiency. *Id*. The trial court concluded that the testing of only three windows was insufficient, holding as "fair and adequate" a requirement to test an additional five percent of the windows. *Id*. The appellate court found that: "while the court below may have felt that it was better to test additional windows, that is not what the parties agreed to and is, therefore, outside the authority of the trial court to "enforce" the contract." *Id*. at 1214. The terms of the Agreement in the present case are clear and unambiguous, and therefore, the trial court was correct in not including obligations not expressly stated in the Agreement.

Similarly, in *Hobus v. Crandall*, 972 So. 2d 867, 868 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D479b], the former husband performed his obligation under a marital settlement agreement by selling the property to himself. The former wife then sought to impose additional obligations on the former husband that were not part of the settlement agreement, such as requiring him to sell the property to a third party, and to sell the property at a qualified appraised value. *Id*. at 868-869. The court held that these additional obligations were improper, as imposing them would amount to judicial revision of the marital settlement agreement. *Id.* at 869. As in *Hobus*, Appellant is asking the court to rewrite the Agreement to include terms that were not plainly stated or expressed in the Agreement. *Id*. The subject Agreement does not give Appellant any input into the amount of the sales price. Courts may not "include terms that were not plainly stated in the agreement." *Id*. (citing *Robinson v. Robinson*, 788 So. 2d 1092 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1545b]).

Contrary to the arguments made by Appellant, the Agreement's requirements regarding retention of a realtor and the placement of a lockbox on the property, do not either expressly or impliedly include an obligation for Appellee to sell the property or any limitation on a sale price. Instead, it is the sale of the property which triggered Appellee's obligation to pay 15 percent of the net profit from the sale. Further, Appellant was not required to move out or pay rent unless this triggering condition occurred. Appellant, realizing that the Agreement did not include express terms requiring a sale or a minimum sale price, now seeks to have the Court rescue him. However, as stated in *Hobus*, "courts cannot rescue parties from the unintended consequences of knowingly made, and otherwise binding, contractual obligations." *Hobus*, 972 So. 2d at 870.

Appellant contends that the trial court erred in not considering the implied covenant of good faith and fair dealing implied in the Agreement. Although it is true that an implied covenant of good faith and fair dealing exists in virtually every contractual relationship, it is not applicable in this case. *See Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1591a]; *see also* Restatement (Second) of Contracts § 205 (1981). "Because the implied covenant is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A*., 896 So. 2d 787, 792 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D219a]. "A duty of good faith must be anchored to the performance of an express contractual obligation." *Dep't of Revenue v. Gen. Motors LLC*., 104 So. 3d 1191, 1197 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D2796a] (quoting *Flagship Resort Dev. Corp. v. Interval Int'l, Inc*., 28 So. 3d 915, 924 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D252a]) (internal quotations omitted). "A duty of good faith must 'relate to the performance of an express term of the contract and is **not an abstract and independent term of a contract which may be asserted as a source of breach** when all other terms have been performed pursuant to the contract requirements.' " *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 548 (Fla. 2012) [37 Fla. L. Weekly S395a] (citing *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc*., 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1316a]) (emphasis added). Since there is no express provision in the subject Agreement obligating Appellee to sell the property or imposing a limitation on the sale price,[2] Appellant's argument regarding an implied covenant of good faith and fair dealing must fail.[3]

Accordingly, the decision of the trial court is AFFIRMED. (TRAWICK, J., concurs.)

REBULL, J. (dissenting) A hollow promise is one "lacking in real value, sincerity, or substance."[4] The law presumes that all contractual terms and promises are there for a reason, and should be given meaning and effect. The law therefore requires that when someone promises to do something in a contract, that they perform that promise in good faith and that they deal fairly with the person to whom the promise was made. The law does not, in other words, sanction hollow promises.

Because Ms. Bellamy did not perform in good faith her promise to pay 15% of the sales price of disputed real property to Mr. Edwards, I would reverse the final judgment appealed.

I.

The record on appeal reflects the following allegations made by the parties in this family dispute over a residential property located in the Coconut Grove neighborhood of the City of Miami. John Edwards lived in the property his entire life, for over 35 years. He lived there with his mother and maternal grandmother, Ola Lee Edwards. Mr. Edwards believed that his grandmother was the sole owner of the property.

In 1979, however, Ms. Edwards had quit claimed the property from herself as sole owner, to herself and her daughter, Grace Maxwell, as joint tenants with right of survivorship. Grace Maxwell (also known as Grace Bellamy) is Mr. Edwards' maternal aunt. Ola Lee Edwards and Grace Maxwell, in 1987, quit claimed the property to Ms. Edwards as a life estate, and to Ms. Maxwell as remainderman.

Ms. Edwards passed away in December of 2017, at the age of 105. This left Ms. Bellamy as the sole record owner of the property. In March of 2018 Ms. Bellamy filed this action against Mr. Edwards (and anyone else in the property), seeking exclusive possession of the property and to remove Mr. Edwards. In his response to the complaint, Mr. Edwards alleged that he made or contributed to all payments of real estate taxes for the property, and that he paid other bills and costs related to the maintenance and upkeep of the home. He alleged that he had an interest in the property.[5]

In July of 2018, the lower court ordered the parties to participate in an "in-house mediation" at the courthouse with a mediator provided by the court system. That mediation resulted in the following fully

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executed "Stipulation and Order of Dismissal," which I reprint in full:

IN THE COUNTY COURT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA
COUNTY COURT/CIVIL DIVISION
CASE # 2018-006879-CC-05
Grace Bellany
Plaintiff
Vs. STIPULATION AND ORDER OF DISMISSAL

John Edwards
Defendant

Michael Scott Bloom, Attorney for Plaintiff/Landlord and Robert W Holland, Attorney for Defendant/Tenant, Parties to the above styled cause being present for trial and desirous to settle their differences through the use of the Court Mediator:

IT IS HEREBY AGREED AND STIPULATED AS FOLLOWS:

1. Defendant/Tenant agrees to vacate the premises located at 3133 Elizabeth Street Miami, Florida 33133, Miami Dade County, Florida 20 days prior to the closing of the property.
2. Defendant/Tenant hereby acknowledges that he will move out on or before 20 days before the closing of such property and maintain the property in broom swept condition. Tenant Shall make copies of the keys to the property for the Plaintiff/Landlord and allow a lockbox to remain in the property to allow access to realtors and Plaintiff/Landlord access is obliged to Disburse 15% of the net profit at the time of the sale of the property to the defendant and give 4 Hour notice to tenant prior to showing the property. Defendant shall not enter into any tenancies or right to possession of the property. Plaintiff/Landlord shall notify Defendant /Tenant of the move out day via e-mail to opposing counsel
3. Based upon the preceding stipulation, the above action is dismissed provided, however, the Court will retain jurisdiction to enforce the stipulation.
4. Failure to comply with the preceding conditions by Defendant/Tenant shall entitle Plaintiff/Landlord to obtain Judgment for Removal of Defendant/Tenant and Writ of Possession without further notice upon filing of an Affidavit of Non-Payment/Non-Compliance by the Plaintiff/Landlord.
5. Failure to comply with the preceding conditions by Plaintiff/Landlord shall enable Defendant/Tenant to seek appropriate remedies in Court.

ENTERED INTO ON THIS 31st day of July 2018.

Plaintiff/Landlord

Plaintiff's Attorney

Defendant/Tenant

Defendant's Attorney

Case mediated by: Fernando Perez.

THIS CAUSE came to be heard before me upon Plaintiff/Landlord's Complaint for Removal of Tenant, the parties having made use of the Court's Mediator and having entered into the above stipulation freely, voluntarily and in open Court, it is

ORDERED AND ADJUDGED the cause is dismissed.

1. That the Stipulation entered into by the parties is hereby incorporated and made a part of the Court file.
2. The cause is accordingly dismissed provided, however, this court retains jurisdiction of the above

FINAL ORDERS AS TO ALL PARTIES AND DISPOSITION NUMBER
THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.
Judge's Initials

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 31st day of July 2018.

SIGNED AND DATED

COUNTY COURT JUDGE

JUDGE ALEXANDER E. SOSA

Cc: All Parties

Under the settlement stipulation, Ms. Bellamy delivered a HUD Settlement Statement to Mr. Edwards, reflecting her intention to sell the property to her son for $200,000. In response to what he deemed to be a sales price which was indisputably below market value and therefore a breach of the settlement stipulation, Mr. Edwards filed a motion to enforce the stipulation, and attached a copy of the 2018 "Assessed value" from the Miami-Dade County Tax Collector, which assessed the value of the property at $429,019. Mr. Edwards argued, among other things, that the stipulation contemplated a sale of the property for market value. Ms. Bellamy filed her own motion against Mr. Edwards for what she argued was his noncompliance with the settlement stipulation.

On February 14, 2019, the trial court conducted an evidentiary hearing on both motions. Ms. Bellamy pertinently testified that she consulted with a realtor to determine the value of the property. She determined that it was worth at least $100,000 more than the $200,000 price to which she had agreed to sell it to her son. She further testified that she wanted to keep the property in her family, and not sell it to a stranger.

Mr. Edwards testified that developers had asked him about the property and expressed interest in buying it for $750,000. He also presented the testimony of a licensed real estate broker who valued the property at $650,000, based on his examination of comparable properties sold in the neighborhood.

The trial court denied Mr. Edwards' motion, and granted Ms. Bellamy's. In its final judgment, the court found that competent counsel represented Mr. Edwards, who "could have included specific language regarding the exact terms of sale in the Stipulation of Settlement, but failed to do so. The Stipulation is clear and unambiguous as to Defendant's entitlement, and no language exists requiring the parties to agree on a sale price, which the Defendant is now baselessly contesting." The court further ruled as follows:

> The Court accepted as true the Defendant's testimony that the Stipulation was entered into freely and voluntarily, without coercion or duress. Defendant testified that he believed at the time of the Stipulation that the property was exceptionally valuable, despite entry into an agreement that lacked any terms regarding sale price.
>
> ***The Court further finds that to the extent the Stipulation of Settlement included terms relating to the retention of a realtor and the placement of a lockbox on the subject property, same does not limit the Plaintiff with regard to the selling price of the subject property.***

(emphasis added).

The lower court entered final judgment in favor of Ms. Bellamy and against Mr. Edwards. Mr. Edwards now appeals that final judgment, along with the denial of his motion for rehearing.

II.

On appeal, Mr. Edwards argues that Ms. Bellamy's intention to pay him 15 percent of the net profit from the sale of the property, based on a below-market sale price of $200,000, is a breach of the implied covenant of good faith and fair dealing which is a part of the settlement stipulation. Ms. Bellamy argues, on the other hand, that because there is no requirement in the stipulation that the property ever be sold, there can therefore be no implied requirement that the property be sold at fair market value. She argues alternatively that even if the implied covenant applies, her decision to sell the property to her son for $200,000 does not violate it.

A stipulation is a contract, subject to the supervision of the court. *See generally Smith v. Smith*, 107 So. 257, 260 (Fla. 1925) ("A stipulation concerning the proceedings in a pending cause is an obligation unlike ordinary contracts between parties not in court, since no consideration is necessary to its validity, no mutuality is required, it may bind those incapable of binding themselves out of court, and it is subject to the supervision of the court."); 2A Fla. Jur 2d *Agreed Case and Stipulations* § 5 (March 2020 Update).

Like the stipulation we are called upon to interpret in this case, a stipulation settling litigation is especially favored. The Third District Court of Appeal holds that it:

> is the policy of this state to encourage settlements and enforce them whenever it is possible to do so. *See Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985) (finding that "settlements are highly favored and will be enforced whenever possible"); *Hernandez v. Gil*, 958 So.2d 390, 391 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D451b] (same). Accordingly, "[i]t is fundamental that '[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court.' " *Dorson v. Dorson*, 393 So.2d 632, 633 (Fla. 4th DCA 1981) (quoting *Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1, 4 (Fla.1971)).

Antar v. Seamiles, LLC, 994 So. 2d 439, 442 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2526a].

We are called upon to interpret the stipulation in this case, and to apply it to the facts presented below. In so doing, we use the same interpretive methods which are applied to contracts.

> We conduct a de novo review of a trial court's interpretation of a written contract as a question of law "provided that the language is clear and unambiguous and free of conflicting inferences." *Ciklin Lubitz Martens & O'Connell v. Casey*, 199 So.3d 309, 310 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1678b] (quoting *Commercial Capital Res., LLC v. Giovannetti*, 955 So.2d 1151, 1153 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D814a]). ***Pretrial stipulations are interpreted using the same principles for interpreting written contracts.*** *See McGoey v. State*, 736 So.2d 31, 34 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1202a] (citing contract law and explaining that the essence of a pretrial stipulation is "an agreement between the parties" requiring mutual assent).

* * *

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> "When construing stipulations, a court should attempt to interpret it in line with the apparent intent of the parties." *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., LLC*, 196 So.3d 557, 561 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1747a]. As explained in *Travelers Insurance Co. v. VES Service Co*., 576 So.2d 1349 (Fla. 1st DCA 1991):
>
> > A stipulation . . . must be carefully examined to determine whether the language used actually discloses a clear, positive, and definite stipulated fact. The statement should not be vague or ambiguous. Nevertheless, it should receive a construction in harmony with the apparent intention of the parties. It is not to be construed technically, but rather in accordance with its spirit, in furtherance of justice, in the light of the circumstances surrounding the parties, and in view of the result that they were attempting to accomplish. 2 Fla. Jur. 2d, Agreed Case and Stipulations, § 6; *see Federal Land Bank of Columbia v. Brooks*, 139 Fla. 506, 190 So. 737 (Fla. 1939).
>
> *Id*. at 1350 (alteration in original)(emphasis added).

Wiener v. The Country Club at Woodfield, Inc., 254 So. 3d 488, 491 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2076a].

The Florida Standard Jury Instructions for Contract and Business Cases require that a contract be construed as a whole, and that every provision in a contract be given meaning and effect.

> **416.17 INTERPRETATION—CONSTRUCTION OF CONTRACT AS A WHOLE**
>
> **In deciding what the disputed term(s) of the contract mean, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that *all the parts* make sense when taken together.**
>
> **SOURCES AND AUTHORITIES FOR 416.17**
>
> 1. "In reviewing the contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion." *J.C. Penney Co., Inc. v. Koff*, 345 So.2d 732, 735 (Fla. 4th DCA 1977).
>
> 2. *Every provision in a contract should be given meaning* and effect and apparent inconsistencies reconciled if possible. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979); *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Company*, 215 So.2d 336 (Fla. 4th DCA 1968); *Transport Rental Systems, Inc. v. Hertz Corp*., 129 So.2d 454 (Fla. 3d DCA 1961).
>
> 3. "We rely upon the rule of construction requiring courts to read provisions of a contract harmoniously in order to *give effect to all portions thereof*." *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000) [25 Fla. L. Weekly S206a]. *See also Sugar Cane Growers Cooperative of Fla., Inc. v. Pinnock*, 735 So.2d 530, 535 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D189a] (holding contracts should be interpreted to *give effect to all provisions); Paddock v. Bay Concrete Indus., Inc*., 154 So.2d 313, 315 (Fla. 2d DCA 1963) ("*All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each*.").

Fla. Std. Jury Instr. (Cont. & Bus.) 416.17 (emphasis added).

In a comprehensive treatise on interpreting legal texts, the authors note that "[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) ("24. Whole-Text Canon"). All of the foregoing, relating to considering and giving effect to all of provisions in a contract, is the flip side of the "Surplusage Canon," which commands that where possible every word and provision is to be given effect and ***none should be ignored***. *See id*.[6]

Let us pause at this point to analyze the stipulation at issue through this interpretive lense. Along with referring to the parties as "Plaintiff" and "Defendant," the stipulation refers to them as "Landlord" and "Tenant." This reflects a degree of formality typically seen in written lease agreements. The stipulation also requires the tenant to "vacate the premises" or "move out" no later than 20 days before the closing, and to "maintain the property in broom swept condition." A requirement that a tenant surrender possession of the leased premises in "broom clean" or "broom swept" condition is also often found in formal real estate leases and sales contracts. *See generally Tobin v. Gluck*, 137 F. Supp. 3d 278, 299 (E.D.N.Y. 2015), *aff'd*, 684 Fed. Appx. 61 (2d Cir. 2017) ("The express obligation to surrender leased premises in 'broom clean' condition has been interpreted to require that the premises be free of garbage, refuse, trash and other debris at the time of surrender."); Stephanie Booth, *'Broom Clean' Condition: What Does It Mean If You're Moving Out?* (May 26, 2017), https://www.realtor.com/advice/move/what-is-broom-clean-condition/ (last visited April 1, 2020).

Immediately following the "broom swept condition" language, the stipulation has the following sentence:

> Tenant Shall make copies of the keys to the property for the Plaintiff/Landlord and allow a lockbox to remain in the property to ***allow access to realtors*** and Plaintiff/landlord access is obliged to Disburse 15% of the net profit at the time of the sale of the property to the defendant and give 4 Hour notice to tenant prior to ***showing the property***.

(emphasis added). This language clearly expresses that the parties anticipated and expected that the property would be listed with a realtor, and the property would be shown to various potential buyers and their agents/realtors. Indeed, a "lockbox" is very commonly used by realtors to keep a key to the property at the home so that when a buyer's realtor confirms a showing, they will receive the combination to the lockbox so they can show the property when no one is home.[7] It's also important to note that the obligation for the Landlord to disburse 15% of the net profit to the defendant is sandwiched within the same sentence which begins and ends with allowing access to realtors and "showing the property." The language of the stipulation could not be clearer regarding what the parties expected.

Despite this, the final judgment on appeal essentially ignores and gives no effect to these provisions, contrary to the interpretive canons outlined above. The lower court wrote that it "further finds that to the extent the Stipulation of Settlement included terms relating to the retention of a realtor and the placement of a lockbox on the subject property, ***same does not limit the Plaintiff with regard to the selling price of the subject property***." If this interpretation of the stipulation is correct, than what was the point of those provisions at all? Especially as it applies to the Plaintiff selling the property without a realtor to her son, at a price less than half of the value used by the tax collector to assess the property. If Ms. Bellamy contemplated selling the property to her son at a below-market price without the use of a realtor, then there was no reason to include those terms in the stipulation. Does anyone believe that this result is in line with the contracting parties' reasonable expectations at the time they entered into the contract?

Even more striking, is the lower court's declaration that there is no "limit" to the price at which the Plaintiff may sell the property. If that is correct, than nothing would preclude Ms. Bellamy from selling the property to her son for ten dollars, or even one dollar. Undoubtedly, the stipulation cannot be interpreted in such an absurd manner.

"The courts generally agree that where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438, 450 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1036a], reh'g denied (June 6, 2019) (quoting with approval *King v. Bray*, 867

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So.2d 1224, 1227 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D632a]). Here, the "rational manner" to interpret the stipulation is to give effect to ***all*** of its words, and the parties' expectations as reflected in those words; this excludes sanctioning an indisputably below-market sale to a family member with no regard to a realtor and the property's market value.

III.

All of the above fits hand in glove with the implied covenant of good faith and fair dealing.

> The implied covenant of good faith and fair dealing applies to every contract. . . . The covenant of good faith must relate to the performance of an express term of the contract . . . . The purpose of the implied duty of good faith is to protect the parties' reasonable commercial expectations. . . . It is usually raised when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards. . . . This "discretion" concept applies only where there is an express contractual duty or obligation over which one party has sole discretion.

Meruelo v. Mark Andrew of Palm Beaches, Ltd., 12 So. 3d 247, 250 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D907a] (internal quotations and citations omitted). Reversing the lower court's failure to enforce the covenant, then Judge Canady quoted from an earlier decision which elaborated on the nature of the duty: "[W]here the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations ***of the other party***." *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1032b] (emphasis added) (internal quotations and citations omitted).

In this case what is at issue is Ms. Bellamy's performance of her contractual obligation to disburse to Mr. Edwards 15% of the net profit from the sale of the property. Ms. Bellamy has the discretion to decide ***whether*** to sell the property and, if so, ***when*** to sell the property.[8] She also has the discretion to decide at what price she will property; but in doing so, and therefore triggering her obligation to pay 15% to Mr. Edwards, she must act in good faith and not contravene Mr. Edwards' reasonable contractual expectations, arising from the language of the contract itself; which include use of a realtor and showings of the property. In other words, a reasonable contractual expectation by Mr. Edwards that his 15% will come from a sale of the property at (something at least in the zone of) market value.

I respectfully believe the final judgment should be reversed and the case remanded. The Court should of course not set a specific sales price or otherwise purport to mandate what constitutes the good faith performance of Ms. Bellamy's contractual duty. Instead, what this Court should do is declare what is ***not*** good faith performance, that is, Ms. Bellamy's payment to Mr. Edwards of $29,093.31, based on a well below-market sale price of $200,000 to her son.[9] For all of the reasons I've expressed, that factual scenario does not constitute good faith and fair dealing with Mr. Edwards as it relates to his 15%.

Conclusion

The way one federal judge described it, the convenant of good faith and fair dealing is implicated "[w]here the fruits of a contract to one party depend on the efforts of another . . . ." *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F. Supp. 724, 728 (S.D. Ill. 1976). This case could not be a better example of that analogy in practice. Mr. Edwards 15% depends on Ms. Bellamy's efforts and the exercise of her discretion.

The Court's holding today is that Ms. Bellamy paying Mr. Edwards his disbursement based on a sales price well below market value to her son, is not a breach of her obligation to perform the stipulation in good faith and with fair dealing towards Mr. Edwards' ***reasonable*** contractual expectations. I would reverse the final judgment on appeal and reinstate the effectiveness of the lis pendens recorded on the property, and remand for further proceedings, including but not limited to performance of the 15% payment obligation in good faith, based on a market value sales price for the property.

I respectfully dissent.

---

[1]Fla. Stat. § 83.43(4) (2020) ("Tenant" means any person entitled to occupy a dwelling unit under a rental agreement).

[2]Appellant asks us to consider the Agreement provision requiring Appellee to disburse the 15% net profit from the sale of the property as an express provision which requires an implied covenant of good faith. This argument is without merit. There was no obligation for Appellee to sell the property at all. The Agreement solely obligates Appellee to provide "15% of the net profit at the time of sale of the property to defendant." Applying the implied covenant of good faith to this provision would, for example, require Appellee to refrain from incurring or inflating costs that would lower the net profit amount, or unreasonably delaying the payment owed to the Appellant.

[3]In appropriate circumstances, the implied covenant of good faith is described as a " 'gap filling default rule' which comes into play 'when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards.' " *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.,* 966 So. 2d 1, 3 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1032b] (quoting *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1471a]); *see also Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D195a]. Appellant claims that the implied duty of good faith should be invoked under the application of Appellee's exercise of sole discretion in determining the sales price. We do not believe that *Speedway* is applicable here. Under the Agreement, Appellant lived at the property rent free. Appellee had unfettered discretion in either allowing Appellant to remain at the property or to sell the property whenever she chose and without any limitation on the amount of a sale. Appellant freely accepted this arrangement. Under these circumstances there is no need for "defined standards" in the exercise of Appellee's discretion through an implied covenant of good faith.

[4]Definition of *hollow*, Merriam-Webster Dictionary (April 2, 2020), https://www.merriam-webster.com/dictionary/hollow 10

[5]The majority makes findings on appeal that do not appear anywhere in the record. For example, the majority finds that Mr. Edwards "had no vested interest in the property . . . ." This is directly contrary to Mr. Edwards' allegations that he paid for the maintenance and upkeep of the property, including real estate taxes. Because this case settled, no findings have ever been made at trial regarding the nature of Mr. Edwards' alleged interest in the property.

[6]Regrettably, the majority's analysis falls prey to this interpretive fault; it gives ***zero*** effect and meaning to the following words and provisions of the settlement contract: (1) allow access to realtors; (2) make copies of the keys and allow a lockbox on the property; (3) four hour notice to Mr. Edwards prior to ***showing*** the property; and (4) Tenant and Landlord. The Court's failure to explain why those words are there—if the parties contemplated a below-market sale to Ms. Bellamy's son—is deafening.

[7]Jeanne Sager, *Real Estate Lockbox: Do Home Sellers Really Need One for Safety and Convenience?* (April 27, 2018), https://www.realtor.com/advice/sell/real-estate--lockbox-do-home-sellers-need-one/ (last visited April 1, 2020).

[8]Under the stipulation, Mr. Edwards can continue to live at the property until 20 days before a scheduled closing.

[9]Indeed, a close examination of the HUD settlement statement reflects that the property does not have a mortgage. But as part of the transaction contemplated by Ms. Bellamy, the parties were borrowing against the property to take a $150,000 loan out and use that equity for themselves. This appears to be how the $200,000 figure was arrived at.

* * *

Insurance—Personal injury protection—Summary judgment—Error to reject affidavit of expert on reasonableness of charges

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Tania Cazo, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-327-AP-01. L.T. Case No. 12-14247 SP 23 (02). June 17, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Caryn Canner Schwartz, Judge. Counsel: Michael Neimand, House Counsel for United Automobile Insurance Company for Appellant. Chad A. Barr, Law Offices of Chad A. Barr, P.A., for Appellee.

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

OPINION

(PER CURIAM.) United Automobile Insurance Company (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider. Here, the trial court rejected the conflicting

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affidavit offered by UAIC of its adjuster, Monica Johnson. As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to exclude UAIC's conflicting affidavit on whether the medical bills at issue were reasonable in price. Taking UAIC's excluded affidavit into account, it was error to grant summary judgment. *See United Auto. Ins. Co. v. Miami-Dade MRI a/a/o Bermudez,* 2018-164 (Fla. 11th Cir. Ct. June 3, 2020); *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). Accordingly, the summary judgment and final judgment entered below are hereby **REVERSED**, and this cause is **REMANDED** to the trial court.

Appellee's Motion for Attorney's Fees is **DENIED**. Appellant's Motion for Attorney's Fees is conditionally **GRANTED** (conditioned upon Appellant ultimately prevailing and the enforceability of the proposal for settlement) and **REMANDED** to the trial court to fix amount.

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[1]Judge de la O did not participate in oral argument.

* * *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—Where there was no dispute regarding amount of medical provider's bill prior to insurer's having issued check for partial payment, there could be no common law accord and satisfaction—Conspicuous statement—Check for partial payment did not contain conspicuous statement required for statutory accord and satisfaction where check included phrase stating that it was full and final payment of PIP benefits in all capitals on payee line, but phrase is not set off from other text by heading, size, type, font, color or symbols—Trial court correctly found that partial payment was not accord and satisfaction

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI, CORP., a/a/o Jose Ramos, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-218-AP-01. L.T. Case No. 2012-14300-SP-23. June 11, 2020. An Appeal from the County Court for Miami-Dade County, Laura S. Cruz, Judge. Counsel: Michael J. Neimand, House Counsel of United Automobile Insurance Company, for Appellant. Chad A. Barr, Law Office of Chad A. Barr, P.A., for Appellee.

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

(TRAWICK, J.) On July 9, 2008, Jose Ramos was involved in an automobile accident and sustained personal injuries. He was insured under an automobile policy issued by the Appellant, United Automobile Insurance Company ("United Auto"). Ramos was treated by Appellee Miami Dade County MRI, Corp ("MRI"). Ramos' father assigned his son's right to PIP benefits under the United Auto policy to MRI. MRI then billed United Auto for services rendered to Ramos, but United Auto only made a partial payment. MRI subsequently filed a complaint for breach of contract. United Auto filed an answer and later an amended answer, raising the defense of accord and satisfaction. United Auto then filed a motion for final summary judgment on this affirmative defense, and MRI responded with a like motion on the same issue. The trial court denied United Auto's motion and granted MRI's, ruling that United Auto's partial payment did not meet the elements of accord and satisfaction under either the common law or the Uniform Commercial Code ("UCC"). United Auto appeals the trial court's decision on both motions.

The standard of review for summary judgment is *de novo. Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. "Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." *Id.* "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris,* 475 So. 2d 666, 668 (Fla. 1985).

The elements of the affirmative defense of common law accord and satisfaction are set forth in *Republic Funding Corp. v. Juarez,* 563 So. 2d 145, 146 (Fla. 1990): (1) a preexisting dispute as to the amount due from one party to another, (2) a mutual intent to effect settlement of that dispute by a superseding agreement, and (3) the subsequent tender and acceptance of performance of the new agreement in full satisfaction of the prior disputed obligation. *See St. Mary's Hospital, Inc. v. Schocoff*; 725 So. 2d 454, 455 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D405a].

United Auto, after being billed by MRI, issued a check in partial payment of the billed amount. The trial court found that there was no evidence of a dispute as to the amount of the bill prior to United Auto's issuance of this check. Thus, there could be no common law accord and satisfaction. However, even if such a dispute did exist, and each of the elements of common law accord and satisfaction had been established, those elements differ from those required for statutory accord and satisfaction, §673.3111, Fla. Stat. (2019). If a conflict exists between a common law defense and a statutory defense, the statutory defense controls. *See* §2.01, Fla. Stat. (2019); *Berman v. U.S. Financial Acceptance Corp.,* 669 So. 2d 1116, 1117 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D719b].

The UCC, codified in §673.3111, Fla. Stat. (2019) (Accord and Satisfaction by use of instrument), provides in pertinent part:

> (1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.
>
> (2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.[2]

The check which United Auto issued to MRI included the phrase "MIAMI DADE COUNTY MRI, AAO JOSE R. RAMOS FOR FULL AND FINAL PAYMENT OF PIP BENEFITS DOS 8/28/08" on its payee line. United Auto argues that this language was sufficient to meet the requirements of the UCC. We do not agree.

Section 673.1111(2) requires that a check or an accompanying "written communication" submitted as an accord and satisfaction of a disputed claim contain "a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." §671.201(10) , Fla. Stat., states:

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surround-

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ing text of the same or lesser size; and

(b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The subject check[3] does not meet the requirements for conspicuousness under §671.201(10). The disputed language, while in all capitals, is not separated from other language by any "heading." While this language is on the payee line, it is the same size as the surrounding text and is not in a type, font, or color in contrast to the surrounding text of the same size. The language was also not set off from surrounding text of the same size by symbols or other marks that call attention to the language. All of these non-exhaustive statutory options support the same requirement—that the "conspicuous terms" be noticeable to the average eye. Thus, in our view, the requirement that the language used to support an accord and satisfaction be conspicuous has not been met here.

The Dissent argues that because the statute *includes* a list of options, the list is not exhaustive. Our colleague believes that the language in the check is conspicuous because it is in all capitals and appears on the payee line. We disagree. Indeed, within this very opinion, the words "ACCORD AND SATISFACTION"— in Times New Roman 14-point—stand out to the reader, especially, when viewed against the remaining text of the opinion. On the check, however, the words are not in a distinctive font or made to stand out in any way and are thus not consistent with the purpose of the statute—to be noticed by a reasonable person.[4]

"[T]he burden of proving each element of an affirmative defense rests on the party that asserts the defense." *Custer Medical Center v. United Auto. Inc. Co.,* 62 So. 3d 1086 1097 (Fla. 2010) [35 Fla. L. Weekly S640a]; *see also State Farm Mut. Auto. Ins. Co. v. Curran,* 135 So. 3d 1071, 1079 (Fla. 2014) [39 Fla. L. Weekly S122a]. United Auto failed to meet its burden in establishing that the disputed language was conspicuous. As a result, the trial court correctly found that the partial payment by United Auto was not an accord and satisfaction.

Accordingly, the Final Judgment in favor of MRI is **AFFIRMED**. Appellee's Motion for Award of Appellate Attorneys' Fees pursuant to Florida Rule of Appellate Procedure 9.400 and §§628.736(8) and 627.428, Fla. Stat. is hereby **GRANTED** and this matter is **REMANDED** for a determination of attorneys' fees. The Appellant's Motion for Attorney's Fees pursuant to Florida Rule of Appellate Procedure 9.400(b) and §§768.79 and 59.46, Fla. Stat. is hereby **DENIED**. (WALSH, J., concurs.)

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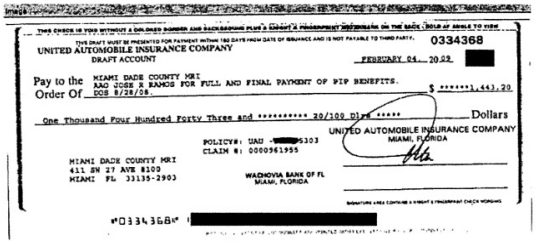
[1]Judge de la O did not participate in oral argument.

[2]Subsection (3) is inapplicable to the facts of this case. It concerns the application of §673.3111 to situations where the claimant is a large organization and the person who received the full payment check was without authority to settle the claim.

[3]Below is an image of the check at issue:



[4]Normally, this type of judgment-call would be decided by a jury. However, the Legislature saw fit to require that "[w]hether a term is "conspicuous" is a decision for the court." § 671.201(10)(a), Fla. Stat.

(DE LA O, dissents.) This dispute should be resolved by a jury. Neither party was entitled to summary judgment. I disagree with the majority's conclusions that the check lacked a conspicuous statement that the payment was tendered in full satisfaction of the claim. However, there are disputed issues of fact that prevent both United Auto and MRI from establishing whether United Auto submitted the partial payment in good faith or not.

CONSPICUOUSNESS

I would find that the language in the check is sufficiently conspicuous because it appears in the payee line. There are two locations on a check that a recipient will natural look to upon receipt. First, of course, is the amount. But not far behind is the payee. In other words, a business that receives a check wants to know the value of the check and that the check is made out to the correct business.

The majority concludes that the language in the check was not conspicuous because it did not comply with Florida Statutes section 671.201(10) due to the "FULL AND FINAL PAYMENT" language in the payee line being "the same size as the surrounding text and is not in a type, font, or color in contrast to the surrounding text of the same size." However, section 671.201(10) does not require that the statement be a heading, or in a different font, color, or size. Rather, the plain language of the statute provides that these are merely factors the trial court can look to in determining whether, as a matter of law, the statement is sufficiently conspicuous to warrant discharge of the claim. We know this because the statute prefaces these factors by stating that "[c]onspicuous terms *include* the following:" (emphasis added). This means the list is not exhaustive. *See Miami Country Day Sch. v. Bakst,* 641 So. 2d 467, 469 (Fla. 3d DCA 1994) ("Pursuant to section 222.05, the term dwelling house *includes* a mobile home and a modular home: that language suggests that the legislature intended to enlarge the definition of the term 'dwelling house' rather than to limit the term to modular and mobile homes or to list every possible type of dwelling house.") (emphasis in original). "The participle *including* typically indicates a partial list." *In re B.R.C.M.,* 182 So. 3d 749, 752 (Fla. 3d DCA 2015) [41 Fla. L. Weekly D36b], *decision quashed on other grounds,* 2017 WL 1709786 (Fla. Apr. 20, 2017) [42 Fla. L. Weekly S472a]. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) ("[T]he word include does not ordinarily introduce an exhaustive list. . . .").

Generally, it is improper to apply *expressio unius* to a statute in which the Legislature used the word "include." *See* 2A Norman J. Singer, Sutherland Statutory Construction § 47.25 (7th ed. 2014). This follows the conventional rule in Florida that the Legislature uses the word "including" in a statute as a word of expansion, not one of limitation.

White v. Mederi Caretenders Visiting Services of Se. Florida, LLC, 226 So. 3d 774, 781 (Fla. 2017) [42 Fla. L. Weekly S803a].

Obviously, complying with these factors increases the likelihood a court will find the language was sufficiently conspicuous. In the end, however, the central question is whether the language was "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." § 671.201(1), Fla. Stat. (2019). I conclude that, as a matter of law, a reasonable person ought to notice the words "FOR FULL AND FINAL PAYMENT OF PIP BENEFITS" in the payee line of a check, when displayed in the same size and font as the payee's name.

GOOD FAITH

To succeed on its accord and satisfaction affirmative defense, United Auto must also prove that it tendered the check to MRI in good faith. § 673.3111(1), Fla. Stat. (2019). Conversely, to defeat this affirmative defense and obtain summary judgment against United Auto, MRI must establish, *inter alia,* that United Auto did not act in good faith and that there is no disputed issue of material fact that

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would show otherwise. Of course, "[i]f the record on appeal reveals the merest possibility of genuine issues of material fact, or even the slightest doubt in this respect, the summary judgment must be reversed." *Piedra v. City of N. Bay Vill.,* 193 So. 3d 48, 51 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1087a]. *See Berges v. Infinity Ins. Co.,* 896 So. 2d 665, 680 (Fla. 2004) [29 Fla. L. Weekly S679a] ("[W]here material issues of fact which would support a jury finding of bad faith remain in dispute, summary judgment is improper.").

Generally, establishing good or bad faith at the summary judgment stage is difficult. *See Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092, 1098 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D195a] ("[B]ecause reasonable persons could differ as to whether CSXI's conduct in the performance of its contract with appellants violated the duty of good faith and fair dealing, the grant of summary final judgment was improper."). Here, the task is doubly difficult for MRI because of the UCC's definition of good faith in the context of accord and satisfaction by a negotiable instrument. The comments to the UCC section corresponding to section 673.3111(1) explain how good faith should be determined.

> "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(6) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender. Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

§ 3-311. Accord and Satisfaction by Use of Instrument., Uniform Commercial Code § 3-311, comment 4.

The comment sets out two examples of bad faith. Doubtless there are more. But I cannot overlook the fact that neither example applies to the facts before us. The payment submitted by United Auto to MRI was not arbitrarily small in relation to the claim. Rather, United Auto asserts that it is based on a formula grounded in the Medicare reimbursement rates.

Nor did United Auto pre-print the FULL AND FINAL PAYMENT language on their check stock. Rather, the language was typed into the payee line. This is an important distinction because the majority relies on this language from the UCC comment to conclude that MRI proved United Auto acted in bad faith. But the example in the comment is not applicable here.

Where the determination of good faith is so fact dependent, the matter should ordinarily be left to a jury. This is particularly true where the finding of good faith revolves around "reasonable commercial standards." *See Snow v. Byron,* 580 So. 2d 238, 243 (Fla. 1st DCA 1991) (Bank's liability "dependent upon whether it dealt with the forged check 'in good faith and in accordance with reasonable commercial standards' . . . . The assertion of good faith and reasonable commercial standards is an affirmative defense. This defense involves factual issues to be determined by the trier of fact.") (citations omitted).

MRI argues that United Auto did not act in good faith because the assignor (United Auto's insured) "instructed" United Auto in the AOB not to send partial payment to MRI unless there was a prior written agreement. Yet, a jury could conclude that MRI chose to accept the offered amount as "full and final payment" to resolve the claim. As the assignee of the AOB, MRI was free to waive any terms of the AOB for its benefit. By what right can the assignor reject future payments to the assignee when he has irrevocably assigned the claim? To ask the question is to answer it. The assignee can do no such thing, and it is quite a legal stretch for MRI to assert United Auto is acting in bad faith for ignoring instructions from its insured as to how United Auto must handle the claim *after* the insured irrevocably assigns it.

MRI did produce evidence from which a jury could perhaps conclude United Auto did not act in good faith because it routinely submitted partial payments to providers as full and final settlement of PIP benefits. On the other hand, the jury could conclude that because United Auto was basing its payment on a formula grounded in Medicare reimbursement rates, it was acting in a principled and good faith manner using commercially reasonable standards, even if it does so routinely. Or the jury could conclude it is not commercially reasonable to base the payment on Medicare reimbursement rates. The point is that a trial court cannot say that as a matter of law that it is not commercially reasonable for United Auto to send full and final payments based on the Medicare reimbursement schedule. Only a jury can do so. *See Mills v. State Farm Mut. Auto. Ins. Co.,* 27 So. 3d 95, 96 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2614d] ("The question of whether a liability insurer has acted in bad faith in handling a claim against the insured is determined upon the totality of the circumstances, with each case determined on its own unique facts. The question of failure to act in good faith is ordinarily for the jury. Where material issues of fact which might support a jury finding of bad faith are in dispute, summary judgment is improper.") (citations omitted).

For these reasons, I would affirm the trial court's denial of United Auto's motion for summary judgment, but would reverse the trial court's grant of summary judgment to MRI, and the entry of final judgment against United Auto, and would remand for a trial by jury

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Insurance—Personal injury protection—Coverage—Medical expenses—Limitation of reimbursement to schedule of maximum charges—Following 2012 amendment to PIP statute, insurer was only required to give simple notice of intent to reimburse using statutory fee schedules, rather than clear and unambiguous election required by *Virtual Imaging*—Trial court did not err in finding that PIP policy providing that insurer would limit reimbursement to 80% of schedule of maximum charges complied with statutory notice requirements—Multiple Procedure Payment Reduction is not impermissible utilization limit—Deductible—Insurer improperly applied deductible after reducing bills by application of statutory fee schedules

COUNTYLINE CHIROPRACTIC MEDICAL & REHAB CENTER a/a/o Sonia Ambrose, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-378-AP-01. L.T. Case No. 2015-19152SP23 (06). May 6, 2020. An Appeal from the County Court for Miami-Dade County, Spencer Multack, Judge. Counsel: Myones Legal PLLC, Howard W. Myones, and Marlene S. Reiss, Esq., P.A., Marlene S. Reiss, for Appellant. Kubicki Draper, P.A., Andrew T. Lynn and Michael C. Clarke, for Appellee.

[Lower court order at 25 Fla. L. Weekly Supp. 663a.]

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

(WALSH, J.) Sonia Ambrose was injured in a car accident and treated by Appellant Countyline Chiropractic Medical & Rehab Center ("Countyline" or "Provider"). Ms. Ambrose assigned her personal

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injury protection (PIP) benefits with Appellee, Progressive Select Insurance Company ("Progressive Select" or "Insurer"), to her provider. The trial court granted summary judgment in favor of Progressive Select.

Countyline raises three issues on appeal. First, Countyline argues that the PIP policy improperly elected reimbursement at 200% of the Medicare Part B fee schedule. Second, Countyline argues that the Insurer improperly applied the MPPR deductions which were unlawful "utilization limits." Third, Countyline argues that the Insurer improperly reduced the bills before applying the deductible.[1]

The standard of review of a trial court's entry of 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]. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez*, 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The three issues on appeal address pure questions of law.

1. Insurer's Policy Language was Sufficient Under Section 627.736(5)(a)5 to Reimburse Under Section 627.736(5)(a)1.f., Florida Statutes (2013)

Turning to the first issue on appeal, the Provider argues that the Insurer improperly failed to make a clear and unambiguous election in its policy of its right to reimburse for medical services using 200% of the Medicare Part B Fee Schedules. The Provider argues that the Progressive Select policy in effect here violated the notice requirements set forth in *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a] and *Allstate Ins. Co. v. Orthopedic Specialists, Inc.*, 212 So. 3d 973, 977 (Fla. 2017) [42 Fla. L. Weekly S38a]. Progressive Select's policy notified the insured as follows:

> If an insured person incurs medical benefits that we deem to be unreasonable or unnecessary, we may refuse to pay for those medical benefits and contest them.
>
> We *will* determine to be unreasonable any charges incurred that exceed the maximum charges set forth in Section 627.736(5)(a)(1)(a) through (f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida Law, we *will* limit reimbursement to, and pay not more than, 80 percent of the following schedule of maximum charges:
> * * *
>
> f. for all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B . . . .

We must determine whether this policy election is permissible under the applicable PIP statute.

In *Virtual Imaging*, the court analyzed whether an insurer could—unilaterally, and without notice to its insured—elect to reimburse its insured at 200% of Medicare Part B. *Virtual Imaging*, 141 So. 3d at 152. The 2008 version of the PIP statute then in effect, Section 627.736(5)(a)(2), Florida Statutes, provided that, "insurers 'may limit reimbursement' to eighty percent of a schedule of maximum charges set forth in the PIP statute." *Id.* at 154. In order to avail itself of this option, however, the court in *Virtual Imaging* held that an insurer may not unilaterally elect this reimbursement method but instead, must in its policy "clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Id.* at 158. However, the court restricted its holding to policies written under the 2008 version of the No Fault statute, which had not yet been amended. *Id.* at 150.

Later, in *Allstate Ins. Co. v. Orthopedic Specialists, Inc.*, 212 So. 3d 973, 977 (Fla. 2017) [42 Fla. L. Weekly S38a], the court approved an Allstate policy written under the 2009 PIP statute which clearly and unambiguously elected reimbursement under Section 627.736(5)(a)2, or at 200% of the Medicare Fee schedule. *Id.* at 976. The court analyzed the 2009 statute in its decision in *Orthopedic Specialists*; the 2009 statute, like the 2008 statute, had not yet been amended.

The policy in this case was written in 2014. In 2012, the legislature made substantive changes to the No Fault statute. The legislature enacted Section 627.736(5)(a)5., Florida Statutes, which provides:

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

Ch. 2012-197, § 10, at 22, Laws of Fla. The policy language in the Progressive Select policy complies with this statutory provision. Therefore, contrary to the Provider's argument, Progressive Select was required merely to give simple notice that it "may" limit reimbursement applying the fee schedule, rather than a "clear and unambiguous" election required by *Virtual Imaging* and *Orthopedic Specialists*. These opinions analyzed the 2008 and 2009 No Fault statutes, respectively, and do not apply to policies written after 2012.

Moreover, in amending section 627.736(5), the legislature renumbered all reimbursement methods under a single subsection—627.736(5)(a)—which specifically requires that an insured or provider "may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, ..." Further limitations of reimbursement are contained within section 627.736(5)(a)1., which evinces the intent that the Medicare Fee Schedule and other reimbursement methods are subsets of the general requirement that reimbursement be "only a reasonable amount."

Thus, instead of two discrete reimbursement methods—a reasonable amount **or** fee schedule (or other) limited reimbursement method, now there is one—a reasonable amount, within which, the insurer "may" elect to reimburse according to certain fee schedules. And the notice of that intent need only be general—that the insurer may elect to reimburse under a fee schedule or other limited reimbursement.

Secondly, the court in *State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc.*, 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], *review granted*, No. SC18-1390, 2019 WL 3214553 (Fla. July 17, 2019), concluded that after the statutory amendments, insurers need only give a simple notice of intent to reimburse using fee schedules and further explained:

> In 2012 the legislature substantially amended section 627.736(5), setting forth the schedule of maximum charges limitation as a subsection of the reasonable charge calculation methodology. Ch. 2012-197, § 10, at 2743-44, Laws of Fla. As a result of this amendment, the reasonable charge and schedule of maximum charges methodologies are no longer coequal subsections of 627.736(5)(a); **instead the reasonable charge method is set forth in subsection (5)(a), and the schedule of maximum charges limitation is provided in subsection (5)(a)(1). Based on the current construction of the PIP statute, we conclude that there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer**.

Id. at 777-78 (emphasis added).

The *MRI Associates* decision is currently pending review in the Supreme Court of Florida. However, in the absence of a conflicting

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opinion from another District Court of Appeal, we are bound by the Second District Court of Appeal's decision in *MRI Associates*. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992). We therefore affirm the trial court's ruling that the policy at issue complied with the statutory notice requirements for reimbursement under a fee schedule.

2. **The Application of the Multiple Procedure Payment Reduction (MPPR) is not an Unlawful Limitation of Treatment or Other Utilization Limit**

The Provider next argues that Progressive Select improperly reduced its reimbursement by applying the Multiple Procedure Payment Reduction (MPPR) to services performed on the insured on the same date of service. Progressive Select's policy states:

> In determining the appropriate reimbursement under the applicable Medicare fee schedules, all reasonable, medically necessary, and covered charges will be subject to the Center for Medicare Services (CMS) coding policies and payment methodologies, including applicable modifiers. **The CMS policies include, but are not limited to: . . . Multiple Procedure Payment Reduction (MPPR),** . . . .

Progressive Select further reduced the reimbursement for medical costs using the MPPR reduction. The Provider argues that such a reduction is an improper limitation on the number of treatments or other "utilization limit" in violation of Section 627.736(5)(a)3., Florida Statutes (2013).

Congress passed the American Taxpayer Relief Act of 2012. Section 633 of the Act, "Treatment of multiple service payment policies for therapy services," allows for payment reductions for multiple services performed on the same date. *See* 42 U.S.C.A. § 1395m(k)(7) (West); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 633, 126 Stat 2313 (2013). Section (k) of this provision addresses "Payment for outpatient therapy services and comprehensive outpatient rehabilitation services." Included within the section are efficiencies and fee limitations, including fee schedules, adjusted reasonable costs, restraint on billing, savings, in short, all subjects addressed toward reducing the cost of medical services. The statutory language of 42 U.S.C.A. § 1395m(k)(7) is clear and unambiguous. But even if it were not, considering its meaning *in pari materia* with the other provisions in section (k) of the statute reflects Congress' clear intent to govern reduction of costs for medical services, not reduction of medical services. *See E.A.R. v. State*, 4 So. 3d 614, 628 (Fla. 2009) [34 Fla. L. Weekly S120a] (" 'The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.' ") (quoting *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) [30 Fla. L. Weekly S780a]).

The Congressional Research Service published *Medicare, Medicaid, and Other Health Provisions in the American Taxpayer Relief Act of 2012*, in which it described the MPPR as follows:

> Following recommendations from GAO and MedPAC, CMS has established and implemented multiple procedure payment reduction (MPPR) policies to adjust payment to more appropriately reflect efficiencies gained when certain services are provided together, for example, when multiple similar services are performed on the same patient during the same visit. These payment reductions reflect efficiencies that typically occur in either the practice expense (PE) or professional work component or both when services are furnished together.

Medicare, Medicaid, and Other Health Provisions in the American Taxpayer Relief Act of 2012, 2013 WL 1401568, at *11. With respect to allowing PIP insurers to use Medicare coding policies and payment methods, Florida amended Section 627.736(5)(a)(4), Florida Statutes, to be renumbered as 627.736(5)(a)3., and made the following substantive changes:

> 3.~~4.~~ Subparagraph 1. ~~2.~~ does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 1. ~~2.~~ must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider is ~~would be~~ entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes. However, subparagraph 1. does not prohibit an insurer from using the Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount of reimbursement for medical services, supplies, or care if the coding policy or payment methodology does not constitute a utilization limit.

Ch. 2012-197, § 10, at 22, Laws of Fla. (additions indicated by underline; deletions indicated by ~~strikethrough~~).

The language and purpose of 42 U.S.C.A. § 1395m(k)(7) supports the conclusion that the MPPR is not a limitation on services nor another utilization limit, but rather, is a coding policy and payment methodology. Such a payment methodology is expressly permitted by Section 627.736(5)(a)3., Florida Statutes.

Further, in determining the meaning of a statute, we look to the language used by the legislature. *Geico Gen. Ins. Co. v. Beacon Healthcare Ctr. Inc*., No. 3D18-2030, 2020 WL 912938, 45 Fla. L. Weekly D437a (Fla. 3d DCA Feb. 26, 2020). Section 627.736(5)(a)3. forbids limiting the number of treatments "or other utilization limits." The word 'utilization' means "to make use of: turn to practical use or account." *Utilize*, Merriam-Webster Online (2020).[2] In short, utilization means use. The patient is the user of services, not the provider. Therefore, in determining whether the MPPR is a utilization limit, the focus should be on the number and extent of services used by the patient, not the amount of reimbursement to the provider. The No Fault statute caps reimbursement at a total amount of $10,000. § 627.739(2), Fla. Stat. (2013). Reduction of the cost of each service does not reduce the number of services the patient may receive—it enables the patient to receive more. Thus, the practical effect of applying the MPPR supports the conclusion that it is not a utilization limit.

Every decision from this court which has analyzed whether the MPPR constitutes any kind of "utilization limit" has concluded that MPPR is a limitation on cost, not on services. *See South Florida Institute of Wellness and Rehab, LLC a/a/o Jennifer Trinidad v. Progressive Select Ins. Co.*, 27 Fla. L. Weekly Supp. 433b (Fla. 11th Cir. Ct. July 12, 2019); *State Farm Mutual Auto. Ins. Co. v. Pan Am Diagnostic Servs. Inc., a/a/o Cristina Lasaga*, 27 Fla. L. Weekly Supp. 19a (Fla. 11th Cir. Ct. Mar. 1, 2019); *State Farm Mutual Auto. Ins. Co. v. Millennium Radiology, LLC d/b/a Mobile Imaging of America a/a/o Jorge Sanchez*, 26 Fla. L. Weekly Supp. 871a (Fla. 11th Cir. Ct. Jan. 9, 2019); *State Farm Mutual Auto. Ins. Co. v. Pan Am Diagnostic Servs. d/b/a Wide Open MRI a/a/o Maxime Jean Louis*, 26 Fla. L. Weekly Supp. 466b (Fla. 11th Cir. Ct. Sept. 5, 2018).

We accordingly affirm the trial court's order determining that the MPPR is not an impermissible limitation of services nor other utilization limit.

3. The Insurer Improperly Reduced the Bills by the Fee Schedule Before Applying the Deductible

Finally, the Provider correctly argues that the Insurer improperly applied the deductible *after* reducing the bills by the Medicare fee schedule. In *Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr*., 260 So. 3d 219, 220 (Fla. 2018) [44 Fla. L. Weekly S59a],[3] the court concluded, the amendment to "section 627.739(2) to require that

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"[t]he deductible amount . . . be applied to 100 percent of the expenses and losses described in s. 627.736" meant that the deductible must be applied to the total amount of the bills *before* any further reductions were made. *Id.* at 225.

We therefore reverse the order granting summary judgment on the application of the deductible, and remand for the trial court to determine the damages due to the Provider by applying the deductible to 100% of the charges before applying any reductions. (TRAWICK and BOKOR, JJ., concur.)

---

[1]Since we must reverse the summary judgment order because the Insurer improperly applied the deductible, the Appellant Countyline argues that we should not address the remaining issues because they are moot, citing *J.B. v. State*, 29 So. 3d 300 (Fla. 2d DCA 2010), and a number of other decisions.

Mootness affects an appellate court's very jurisdiction. It means that there is no purpose to the litigation because the issues have been resolved, rendering any resulting opinion advisory in nature. *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 599 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D548a] ("The doctrine of mootness is a corollary to the limitation on the exercise of judicial power to the decision of justiciable controversies. Generally speaking, an appellate court will dismiss a case if the issues raised in it have become moot."). Our jurisdiction is not divested because one issue of the several raised must result in a reversal.

Moreover, the remaining issues raised in this appeal are likely to recur on remand, even after the damages are recalibrated under a proper application of the deductible. Once the trial judge assesses the damages, the Provider or Insurer could well argue anew whether the fee schedule or MPPR reductions may be applied. Further, in addressing these issues now, the Provider may, if it wishes, seek further review in the pipeline following the Supreme Court of Florida's review of *State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc*., 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], *review granted*, No. SC18-1390, 2019 WL 3214553 (Fla. July 17, 2019). Therefore, in order to avoid piecemeal litigation and to give clearer guidance to the trial court on remand, we find that the remaining issues on appeal are not moot and should be decided in this appeal.

[2]https://www.merriam-webster.com/dictionary/utilize.

[3]At the time the trial court entered the order granting summary judgment, it did not have the benefit of the decision in *Progressive Select Ins. Co.*.

* * *

Insurance—Settlement agreement— Enforcement— Denial— Appeals—Order denying motion to enforce settlement agreement is not an appealable order and is not reviewable by certiorari

GEICO GENERAL INSURANCE COMPANY, a Florida Corporation, Appellant, v. LORETA MATHIS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-102-AP-01. L.T. Case No. 2017-7940 CC 04. June 10, 2020. An Appeal from County Court in and for Miami-Dade County, Hon. Diana Gonzalez-Whyte, Judge. Counsel: Giancarlo Nicolosi, Jorge I. Gonzalez, Jr., and Lissette Gonzalez, Cole, Scott & Kissane, P.A., for Appellant. Ashley N. Flynn and Bruno Renda, Fowler White Burnett, P.A., for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER OF DISMISSAL

(PER CURIAM) This is an appeal from an order denying a motion to enforce settlement agreement. The case below is open and pending. Finding we have no jurisdiction; we dismiss this appeal.

In the underlying lawsuit, Defendant/ Appellant, GEICO General Insurance Company ("GEICO") filed a motion to enforce settlement agreement. Following a hearing, the motion was denied. Nothing prevents the Appellant from raising this issue on plenary appeal, should the case be adjudicated on behalf of the Plaintiff, Loreta Mathis. GEICO filed a notice of non-final appeal, pursuant to Rule 9.130(a)(3)(C)(xii), Florida Rules of Appellate Procedure.

Although not raised by the parties, "[a]n appellate court has an independent duty to determine whether it has appellate jurisdiction and is not bound by the trial court's caption or the parties' characterization of an order." *Medeiros v. Firth*, 200 So. 3d 121 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D765a], *citing Almacenes El Globo De Quito, S.A. v. Dalbeta L.C.*, 181 So. 3d 559, 560 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2785b]. This Court issued an order to show cause to the Appellant as to why this case should not be dismissed. This Court has reviewed both the Appellants' and Appellee's responses.

Because the order on appeal is neither an appealable non-final order nor a final order, this appeal must be dismissed. Jurisdiction to hear nonfinal appeals in the district courts of appeals is governed by Rule 9.130. *See* Art. V, § 4(b)(1), Fla. Const.; Rule 9.130(a)(1), Fla. R. App. P. However, jurisdiction to hear appeals from nonfinal orders in the circuit courts is governed by general law. *See* Art. V, § 5, Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law"); *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994) ("The authority for appeals to the circuit court is established solely by general law as enacted by the legislature").

Here, no statute authorizes an appeal from an order denying a motion to enforce settlement, and therefore, this appeal must be dismissed until such time as the lower court enters an appealable final order. *See* Padovano, P., *Florida Appellate Practice* § 5:3 (2019 ed.); *911 Dry Solutions, Inc. v. Florida Family Insurance Company*, 259 So. 3d 167, 169 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1929a] (where Legislature has not enacted law authorizing appeal from order compelling appraisal, appeal from county court to circuit court was properly dismissed); *Shell v. Foulkes*, 19 So. 3d 438, 440 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2039a] (Appeal of county court order of default in eviction action properly dismissed); *State v. Sowers*, 763 So. 2d 394 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1264b] (no circuit court jurisdiction to hear appeal of order in limine). GEICO argues that because section 26.012 does not distinguish between final and non-final appeals, that all non-final appeals are therefore authorized. This argument is refuted by the above authorities.

Nor is the trial court's order a final order or judgment, which would be appealable under section 59.06, Florida Statutes. "Florida's test of finality for appellate purposes is well established: the order constitutes the end of judicial labor in the trial court, and nothing further remains to be done to terminate the dispute between the parties." *Bloomgarden v. Mandel*, 154 So. 3d 451, 454 (Fla. 3d DCA 2014) [40 Fla. L. Weekly D95a], *citing Miami-Dade Water and Sewer Auth. v. Metro. Dade County*, 469 So. 2d 813, 814 (Fla. 3d DCA 1985). Clearly, judicial labor is not at an end—the case below remains pending. And again, Rules 9.110 and 9.130(a)(4) do not establish the jurisdiction of this Court to hear such an appeal—only the Florida Statutes may authorize circuit court appellate jurisdiction.

Nor is the trial court's order reviewable by certiorari, because there was no departure from the essential requirements of law resulting in irreparable harm. *See Pannell v. Triangle/Oaks Ltd. Partnership*, 783 So. 2d 325 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D989a]; *citing Rodriguez v. Young America Corp.,* 717 So. 2d 621 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2196b] (citing numerous cases). The trial court's order merely denied a motion to enforce settlement—the case remains pending. There was no error for which GEICO cannot seek redress through plenary appeal if and when a final judgment is secured against it. The fact that GEICO will be forced to litigate this case does not constitute the type of irreparable harm which would authorize the writ. *See, e.g., AVCO Corp. v. Neff*, 30 So. 3d 597 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D541a] (because the error complained of may be addressed on plenary appeal, the trial court's order denying summary judgment did not cause irreparable harm).

We therefore dismiss this appeal because an order which denies a motion to enforce settlement is not an appealable order.

Appeal DISMISSED. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

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STEPHANOV PIERRETTE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000301-AC-01. L.T. Case No. B18-32989. May 28, 2020.

This Court, proceeding in the manner outlined and recommended by the Supreme Court of the United States in *Anders v. California,* 386 U.S. 738, (1967), having deferred ruling on a motion of the Public Defender to withdraw as counsel for the **Appellant,** Stephanov Pierrette, and having furnished appellant with a copy of the public defender's memorandum brief, and having allowed the appellant a reasonable specified time within which to raise any points that appellant chose in support of this appeal, and the appellant having failed to respond thereto, on consideration thereof upon full examination of the proceedings, this Court concludes that the appeal is wholly frivolous. Whereupon, the Public Defender's said motion to withdraw is granted, and the order or judgment appealed is hereby affirmed. (DARYL E. TRAWICK, LISA S. WALSH, and MARIA DE JESUS SANTOVENIA , JJ., CONCUR)

* * *

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. DOCTOR REHAB CENTER, INC., a/a/o Dainier Zaldivar, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-000067-AP-01. L.T. Case No. 2011-001984-SP-26. May 28, 2020. An Appeal from the County Court for Miami-Dade County, Judge Lawrence D. King. Counsel: Michael Neimand, United Automobile Insurance Company, Miami, for Appellant. Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Appellee.

[Lower court order at 25 Fla. L. Weekly Supp. 1031a]

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

(PER CURIAM.) Affirmed. *Pearce v. Sandler,* 219 So. 3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b]; *Southeastern Fidelity Ins. Co. v. Rice,* 515 So. 2d 240, 242 (Fla. 4th DCA 1987). (TRAWICK, WALSH and SANTOVENIA, JJ., CONCUR.)

* * *

LEONARD JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-282-AC-01. L.T. Case No. M19-22215. May 18, 2020. An Appeal from the County Court in and for Miami-Dade County, Hon. Edward Newman, County Court Judge. Counsel: Carlos J. Martinez, Office of the Public Defender and Deborah Prager, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Office of the State Attorney and Manpreet K. Uppal, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ON CONFESSION OF ERROR

(PER CURIAM.) The State's confession of error is well-taken. We reverse the order withholding adjudication and assessing a fine and court costs on a charge of unlawful possession of spiny lobster and remand to the trial court with directions to dismiss the charge. (TRAWICK, WALSH, AND SANTOVENIA JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Actual physical control of vehicle—Inoperable vehicle—Where licensee was in driver's seat of vehicle which was out of gas and stopped on side of road at time of encounter with officer, and licensee's statements to law enforcement supported finding that he was driving vehicle when it ran out of gas, hearing officer had sufficient circumstantial evidence to find that licensee was in actual physical control of vehicle

JORDAN SCOTT MILLS, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2019-CA-5863 NC. May 11, 2020. Counsel: Kathy Jimenez-Morales, Chief Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANDREA McHUGH, J.) THIS CAUSE comes before the Court on the Amended Petition for Writ of Certiorari filed by Jordan Scott Mills ("Petitioner") on December 2, 2019. Petitioner is seeking review of a decision of the State of Florida, Department of Highway Safety and Motor Vehicles ("Department"), sustaining the suspension of the Petitioner's driver license. Upon review of the Amended Petition, the Court directed Respondent to file a Response, by Order dated December 10, 2019. The response was filed on February 4, 2020 and Petitioner's reply was filed on February 24, 2020. The Court has reviewed the Amended Petition, the Response, the Reply, the court file, and the applicable law, and is otherwise duly advised of the premises.

Standard of Review

On a petition for writ of certiorari, this Court's proper standard of review is to determine whether the administrative tribunal (1) accorded procedural due process, (2) observed the essential requirements of the law, and (3) based its administrative findings on competent substantial evidence. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). While applying this standard, the Court may not reweigh the evidence or substitute its judgment for the agency's finding. *See Haines City Community Dev. Co. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Facts

On August 25, 2019, Sarasota County Sheriffs Deputy Sergeant Osborne observed Petitioner in the driver's seat of his vehicle in the roadway in front of the Lexus automotive dealership at 4883 Clark Road in Sarasota, Florida. The vehicle was in the right hand lane of westbound Clark Road, and Petitioner was attempting to start the vehicle, "turning over the engine;" the vehicle "appeared to be out of gas." Sergeant Osborne never stated that he saw Petitioner driving before he saw Petitioner on the side of the road attempting to start the vehicle, nor did he discuss the operability of the vehicle with the officer who ultimately performed the DUI investigation, Deputy Timothy Brenckle. Another person, Michael Burner, exited the vehicle from the passenger seat and pushed the vehicle out of the roadway and into the Lexus dealership parking lot, with the assistance of Sergeant Osborne. (DUI Probable Cause Affidavit, p. 5; Transcript, pp. 7-8). After the vehicle was moved, Petitioner exited the vehicle, and Sergeant Osborne observed Petitioner and Mr. Burner walking around the parking lot. Sergeant Osborne approached Petitioner, and when he did so, smelled a "strong odor of an alcoholic beverage coming from" Petitioner. The driver's door to the vehicle was open, and Sergeant Osborne observed an empty baggie on the driver's side floorboard. When asked whether the vehicle contained contraband, Petitioner stated that it did not and that he would not consent to a search. Sergeant Osborne suspected Petitioner was under the influence of alcohol, and requested a DUI investigation. (DUI Probable Cause Affidavit, p. 5; Transcript, pp. 7, 9-11).

In response to Sergeant Osborne's request, Deputy Brenckle arrived on the scene to perform the DUI investigation, and found Petitioner walking in circles next to the vehicle. Petitioner appeared "unsteady on his feet," and Deputy Brenckle "could smell the clear odor of an alcoholic beverage coming from [Petitioner's] person." Petitioner had watery eyes and his speech was slurred. (DUI Probable Cause Affidavit, p. 5; Transcript, p. 11). At some time during these events, Petitioner stated that

> he and the passenger had been on Coburn Road off of Fruitville [R]oad where they had been drinking with the [Petitioner's] girlfriend. The [Petitioner] advised that he was only there for 16 minutes. He advised that he had one Bud Light, and that he then got into an

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argument with his girlfriend. He advised that he and his passenger left and were headed back to his residence on Olive Avenue.

(DUI Probable Cause Affidavit, p. 5).

Deputy Brenckle advised Petitioner that he was there to carry out a DUI investigation; Petitioner refused to perform field sobriety exercises. Deputy Brenckle informed Petitioner that a decision would be made based on Sergeant Osborne's observations, as well as his own "confirmation of the odor of an alcoholic beverage." Petitioner advised Deputy Brenckle that "he understood." (Transcript, p. 11). After arriving at the jail, Petitioner was placed under arrest and Deputy Brenckle read implied consent warnings to Petitioner. Petitioner stated he understood the warnings, and refused to provide a breath sample. (Transcript, p. 11). Petitioner's driver's license was suspended, and he requested a formal administrative review of the suspension.

On October 3, 2019,[1] an evidentiary hearing was held, where Deputy Brenckle testified (Transcript, pp. 6-12), and the following exhibits were admitted:

DDL-1: Florida Uniform DUI Citation
DDL-2: Affidavit of Refusal to Submit to Breath and/or Urine Test
DDL-3: Sarasota County Sheriff's Office DUI Packet
DDL-4: Copy of Petitioner's Driver License

After the exhibits were admitted and Deputy Brenckle testified, Petitioner moved to invalidate the driver license suspension. Petitioner argued that the suspension should be invalidated because the vehicle was inoperable at the time of the arrest. The motion was denied. (Transcript, pp. 13-14).

Analysis

In the instant case, the scope of the DHSMV's administrative review was limited to a determination of whether the following issues were proven by a *preponderance*[2] of the evidence: (1) whether the law enforcement officer had probable cause to believe that Petitioner was driving while intoxicated (which includes determining whether the officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle); (2) whether Petitioner refused to submit to a breath test requested by the officer; and (3) whether, when Petitioner refused the test, he was given the proper warning that his license would be suspended. *See* § 322.2615(7)(b) Fla. Stat. After review, the Hearing Officer concluded that law enforcement did have probable cause to believe the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol; the Petitioner refused to submit to a breath test after being requested to do so by a law enforcement officer subsequent to a lawful arrest; and that Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

Petitioner raises a single issue: that there was insufficient evidence presented, as a matter of law, to support that Petitioner was lawfully arrested for driving under the influence of alcohol. Petitioner asserts that "the sole issue for consideration is whether the Department erred when it sustained the Petitioner's driver's license suspension, based upon the vehicle being inoperable at the time of the DUI arrest." (Amended Petition, p. 5).

In support of his claim, Petitioner cites to *Jones v. State,* 510 So. 2d 1147 (Fla. 1st DCA 1987). The *Jones* court was presented with the following certified question:

> Must the State prove as an element of the offense of being in actual physical control of a motor vehicle while under the influence of alcoholic beverages when affected to the extent that the normal faculties are impaired, that the motor vehicle be capable of immediate self powered mobility.

Id.

In *Jones,* two state troopers discovered the appellant slumped over the steering wheel of a vehicle. Early that morning, the vehicle, which appellant's sister-in-law had been driving, had stopped functioning; the sister-in-law had walked home while appellant slept in the vehicle. Appellant tried to start the car, in the presence of the troopers, but the car would not start, and had to be pushed to a repair facility. It was found that the vehicle had electrical problems preventing it from being operable. The *Jones* court found, therefore, that appellant did not have actual physical control of a vehicle, because the vehicle was inoperable, and reversed the appellant's conviction. *Id.*

But *Jones* is factually distinguishable from the instant case. In *Jones,* the parties stipulated that the appellant had not driven the vehicle prior to it becoming inoperable; no such stipulation was entered here. Even if the law enforcement officers at the scene in the instant case did not see the vehicle in operation, there was more than sufficient circumstantial evidence for the hearing officer to determine, by a preponderance of the evidence, that the vehicle was only *temporarily* inoperable, due to the car being out of gas. Not only was Petitioner in the driver's seat when Sergeant Osborne first observed the vehicle, but Petitioner's own statements to law enforcement support the finding that Petitioner was driving the vehicle prior to it running out of fuel. Finally, it is important to note that in *Jones,* the court explicitly held, in answering the certified question, that

> The question certified here confines itself to what the state must prove. The Florida statute by its terms ***places no burden on the state to prove that the vehicle is capable of operation***. It would be inappropriate for the court to add that requirement to the establishment of every prima facie case of a violation of the statute. We therefore answer the certified question in the negative.

Id. (emphasis added).

Thus, the Court finds that Petitioner's reliance on *Jones* is misplaced. The hearing officer had sufficient evidence to find that Petitioner was in actual physical control of the vehicle.

Based on the record, the Court finds that the Department of Highway Safety and Motor Vehicles' decision to sustain Petitioner's driver license suspension was supported by competent substantial evidence, and the Department observed the essential requirements of the law and accorded the Petitioner procedural due process. In light of the foregoing, the Petitioner's argument fails to demonstrate an entitlement to relief.

Therefore, it is **ORDERED AND ADJUDGED** that the Petitioner's Amended Petition for Writ of Certiorari is **DENIED**.

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[1]The Petition and the Findings of Fact, Conclusions of Law and Decision indicate the hearing having taken place on September 30, 2019, but the transcript reflects that the hearing occurred on October 3, 2019.

[2]This standard requires the evidence "as a whole [to show] that the fact sought to be proved is more probable than not." *Romani v. State,* 542 So. 2d 984, 986 n.3 (Fla. 1989).

* * *

Counties—Code enforcement—Open storage of inoperable vehicles—No merit to property owners' argument that county erred in finding them in violation of county code's prohibition on open storage of inoperable vehicles because the open storage of vehicles is consistent with performing car repairs, a permitted use—Specific condition on use of property that allows open storage of only operable vehicles overrides general code provisions—Irrespective of whether particular vehicle could be started or driven, fact that vehicles lacked license plates rendered them inoperable under code—Where county failed to prove that golf carts on property were inoperable, portion of order requiring removal of carts is reversed

GAMILA SHEHATA and AKRAM ZIKRY, Appellant, v. HILLSBOROUGH COUNTY, FLORIDA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in

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and for Hillsborough County, Civil Appellate Division. Case No. 19-CA-9788, Division X. L.T. Case No. CE18018202. May 7, 2020. On review of a decision of the Hillsborough County Code Enforcement Special Magistrate. Counsel: Akram Zikry, pro se, Brandon, Appellant. Kenneth Pope, Senior Assistant County Attorney, Tampa, for Appellee.

APPELLATE OPINION

(NIELSEN, J.) Appellants Gamila Shehata and Akram Zikry appeal a final order of the Hillsborough County Code Enforcement Board Special Magistrate finding their commercial property in violation of its zoning on several grounds. Appellants were cited for, among other things, the presence of accumulations and the open storage of inoperable vehicles. Mr. Zikry contends that the County did not prove all the elements necessary to find a code violation as to the open storage of vehicles on the property. Specifically, he claims that the storage of inoperable vehicles on the property is consistent with performing car repairs, a use the zone permits. Although Mr. Zikry is correct that car repair is permitted by the property's zone, specific conditions and privileges the County has placed on the property include an express proscription against the open storage of inoperable vehicles. This specific provision overrides more general provisions of the Code. On the other hand, the court finds merit in Mr. Zikry's argument with regard to the open storage of golf carts, where golf carts appear to fit the definition of "vehicle" and the county's inspector offered no evidence that they were inoperable. To the extent the order below requires removal of the golf carts, it is reversed. In all other respects, the order is affirmed.

This court has appellate jurisdiction to review appeals of code enforcement boards and special magistrates. §162.11, Florida Statutes. On appeal, the court is to determine whether due process was afforded the parties, whether the order complies with the essential requirements of law, and whether competent substantial evidence supports the decision. *Haines City Community Development v. Heggs*, 619 So.2d 996 (Fla. 1995) [20 Fla. L. Weekly S318a].

Appellant owns commercial property at 7003 Causeway Blvd. in unincorporated Hillsborough County. It is formally zoned PD—planned development—which allows local government to place certain zoning conditions/privileges to account for a property's unique qualities. The surrounding area is also commercial. In accordance with the PD zoning, permissible uses of the property are limited to those that are allowable only in both CG, a general commercial zoning, *and* CI, a more intensive commercial use, with a few added allowances unique to the subject parcel. Restated, if a use isn't permitted in both CG and CI zones, or consistent with the special conditions of the property, it is not allowed.

The subject property was cited for several violations of the county code. By the time a hearing was held, several violations had been corrected. The order presented for the court's review lists two remaining violations in need of correction. The first relates to unsightly accumulations of various items. Photographs show piles of tires, metal, auto parts, mats, old batteries, drums of old paint, as well as miscellaneous junk and debris. The second relates to the violation of specific zoning conditions imposed on the property by the County, which prohibits open storage of vehicles. Photographs show cars, vans, and golf carts alleged to be inoperable and being openly stored.

With regard to the accumulations, Mr. Zikry does not meaningfully challenge the decision. As to this violation, the decision is affirmed without further discussion. Mr. Zikry does challenge the decision as it relates to the openly stored vehicles, many of which are clearly inoperable. As an express condition of the PD zoning, the property may be used for open storage of *operable* vehicles. In this case, there were two general types of vehicles: the cars/vans and the golf carts.

Starting with the cars and vans, where the operational status did not indicate whether a particular vehicle could be started or driven, it was nonetheless apparent from photographs that all lacked license plates. Under the code, this fact alone made them inoperable. Sec. 8-106, Hills. Co. Code of Ordinances (definition of "inoperable vehicle"). Referring to the code, Mr. Zikry argued below and in this appeal that the county's stance is contrary to the fact that even major motor vehicle repair could be performed on the property. Sec. 12.01.00, Hills. Co. Land Dev. Code. Acknowledging that he is in the business of auto recycling rather than repair, he nonetheless suggests that the activities are comparable: auto repair shops receive, repair and store inoperable vehicles, some of which may have no tags.[1] After they're made operable, they leave the premises. In recycling, he says inoperable vehicles arrive, he readies the paperwork, and they are gone in a few days. Mr. Zikry makes an interesting point. But his argument does not take into account the governing principle that when two applicable provisions to a situation are in conflict, a specific provision will govern over a general one. *Davis v. Sheridan Healthcare,* 281 So. 3d 1259, 1264-65 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2535a] (internal citations omitted)(where a specific provision conflicts with a general one, the specific governs).

Here, the more specific provision is the special condition allowing the open storage of only operable vehicles. Because the storage of inoperable vehicles violates the express specific terms of the property's zoning, the decision is affirmed to the extent it requires the inoperable cars and vans to be removed.

The golf carts require additional consideration, however. Hillsborough County Code s. 12.01.00. defines "vehicle":

> Vehicle: Every device, whether motorized or nonmotorized, upon, or by which any person or property is or may be transported or drawn, excepting devices used exclusively upon stationary rails or tracks.

Under this definition golf carts, like cars, are vehicles. Photographs show a number of golf carts openly stored. The photos do *not* show them in an obvious state of disrepair, however. In fact, the county inspector stopped short of saying they were inoperable, saying "I won't say they're inoperable." So, either the golf carts were operable and could be openly stored, or their state of repair is unknown, and the County has not proven its case against Mr. Zikry as to them. To the extent the order requires the golf carts' removal, that portion of the order is vacated.

It is therefore ORDERED that the order is REVERSED to the extent it requires removal of the golf carts. In all other respects the order is AFFIRMED. This cause is REMANDED to the code enforcement special magistrate for proceedings consistent with opinion. (NIELSEN, BATTLES, TIBBALS, JJ.)

[1]Mr. Zikry presented no evidence that auto repair facilities receive untagged vehicles or that such facilities may openly store inoperable vehicles. This does not form the basis for the court's decision in this case, however.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Hearings—Witnesses—Telephonic oath—Where arresting officer appeared telephonically at formal review hearing without duty officer or notary present with officer to independently verify his identity, oath administered by hearing officer was invalid—While hearing officer has authority to administer oaths telephonically, for oath to be proper witness must appear before duty officer or notary who can vouch for their identity—Fact that hearing officer could have rendered decision based solely on documents without testimony of officer is irrelevant where there has been denial of due process—Petition for writ of certiorari is granted

CASSANDRA L. ECKERT, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 19-CA-10990, Division E. July 1, 2020. On Motion for Clarification. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Christie S. Utt, General

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Counsel and Kayla Cash Robinson, Assistant General Counsel, DHSMV, Jacksonville, for Respondent.

[On Motion for Clarification]

In light of Petitioner's Motion for Clarification, the Court withdraws its original opinion and substitutes the amended opinion below. The result is unchanged.

[SECOND][1]
AMENDED FINAL ORDER GRANTING PETITION WRIT OF CERTIORARI

(HOLDER, J.) Petitioner Cassandra Eckert seeks review of the final order of a hearing officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles, upholding the suspension of her driving privilege. In the proceeding below, Petitioner requested a formal hearing to review the administrative suspension, asking that a subpoena to appear be issued to the arresting officer. The arresting officer appeared for the hearing telephonically, but he did not appear in the physical presence of a duty officer or notary who could verify his identity as directed by the subpoena. The hearing officer administered the oath over the telephone without these safeguards. Petitioner's counsel objected. The hearing officer, citing departmental policy, overruled the objection. Acting on the premise that the law enforcement officer did not make a valid appearance, counsel did not ask any questions of him. The hearing officer entered an order affirming the suspension of Petitioner's driving privileges based on documentary evidence indicating that breath tests showed her blood alcohol level exceeded the legal limit for driving under the influence of alcohol. Having reviewed the briefs and appendices, the court determines that a hearing officer may conduct hearings through electronic means, including the telephone, but when a witness appears telephonically without independent verification of the witness's identity, a hearing officer may not administer an oath to that witness through solely audio equipment such as a telephone. Because the hearing officer could not verify the law enforcement officer's identity solely over the telephone, the witness was not placed under a proper oath, and Petitioner was denied due process. The writ is therefore granted, and the cause is remanded for further proceedings.

Petitioner was arrested August 16, 2019, for driving under the influence of alcohol, in violation of §316.193, Florida Statutes. Breath tests revealed a blood alcohol level that exceeded the legal limit in this state. As a result, her driving privileges were administratively suspended. Petitioner requested a formal review of the suspension in accordance with §322.2615(1)(b)3, Florida Statutes. In advance of the hearing and to secure his testimony, Petitioner requested the issuance of a subpoena to the arresting officer. The Department issued a subpoena for the law enforcement officer's appearance by telephone, which is allowed under §322.2615. The subpoena specifically directed the officer to appear before a duty officer or a notary to be sworn in for his telephonic appearance. On the day of the hearing, the law enforcement officer appeared by telephone, but he did not appear before a duty officer or notary to be sworn in as directed by the subpoena. Despite this, Hearing Officer D. Plato attempted to administer the oath by telephone. Petitioner objected, contending it was in violation of not only her due process rights, but also the terms of the subpoena. Contending the subpoena was issued in error, Hearing Officer Plato noted Petitioner's objection, challenged Petitioner with the existence of unspecified case law purporting to support the practice, refused to reveal the specific case law relied upon even when counsel asked, advised counsel to "do her job" and "look it up," and, finally, denied her objection. Believing that the arresting officer was not administered a valid oath, Petitioner's counsel asked no questions of him. Thereafter, Hearing Officer Plato issued an order. Although the order admitted error as to the hearing officer's earlier representation that case law existed to support his position regarding the telephonic administration of oaths, it nonetheless upheld the suspension. Petitioner now contends that her due process rights have been violated and that the suspension should be set aside.

The hearing officer's determination is based on a departmental policy change that became effective June 6, 2019. The policy exempts law enforcement who appear by telephone from appearing at a duty station or before a notary. Rather, it allows hearing officers to administer witness oaths telephonically without independent verification of a witness's identity. A departmental memo advised hearing officers to overrule attorneys' objections to the policy.

The Department's view is based on its reading of §322.2615(6)(b), which states:

> Such formal review hearing shall be held before a hearing officer designated by the department, and *the hearing officer shall be authorized to administer oaths*, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a), regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension. *The hearing officer may conduct hearings using communications technology*. . . .

(Emphasis added.) The Department gives no explanation for the policy change. It argues here that hearing officers' statutory authority to administer oaths, examine witnesses, and take testimony, along with the ability to conduct hearings using communications technology, allows them to forego the verification of a witness's identity when administering oaths telephonically. §322.2615(6)(b), Fla. Stat. It contends other courts have viewed such challenges favorably to the Department. This court disagrees with this characterization.

Nearly all of the cases the Department cites address only telephonic *appearance* of witnesses, not the manner in which witness oaths were administered. *State, Dept. of Highway Safety and Motor Vehicles v. Edenfield*, 58 So. 3d 904, 907 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a] (witness may appear for hearing by telephone); *State, DHSMV of Highway Safety and Motor Vehicles v. Bennett*, 125 So. 3d 367, 369 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2376b] (A party does not have a right to require a police officer's live appearance at an administrative hearing dealing with a driver's license suspension; hearing officer may determine whether a telephonic appearance is adequate.); *State, Dept. of Highway Safety and Motor Vehicles v. Canalejo*, 179 So.3d 360, 362 (3d DCA 2015) [40 Fla. L. Weekly D2344a] (*citing Edenfield,* a party does not have a right to require an officer's live appearance at an administrative hearing dealing with license suspension.) The manner in which oaths were administered was not at issue in any of the foregoing cases.

Specific to the issue presented, however, the Department cites *Igor Graca, v. State of Florida, Department Of Highway Safety And Motor Vehicles*, 24 Fla. L. Weekly Supp. 329c (Fla. 20th Jud. Cir. [Appellate] 2016). In *Igor Graca,* as here, the petitioner did not object to the telephonic *appearance* of the witness, but, as here, he expected that the requirements to appear be of the State's subpoena would be upheld and that rules concerning the use of communication equipment would apply. Rule 2.530, Florida Rules of Judicial Administration states, "[t]estimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness' jurisdiction is present and administers the oath consistent with the laws of the jurisdiction." The *Igor Graca* court determined that the Rules of Judicial Administration did not apply to the particular proceeding. Instead, the court interpreted §322.2615(6)(b) as allowing a hearing officer to place a witness under oath by telephone without independent verification of the witness's identity.

Petitioner here argues that the Department's procedure overlooks the significance and solemnity of taking an oath. Petitioner acknowl-

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edges that §322.2615(6)(b) allows hearing officers to, among other things, administer oaths. It also allows them to conduct hearings electronically. Arguably, an oath can be administered telephonically. It does not necessarily follow, however, that it authorizes an oath administered by telephone without independent verification of the witness's identity. The statute is silent on that point. Administrative rules governing these proceedings require that witnesses testify under oath, but they also provide no required method or safeguards for administering oaths. Rule 15A-6.013(4), (8), Florida Administrative Code.

Petitioner relies on an opinion of the Attorney General that oaths may not be administered by a notary over the phone. Op. Atty. Gen. Fla. 92-95 (1992). Such opinions are not binding on this court, but they may be instructive. In AGO 92-95, the Attorney General opined that a notary may not administer an oath to someone appearing telephonically if that person was not in the notary's presence. He further stated his opinion that the rationale applied even if all parties stipulated to the witness's identity. *Id.* Case law relied upon by the Attorney General, and now by Petitioner, underscores the importance of oaths. A valid oath must be an unequivocal act in the presence of an officer authorized to administer oaths by which declarant knowingly attests to the truth of a statement and assumes the obligations of an oath. *Collins v. State*, 465 So.2d 1266, 1268 (Fla. 2d DCA 1985). The key to a valid oath is that perjury, which is a crime, will lie for its falsity. *Id.* It is essential to the offense of perjury that a statement considered perjurious was given under an oath *actually* administered. *Id.*; *Markey v. State*, 37 So. 53 (Fla. 1904)(in a prosecution for perjury, the person alleged to have administered the oath, or defendant himself, or any witness present at such alleged swearing, may be interrogated fully as to the facts connected therewith, that it may be determined whether [witness] was sworn).

The above cases involve legal proceedings. The underlying administrative proceeding was conducted under §322.2615. Under §322.33 "any person who makes any false affidavit, or knowingly swears or affirms falsely to any matter or thing required by the terms of [Chapter 322], shall be guilty of perjury and upon conviction shall be punished accordingly." In addition, §837.02(1), makes perjury in an official proceeding subject to criminal penalties. To convict for perjury, the ability to identify the maker of a false statement must exist. It is not a stretch to imagine a situation wherein the failure to ascertain the identity of a person taking an oath remotely could defeat a charge of perjury against the person charged with it.

As a practical matter, the Department points out that the hearing officer could have rendered a decision solely on the basis of documents without the presence of any witnesses. §322.2615(2), Fla. Stat. Although accurate, this is irrelevant. The right to due process does not depend on the merits of Petitioner's claim. "The right to due process is 'absolute'. . . because of the importance to organized society that procedural due process be observed." *Carey v. Piphus*, 435 U.S. 247, 266; 98 S. Ct. 1042, 1054; 55 L. Ed. 2d 252 (1978)(internal citations omitted). "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing. . . ." *City of Riviera Beach v. Fitzgerald*, 492 So. 2d 1382, 1385 (Fla. 4th DCA 1986), *citing Carey*, at 1053 (*additional internal citations omitted*). And the Florida Supreme Court has recognized that a person's ability to drive is a significant interest, which §322.2615 is intended to protect, not exploit. *Wiggins v. DHSMV*, 209 So. 3d 1165, 1171 (Fla. 2017) [42 Fla. L. Weekly S85a].

In full consideration of the foregoing, this court concludes that although the hearing officer has the authority to administer oaths, and may even do so by telephone, a witness appearing by phone must appear before a duty officer or notary public who can vouch for the witness's identity for such telephonic oath to be proper.[2] To do otherwise would render any consequences for false statements made under those circumstances unavailable to the State. In so doing this court respectfully disagrees with the decision in *Igor Graca, v. State of Florida, Department of Highway Safety and Motor Vehicles*, 24 Fla. L. Weekly Supp. 329c (Fla. 20th Jud. Cir. [Appellate] 2016).[3]

The petition is GRANTED. Ordinarily, the cause would be remanded to the Department to conduct further proceedings consistent with this opinion in accordance with *Tynan v. Department of Highway Safety and Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a] (where original administrative hearing violated driver's due process rights, Department of Highway Safety and Motor Vehicles had right to conduct a second hearing which met due process requirements). Because, however, the suspension period has expired, the order upholding the administrative suspension is QUASHED, and the administrative suspension is SET ASIDE without remand. *McLaughlin v. Department of Highway Safety and Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a].[4]

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[1]Because Respondent filed a response moments after the [first] amended order granting the petition was rendered, the court again sets aside its order in favor of the instant order. The result remains unchanged.

[2]Other electronic means might also be properly utilized. For example, the court notes that during the time of the COVID-19 pandemic, many of its colleagues have properly sworn in witnesses via Zoom by verifying the witness's identity through presentation of a driver's license. The point is that safeguards must be in place to verify a witness's identity in order to make a proper oath.

[3]This court's disagreement is with the ultimate determination of the due process issue. This should not be read as disagreement with the applicability of the Rules of Judicial Administration to administrative proceedings.

[4]In its response to the motion for reconsideration, the Department contends the court cannot direct the setting aside the suspension, it may only quash the hearing officer's order upholding it. Although the court understands the Department's basis for the argument, such a reading in this context results in an automatic victory for the Department if the suspension expires during the court's review no matter the outcome of that review. According to the Department, even if the reviewing court quashes the order upholding the suspension, and the driver is precluded from rehearing under *McLaughlin,* the suspension remains on the driving record. This court disagrees. Although this court does not agree with the rationale that expiration of the suspension period renders the matter moot (as long as the driver isn't required to serve a second suspension), it is bound to follow controlling precedent. The Department's reading of §322.2615(13) such that the suspension is unaffected despite the driver prevailing on review, renders the purpose of that provision ineffective. There is a strong presumption against ineffectiveness, the idea being that the legislature does not enact useless laws. *See*, Antonin Scalia & Bryan A. Garner, *Reading Law* (2012), p. 63. If Petitioner prevails on review *and* is not entitled to a rehearing, the suspension should be set aside whether the reviewing court specifically requires it or merely quashes the order upholding the suspension.

* * *

Counties—Special taxing district—Contracts—Competitive bidding—Bid protest—Mandamus is inappropriate proceeding to review bid contest where petitioner asks appellate court to determine disputed fact, and selection of successful bid involved exercise of discretion—Certiorari—Due process—Because special taxing district is not agency within meaning of Administrative Procedures Act, it is not subject to statutory requirements for procurement and is required only to avoid acting in arbitrary, capricious, illegal, or fraudulent manner—Petitioner received due process where district investigated large discrepancy between one-time expenditures in bids to ensure they were fairly compared, and all parties were afforded notice and opportunity to be heard at bid protest hearing—Fair comparison of bids demonstrated that petitioner's bid was not lowest bid—District did not depart from essential requirements of law in denying bid protest, and denial was supported by competent substantial evidence

BUCCANEER LANDSCAPE MANAGEMENT CORPORATION, Petitioner, v. BLOOMINGDALE SPECIAL TAXING DISTRICT, a municipal corporation,

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Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-13032. Division A. May 19, 2020. Counsel: Jacqueline M. Prats, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Tampa, for Petitioner. Kathleen G. Reres, Shumaker, Loop & Kendrick, LLP, Tampa, for Respondent.

ORDER TREATING MANDAMUS PETITION AS PETITION FOR WRIT OF CERTIORARI AND ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHERYL A. THOMAS, J.) This case is before the court to review a petition for writ of mandamus filed by Buccaneer Landscape Company ("Buccaneer") against Bloomingdale Special Taxing District (Bloomingdale or the "board") after it rejected Buccaneer's bid and awarded the contract to a competitor—Your Green Team. Buccaneer's bid protest was unsuccessful in changing the result. Having reviewed the petition and determining mandamus does not lie, the court will treat the petition as one for writ of certiorari. Because Bloomingdale provided Buccaneer with a fair bid protest process, conducted its business in conformance with the bid documents, and competent substantial evidence supports that Buccaneer's competitor was the lowest responsive and responsible bidder, the petition for writ of certiorari is denied.

The Facts:

Bloomingdale published a solicitation for bids on a landscape maintenance contract on October 1, 2019. The solicitation package consisted of procedures for the Invitation to Bid, Administration Specifications & Agreement, Schedule A Scope of Work, which identified areas to be maintained, Schedule B, which identified so-called Optional Services/Materials[1] and a Proposal Sheet.

A pre-bid meeting took place on October 17, 2019 at Bloomingdale's office, with representatives from both Buccaneer and Your Green Team ("YGT") attending. The meeting was to explain the process and to allow bidders to submit any questions they may have had about the solicitation. Bloomingdale made it clear at this pre-bid meeting that the contract was to be awarded for a term of more than one year. Specifically, Bloomingdale's manager reviewed the essential terms of the solicitation package and, when discussing the term of the contract, stated:

> "*Go to page ten*: *Term of agreement.* Typically this is going to be a 2- or 3-year agreement. That will be a board decision at the time they award it. There is *the ability to renew without going to bid again* with a CPI index increase or decrease depending upon what happens with the economy, but just so you know it will most likely be a three year contract."

(Emphasis added.) In addition to the annual maintenance contract, there were two one-time projects for which pricing was requested. These included pruning of crepe myrtle trees and covering all walls with creeping fig. The scope of work explained the additional line item for fig fill-in as follows: "contractor shall assure 100% coverage of all walls with creeping fig, at all times. There will be a one-time added cost on the proposal page to complete the initial fill in of all bare areas."

Based solely on YGT's proposal sheet, which included $294,110 for annual maintenance, $7000 (one time) for crepe myrtle pruning and $18,538 (one time) for complete wall coverage with creeping fig, indicated total first-year price of $319,649. In comparison, Buccaneer's annual maintenance contract was $312,645, with $1250 for pruning the crepe myrtle, and $2062 for the complete wall coverage. Buccaneer's first-year total came out to $315,957, a difference of $3692 from the first-year total reflected on YGT's proposal sheet. At first blush, Buccaneer appears to be the lowest bidder, although its annual maintenance agreement, a recurring expense, was significantly higher than the next low bidder YGT.

Separated into their components, however, the bids show a large difference between Buccaneer's and YGT's quotes for wall coverage with creeping fig—$18,538 (YGT) vs. $2062 (Buccaneer). At the November 11, 2019 meeting, Bloomingdale's bid manager pointed out the large variance in these costs in each bid package, which asked bidders to provide a cost for 100 percent coverage of the District walls in fig but did not ask for the total number of plants on which the bid was based. Schedule B included quotes for installation of creeping fig and the completed bid packages revealed the fact that YGT quoted $4.00 per plant for creeping fig while Buccaneer quoted $6.00 per plant. At $6.00 each for creeping fig, Buccaneer's bid would allow only 344 plants to cover the approximately 6,120 feet of wall space on Bell Shoals with nothing left over. As Buccaneer would later admit, the board understood that Buccaneer's quote did not factor in enough plants to cover the wall on Bell Shoals Road. In contrast, YGT included with its bid an explanation that its estimate of $18,538 for filling in creeping fig included 4,634 fig plants at $4 each to cover 13,904 feet wall space; however 1,680 of the plants were allocated to cover 6,120 feet of bare walls along Bell Shoals Road. YGT explained that the wall along Bell Shoals Road does not have irrigation, and if Bloomingdale did not want coverage of creeping fig along Bell Shoals, YGT's estimate for creeping fig would reduce by $8162 to $10,376. Subtracting the cost of covering the Bell Shoals wall from the total, YGT's bid results in a first-year contract price of $311,487 ($319,649-$8162). When the proposal sheets are compared without adjustments, but removing the one-time costs from years two and three of the three-year term as reflected on the board's bid tabulation sheets, YGT's initial bid represented a savings over the longer terms, but not on the first year. When compared on *identical* terms, however, Buccaneer's $315,947 bid was $4471 *more* than YGT's $311,746 bid for the first year. The table below illustrates:

Item	Buccaneer Landscaping (Petitioner)	Your Green Team (YGT, prevailing bidder)
Annual Maintenance Contract	$312,645	$294,110
Additional crepe myrtle pruning option (One time only)	$ 1250	$ 7,000
Wall coverage w/creeping fig option (one time only)	$ 2062 (excludes Bell Shoals wall)	$ 18,538 (orig. proposal, includes Bell Shoals wall); $10,376 (excludes Bell Shoals wall)
Total 1-year contract amt. (first year) (*denotes w/o Bell Shoals)	$315,957*	$319,648/*$311,487
3-year contract total (* denotes w/o Bell Shoals)	$941,247 *	$907,868[2]/*$899,706

Bloomingdale awarded the contract to YGT on November 13, 2019. Soon after the board awarded the contract, Buccaneer communicated its intent to protest the award. Acknowledging the protest, Bloomingdale provided Buccaneer with notice and a review hearing before the Bloomingdale Board of Trustees on December 9, 2019. In advance of the hearing Bloomingdale asked Buccaneer to answer several questions, specifically:

1. Whether Buccaneer's bid included the cost of installing creeping fig plants along Bell Shoals Road;
2. Why Buccaneer did or did not include the cost of installing creeping fig plants along Bell Shoals Road;
3. How many creeping fig plants were included in Buccaneer's calculation of $2,062 for the cost of compliance with the option for filling in creeping fig along all walls in Bloomingdale;
4. How Buccaneer considers itself to be the lowest bidder when its bid for annual maintenance of the Contract, without options, was

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$18,535 more than the bid for annual maintenance of the Contract submitted by YGT;

5. Whether Buccaneer would consider itself to be the lowest bidder if Bloomingdale did not include the cost of compliance with the option for installing creeping fig along Bell Shoals Road; (Note that Your Green Team's cost for filling creeping fig along all walls, *except* Bell Shoals Road, reduced its proposal from $ 18,538 to $10,376, bringing its total bid to $311,846[3]).

6. How Buccaneer concluded the Landscape Maintenance Contract (the "Contract") would be for a term of one year when it was noted at the pre-bid meeting that this would be a 2 or 3 year, but most likely a 3 year contract;

7. Whether Buccaneer considers itself to be a responsive bidder when it failed to comply with all requirements for submission of its Proposal Sheet as set forth in section 8.02 of the Invitation to Bid; and

8. Why Buccaneer did not object at the November 11, 2019 meeting to the extent it considers Bloomingdale's decision to meet with each bidder to be 'an action entirely inappropriate, and wholly contrary, to the process and purpose of an Invitation to Bid'.[4]

A bid protest hearing was held December 9, 2019, Buccaneer appeared with counsel before the board. A representative of YGT also appeared. Buccaneer was afforded the opportunity to address the board, ask questions of, and answer questions from the board. As allowed by the solicitation, the board, with YGT's consent, asked Buccaneer if it would accept a contract for the one-time services at the prices Buccaneer quoted. Buccaneer did not accept the offer at its quoted price.

Ultimately, the board rejected Buccaneer's protest. This petition followed.

MANDAMUS

Buccaneer sought review by filing a petition for writ of mandamus. Mandamus lies to compel a public official to perform a legal duty. *Dante v. Ryan*, 979 So. 2d 1122, 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D981b]. A petitioner must have a clear legal right to the requested relief. *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400-401 (Fla. 1992). The relief sought must involve the official's ministerial duty to perform; it cannot involve the exercise of discretion. *Milanick v. Town of Beverly Beach,* 820 So.2d 317, 320 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2523a].

Although Buccaneer cites case law suggesting that mandamus is the correct proceeding to review a bid contest,[5] generally, review of action in response to bid protest is by certiorari or by complaint for injunctive relief, or both. *Biscayne Marine Partners, LLC, v. City of Miami*, 273 So.3d 97 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D467a] (certiorari); *Sutron Corp. v. Lake County Water Authority*, 870 So.2d 930 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1011c] (injunctive relief). In its petition, Buccaneer contends it is the lowest responsive and responsible bidder, which requires the court to determine a disputed fact. Where a petitioner asks the court to determine a right that depends on a determination of controverted facts, mandamus is not appropriate. *Immer v. City of Miami*, 898 So. 2d 258, 259 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D758c]. Finally, the act to which the petition is directed cannot involve the official's exercise of discretion. *Milanick*, at 320. The solicitation's reservation of rights gives Bloomingdale discretion that makes mandamus inappropriate. Therefore, this court will treat the petition as one for writ of certiorari. Rule 9.040(c), Fla. R. App. P.

CERTIORARI: Standard of Review

On a petition for writ of certiorari the court reviews the decision to determine whether the petitioner received due process, whether competent, substantial evidence supports the decision, and whether the lower tribunal departed from the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982).

DUE PROCESS

Buccaneer argues that Bloomingdale failed to comply with its own protest procedures as set forth in section 7.09 of the solicitation package. Section 7.09 advised bidders that the failure to comply with sections 2-562 through 2-576 of the Hillsborough County Code of Ordinances would result in a waiver of a protest. This placed the burden on the *bidder* to comply with certain aspects of these ordinances related to filing a protest, the information to be submitted, notice of interested parties, etc. It does not, however, impose a duty on Bloomingdale to comply with any specific hearing procedures.[6]

As a dependent special taxing district of Hillsborough County, created in 1985 after adoption of Hillsborough County Ordinance Number 85-38, Bloomingdale meets the statutory definition of "governmental entity" but not the statutory definition of "agency" in Section 287.012, Florida Statutes. Section 287.012, Florida Statutes, defines "agency" as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government." Similarly, Bloomingdale does not meet the definition of agency in the Florida Administrative Procedure Act. See Fla. Stat. § 120.52(1).

As a special taxing district, Bloomingdale is not required to observe quite the level of formality other state agencies and the County have to follow. *See First Quality Home Care, Inc. v. All. For Aging, Inc.*, 14 So. 3d 1149, 1152 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1214a] (where entity did not meet definition of agency internal processes applied). Governmental entities that are not subject to statutory requirements for their procurement and bid protest processes are required only to avoid acting in an arbitrary, capricious, illegal or fraudulent manner. *See Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Commis*, 955 So. 2d 647, 652 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1174b].

Bloomingdale held a meeting before the hearing. It investigated the large discrepancy on the one-time expenditures in the bids to ensure bids were fairly compared. Before the meeting, the board sent Buccaneer pre-hearing questions it would be seeking answers to at the hearing. Interested parties received notice and a meaningful opportunity to be heard by the board as due process requires. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (internal citations omitted.) All interested parties were permitted to present evidence, ask questions and have questions asked of them. There is no doubt Buccaneer received due process.

DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW / COMPETENT, SUBSTANTIAL EVIDENCE

Buccaneer maintains that when considering bids in a competitive bidding process, a public entity is required to comply with the criteria published in its own solicitation, and it is not permitted to omit or alter the provisions required by such solicitation. It suggests that to do otherwise "would constitute impermissible favoritism." *Emerald Corr. Mgmt. v. Bay County Bd. of County Com'rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1174b]. Buccaneer claims that when Bloomingdale considered the reasons behind the discrepancy between YGT's and Buccaneer's bid, especially on the wall coverage item, it impermissibly considered criteria not expressly included in or required by the solicitation and information not contained within the bidders' proposal sheets. This rationale requires the court and Bloomingdale to abandon common sense as well as disregard provisions in the solicitation which allow Bloomingdale to do exactly what it did.

Section 6.0 of the Invitation to Bid states:

6.0 Award of Contract. The District will award a Contract to the

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> lowest responsive, responsible Respondent; however, *no award will be made until the District has concluded such investigations as it deems necessary to establish the responsibility of the Respondents in accordance with this Solicitation.*

(Emphasis added.) As was the case here, such investigations must necessarily occur *after* bids are opened. There is no restriction on information that may be considered to make this determination. In addition, section 8.02 of the Invitation to Bid states:

> The District reserves the right to waive any technicalities and formalities in this Solicitation process or in the submitted Bids and make the award in the best interests of the District.

Despite Buccaneer's admission that it did not include the Bell Shoals wall its proposal, it now takes the position that Bloomingdale ignored the fact that, by proposing a price of $2,062 to accomplish "100% coverage of all walls with creeping fig," Buccaneer was contractually committing itself to accomplishing that coverage for that price and accepted the risk that if the number of plants it had estimated ended up being insufficient. This argument is disingenuous. Buccaneer's bid was not responsive to the clear terms of the solicitation. A responsive bid must conform "in all material respects to the solicitation." *Am. Eng'g & Dev. Corp. v. Town of Highland Beach,* 20 So. 3d 1000, 1000-01 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2212a] at n.2 (quotations omitted).

Under the terms of the solicitation, Bloomingdale could have disqualified Buccaneer's bid as nonresponsive. Instead, and recognizing the very point Buccaneer claims Bloomingdale ignored, Bloomingdale offered to award the pruning and wall coverage portions of the contract to Buccaneer at its quoted prices. Tellingly, Buccaneer did not accept.[7]

Were this court to adopt Buccaneer's position that Bloomingdale was obligated to award Buccaneer the contract without determining whether it was, in fact, responsive, it would reward Buccaneer for its failure to adhere to the proposal's terms, while punishing both YGT for adhering to those terms, and Bloomingdale for discovering Buccaneer's omission. Buccaneer is inviting this court to require Bloomingdale to act in a manner it argues vociferously against: arbitrarily and capriciously. When faced with unexplained differences in the bids, Bloomingdale conducted an investigation its own solicitation permits, and, indeed, requires, to determine the lowest responsible and responsive bidder. There is thus no departure from the essential requirements of law. And because Buccaneer's bid was not, in fact, the lowest bid even for one year when fairly compared against YGT's bid, competent, substantial evidence supports the decision.

Buccaneer's remaining arguments are without merit.

It is therefore ORDERED that the petition for writ of certiorari is DENIED and the decision below is AFFIRMED on the date imprinted with the Judge's signature.

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[1]It might have been more accurate to deem some of the so-called "options" as one-time or nonrecurring expenses in a multi-year contract.

[2]The higher figure was used on the bid tabulation, even though it was not an apples-to-apples comparison with Buccaneer. It still represented a substantial savings over the life of the contract. This figure does not include pricing for plants.

[3]Based on the court's calculations, it is believed there is an error as to this figure. It does not change the overall result.

[4]Buccaneer did not provide clear answers to these questions. They are offered to show the reasoning behind its award of the contract to YGT.

[5]*City of Sweetwater v. Solo Const. Corp*., 823 So. 2d 798, 801 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D971a]. The case was reviewed as an appeal by the district court, but as a complaint for mandamus and injunctive relief in the circuit court. The district court in *Sweetwater* did not discuss the merits of the procedural mechanism sought for review in circuit court.

[6]Those procedures include appeal to the Board of County Commissioners, who would have nothing to do with this transaction.

[7]It might be argued that Buccaneer, as it referenced at least once during the protest hearing, employed strategy by building itself a cushion in quoting a higher price for the annual maintenance contract and very low prices for the one-time services. In this case, the strategy was not successful.

* * *

Criminal law—Battery—Error to convict defendant of battery (domestic) where no such crime exists in Florida—Remand to correct judgment and sentence to reflect conviction and sentence for battery—Argument that trial court erred in not allowing defendant to testify about alleged prior violent acts by his father was not preserved for appeal with proffer

STEPHEN CHRISTOPHER BATTON II, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 502018AP000155AXXXMB. L.T. Case No. 502018MM007692AXXXMB. May 15, 2020. Appeal from the County Court in and for Palm Beach County; Debra Moses Stephens, Judge. Counsel: Virginia Murphy, Office of the Public Defender, West Palm Beach, for Appellant. Joseph R. Kadis, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, Stephen Christopher Batton II, appeals his judgment and sentence for one count of Criminal Mischief (under $200) and one count of Battery (Domestic). Appellant asserts that the trial court erred by convicting him of Battery (Domestic), and that the trial court abused its discretion in precluding him from testifying about alleged prior violent acts involving his father.

We hold that the trial court erred in convicting Appellant of Battery (Domestic), as there is no such crime in the State of Florida. *Crockett v. State*, 91 So. 3d 872, 872 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1197b]; *Narinesingh v. State*, 27 Fla. L. Weekly Supp. 230a (Fla. 15th Cir. Ct. Apr. 22, 2019). However, we hold that Appellant's argument concerning prior violent acts was not properly preserved for appeal. *See Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990) ("A proffer is necessary to preserve a claim . . . because an appellate court will not otherwise speculate about the admissibility of such evidence."); *Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984) ("The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture.").

Accordingly, we **REMAND** to the trial court to correct Appellant's judgment and sentence to properly reflect that he was convicted and sentenced to Battery on Count 2, and not Battery (Domestic). We otherwise **AFFIRM** in all other aspects. (SCHER, WEISS, and ARTAU, JJ., concur.)

* * *

Contracts—Real estate brokers—Commission—In action by transaction broker to recover commission fee, court erred in determining that terms of broker's commission were governed by commercial lease between broker's client and tenant where broker was not signatory to lease or third-party beneficiary of lease

PAUL LOUIS LEPINE, Appellant, v. 820, LLC, a Florida Limited Liability Company, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 17-023261 (AP). L.T. Case No. COCE 11-021722. February 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Mardi Levey Cohen, Judge. Counsel: Peter E. Berlowe, Assouline & Berlowe, P.A., Miami, for Appellant. Daniel A. Bushell, Bushell Law, P.A., Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Paul Louis Lepine ("Lepine") appeals an amended final judgment in favor of 820, LLC, ("Owner"). Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the amended final judgment is hereby **REVERSED** as set forth below.

In the proceedings below, Owner filed suit to recover a partial commission fee that was not yet payable to Lepine pursuant to the terms of the Commercial Lease Agreement ("Lease"). Upon a non-

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jury trial, the county court ruled that Lepine breached his duties as a transaction broker under §475.278 (2), Fla. Stat. (2009), and the Lease governed the terms of his commission. Lepine argues he was not bound by the terms of the Lease because he was a non-signatory, but that he fulfilled his obligations under the Listing Agreement ("Agreement") when he found a tenant "ready, willing, and able" to enter into the Lease, and therefore his commission became due once the lease was signed.

"Where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is de novo." *Acoustic Innovations, Inc. v. Schafer,* 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D544a] (quoting *In re Estate of Sterile,* 902 So. 2d 915, 922 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1407a].

"Unless a person is a party to a contract, that party may not sue—or, for that matter, be sued—for breach of that contract where the non-party has received only an incidental or consequential benefit of the contract." *Morgan Stanley DW, Inc. v. Halliday,* 873 So. 2d 400, 403 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D944b] (quoting *Metropolitan Life Ins. Co. v. McCarson,* 467 So. 2d 277 (Fla. 1985); *Caretta Trucking Inc. v. Cheoy Lee Shipyards, Ltd.,* 647 So. 2d 1028 (Fla. 4th DCA 1994) [20 Fla. L. Weekly D20a]. However, a non-party may sue or be sued for breach of contract "if the contract *clearly expresses an intent* to primarily and directly benefit the third party or a class of persons to which that party belongs." *Id.* (quoting *Aetna Cas. & Sur. Co. v. Jelac Corp.,* 505 So. 2d 37 (Fla. 4th DCA 1987); *Security Mut. Cas. Ins. Co. v. Pacura,* 402 So. 2d 1266 (Fla. 3d DCA 1981)). Moreover, "to find the requisite intent, it *must* be established that *the parties to the contract actually and expressly intended* to benefit the third party. . . ." *Id.* (quoting *Clark and Co. v. Dept of Ins.,* 436 So. 2d 1013, 1016 (Fla. 1st DCA 1983)) (emphasis added).

Here, the county court's amended final judgment reflected that Lepine was bound by the terms of the Lease. However, Lepine did not sign the Lease. (R. 129-140). Furthermore, Lepine is not a third party beneficiary. As the sole parties to the Lease, Owner and Tenant did not *intend* for Lepine to benefit from the brokers provision because: (1) there is no evidence to support that Tenant helped in the creation of the Lease; (2) Deborah Mayor, landlord and co-principal of Owner, testified she was neither aware of the broker's provision nor participated in the negotiation of that provision (Trial Tr., pp. 82-83); and (3) Lawrence Judd, attorney and co-principal of Owner testified that he did not put the brokers provision in the Lease nor did he know it existed until after the signing of the Lease. (Trial Tr., pp.61; 95-98) (emphasis added).

Accordingly, the amended 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. Appellant's Motion for Appellate Attorney's Fees is conditionally **GRANTED** as to appellate attorney's fees, contingent upon Appellant ultimately prevailing in the case. Additionally, Appellee's Motion for Appellate Attorney's Fees is hereby **DENIED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

Criminal law—Post conviction relief—Plea—There was factual basis for defendant's plea to crime of offering for prostitution where probable cause affidavit stated that defendant offered "hand manipulation" and "hand manipulation to the genitals" for money—Defendant was not prejudiced by trial court's failure to find factual basis for plea on record where factual basis existed—Voluntariness—Misadvice regarding collateral consequences—Allegation that trial counsel misadvised defendant that her plea would not adversely affect her massage therapist and establishment licenses is facially sufficient and requires evidentiary hearing—No merit to argument that defendant was not prejudiced by misadvice because plea was not sole cause for loss of her licenses—Revocation/denial of licenses based on defendant's failure to report plea within 30 days was directly related to plea

LIHONG XIA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-05AC10A. December 17, 2019. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Jill Levy, Judge. Counsel: Martin L. Roth, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(KOLLRA, JR., J.) **THIS CAUSE** comes before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's denial of her motion for postconviction relief pursuant to Rule 3.850, Florida Rule of Criminal Procedure. Having considered Appellant's Initial Brief, Appellee's Answer Brief, Appellant's Reply Brief, the trial court record, and applicable law, this Court finds as follows:

On September 25, 2017, Defendant entered into a no contest plea in absentia to the charge of Offering for Prostitution, and the trial court withheld adjudication. Subsequently, she filed a motion for postconviction relief. In her motion, memorandum of law, and affidavit in support of her motion, she alleged that her plea lacked a factual basis, her attorney was ineffective for advising her that a factual basis existed when it did not, and she was prejudiced by the trial court's failure to find a factual basis on the record before accepting her plea. She also argued that trial counsel was ineffective for affirmatively misadvising her that she would not lose her massage therapist and establishment licenses as a result of the plea. The trial court denied the motion.

"To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *Peede v. State,* 748 So. 2d 254, 257 (Fla. 1999) [24 Fla. L. Weekly S391a]. Where the trial court did not hold an evidentiary hearing, the appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Id.*

There was a factual basis for the plea and Appellant was not prejudiced by the trial court's failure to find a factual basis for the plea on the record.

The court can find a factual basis for a plea based on the probable cause affidavit and information. *See Blackwood v. State,* 648 So. 2d 294, 295 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D105a]. The probable cause affidavit stated that Appellant offered "hand manipulation" for $40. The information stated that Appellant offered "hand manipulation to the genitals" for money. Together, they establish factual support for the crime of Offering for Prostitution.

"Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists." Fla. R. Crim. P. 3.172(a). "Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." Fla. R. Crim. P. 3.172(j). "[I]t is the defendant's burden to show prejudice where the trial court has failed to place the factual basis for the plea on the record." *James v. State,* 886 So. 2d 1032, 1034 (Fla. 4th DCA 2004)[29 Fla. L. Weekly D2535a] (citations omitted). The purpose of the factual basis is to avoid a defendant mistakenly pleading to the wrong offense. *State v. Sion,* 942 So. 2d 934, 937 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2861b] (citations omitted). There is no prejudice where the record contains evidence establishing the factual basis. *See Sanchez v. State,* 33 So. 3d 753, 755 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D861d]; *James v. State,* 886 So. 2d 1032, 1034 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2535a]; *Suarez v. State,* 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993); *cf. Koenig v. State,* 597 So. 2d 256, 258 (Koenig was prejudiced where "there was absolutely no evidence in the record of the crimes to which Koenig entered his plea"). A defendant must have

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been harmed as a result of the failure to determine the factual basis for the plea. *Nowlin v. State,* 639 So. 2d 1050, 1051 (Fla. 1st DCA 1994).

The case law does not state that Appellant must have been prejudiced as a result of the plea itself, but by the court's failure to find a factual basis for the plea on the record. Appellant acknowledged in her authorization to plea in absentia that her attorney informed her of the nature of the charges against her. As previously discussed, the probable cause affidavit and information provided a factual basis for the plea. Therefore, Appellant was not prejudiced by the court's failure to find a factual basis on the record, and trial counsel was not ineffective.

Appellant's allegations that trial counsel advised her that the plea would not adversely affect her professional licenses is facially sufficient and is not refuted by the record, and therefore, the trial court must hold an evidentiary hearing.

"Claims of 'positive misadvice' given on collateral matters on which counsel has no duty to advise a defendant [constitute] legally cognizable ineffective claims pertaining to the voluntariness of a plea." *Ey v. State,* 982 So. 2d 618, 623 (Fla. 2008) [33 Fla. L. Weekly S321a] (citations omitted). "[A]ffirmative misadvice regarding a collateral consequence may render the plea involuntary." *Hernandez v. State,* 204 So. 3d 128, 130 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2575a]. The trial court was mistaken in finding that trial counsel was not ineffective for failing to inform Appellant of the consequence of her plea as to her professional license when in fact counsel is alleged to have provided affirmative misadvice on the subject. There is nothing in the record to refute Appellant's claim that trial counsel told her the plea would not adversely affect her professional licenses.

Appellee argues that Appellant was not prejudiced by counsel's misadvice because the plea was not the sole reason for the revocation/denial of her licenses. In doing so, Appellee relies on *Hardware v. State,* 185 So. 3d 530 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2345a] and *Sanchez v. State,* 998 So. 2d 674 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D95a]. However, these cases arose in the context of affirmative misadvice specifically as to immigration consequences. In *Hardware v. State,* one of the reasons why the defendant was subject to deportation was because of a visa overstay. 185 So. 3d 530. In *Sanchez v. State,* defendant may have been subject to deportation because of a conviction in a different county. 998 So. 2d 674. Furthermore, the reasons that the Board stated for the denial/revocation of Appellant's license were directly related to the plea. But for her withhold of adjudication on the charge in the instant case, her answers on her application would not have been untruthful, and she would not have failed to report her plea within 30 days. Therefore, but for the withhold of adjudication in the instant case, there is a reasonable probability that Appellant would not have lost her licenses.

Accordingly, it is

ORDERED AND ADJUDGED that the trial court's ruling denying Appellee's motion for postconviction relief is hereby **AFFIRMED** in part and **REVERSED** in part and this matter is **REMANDED** to the trial court for an evidentiary hearing on Appellant's claim that counsel misadvised her that her plea would not adversely affect her occupational licenses. (BAILEY, T., and WEEKES, JJ., concur.)

* * *

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. BROWARD INSURANCE RECOVERY CENTER, LLC, a/a/o Mohannad Jamil, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-008575 (AP). L.T. Case No. COCE17-009297. Consolidated Appeal Nos. CACE18-008576 (AP); CACE18-008683 (AP); CACE18-008686 (AP); CACE18-008687 (AP); CACE18-008691 (AP); CACE18-008891 (AP). May 21, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Robert W. Lee, Judge. Counsel: Alexandra Valdes, Cole, Scott & Kissane, P.A., Miami, for Appellant. Joseph R. Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) This consolidated appeal arises from seven (7) Final Judgments entered in favor of Appellee, Broward Insurance Recovery Center, LLC ("BIRC"), as assignee of various Progressive insureds. Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **REVERSED.** *See Progressive Am. Ins. Co. v. Broward Ins. Recovery Ctr. LLC (a/a/o Michelle Campbell),* Case No. CACE16-021931 (Fla. 17th Cir. Ct. April 2, 2020).

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 Attorney's Fees is hereby **DENIED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

Attorney's fees—Insurance—Prevailing party—Where action against insurer for prejudgment interest resulted in order granting insurer's motion for summary judgment but awarding prejudgment interest to plaintiff, trial court erred in denying plaintiff's motion for award of attorney's fees under section 627.428(1)

OASIS SOLUTIONS OF FLORIDA, INC., a/a/o Ralph and Dianne Dennis, Appellant, v. FIRST PROTECTIVE INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACEI9-002507 (AP). L.T. Case No. COS015-007254. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Terri-Ann Miller, Judge. Counsel: G. Bart Billbrough, Billbrough & Marks, P.A., Coral Gables, for Appellant. Jay M. Levy, Jay M. Levy, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Oasis Solutions of Florida, Inc. ("Oasis") appeals a final order on Plaintiff's Motion for Entitlement to Attorney's Fees. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final order is hereby **REVERSED** as set forth below.

In the proceedings below, Oasis filed suit for breach of contract to recover post loss insurance benefits from First Protective Insurance Company ("First Protective") pursuant to an assignment of benefits from Ralph and Dianne Dennis due to water damage at their home. Upon the parties' cross motions for summary judgment, the county court granted First Protective's motion, and awarded prejudgment interest to Oasis. Oasis filed its motion for entitlement to attorney's fees pursuant to section 627.428(1), Florida Statutes (2019). First Protective filed its response in opposition to Oasis' motion for entitlement to attorney's fees. Following a hearing, the county court denied Oasis' motion on the basis that the award of prejudgment interest was not a judgment. Oasis argues the prejudgment interest award was a judgment and therefore, it is entitled to attorney's fees pursuant to section 627.428(1).

Section 627.428(1) states:

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

§ 627.428(1), Fla. Stat. (emphasis added). "A judgment is a court's decision on the merits as to whether the plaintiff shall obtain the relief sought in the litigation." *Makar v. Inv'rs Real Estate Mgmt., Inc.,* 553 So. 2d 298, 299 (Fla. 1st DCA 1989) (citing *Francisco v. Victoria*

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Marine Shipping, Inc.,486 So. 2d 1386, 1391 (Fla. 3d DCA 1986)) (quoting *Irving Trust Co. v. Kaplan,* 155 Fla. 120, 125, 20 So. 2d 351, 354 (Fla. 1944)), *review denied,* 494 So. 2d 1153 (Fla. 1986)).

Although First Protective paid the remaining balance on the claim before it was served with the lawsuit, Oasis argues the payment did not include prejudgment interest and First Protective still owed money on the balance. Both the county court and First Protective agreed that Oasis was entitled to prejudgment interest. (R. PDF. 143-144). The order[1] granting First Protective's motion for summary judgment is a final judgment that awarded Oasis relief it sought; the prejudgment interest. Since Oasis received a judgment, Oasis is entitled to attorney's fees under section 627.428(1).

Accordingly, the final order on Plaintiff's Motion for Entitlement to Attorney's Fees is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellant's Motion for Appellate Attorney's Fees is **GRANTED**, with the amount to be determined by the county court upon remand. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

[1]The Order granting First Protective's motion for summary judgment and awarding Oasis prejudgment interest is not on appeal.

* * *

ASSOCIATES IN FAMILY PRACTICE OF BROWARD, LLC, a/a/o Matianie Joseph, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACEI9-010283 (AP). L.T. Case No. COWE17-017768. April 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Olga Levine, Judge. Counsel: Chad A. Barr, Law Office of Chad A. Barr, P.A., Altamonte Springs, for Appellant. Kelsey P. Hayden, Goldstein Law Group, Fort Lauderdale, for Appellee.

OPINION UPON CONFESSION OF ERROR

(PER CURIAM.) Appellant appeals from a final judgment entered in favor of Appellee. Appellee has filed a Confession of Error based upon the ruling in *Progressive Select Insurance Company v. Florida Hospital Medical Center,* 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a]. Appellee's Confession of Error is hereby **ACCEPTED**. Accordingly, the final judgment entered in favor of Appellee is hereby **REVERSED**, and the case is **REMANDED** for proceedings consistent with this Opinion. Appellant's Motion for Award of Appellate Attorney's Fees and Costs is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand.[1] Further, Appellant's Motion for Award of Appellate Attorney's Fees and Costs is hereby **DENIED** as to costs, WITHOUT PREJUDICE to Appellant to file a motion in the county court pursuant to Florida Rule of Appellate Procedure 9.400(a). *See* Fla. R. App. P. 9.400(a) ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

[1]Appellee stipulates and acknowledges Appellant's entitlement to reasonable fees and costs in its July 26, 2019 Confession of Judgment.

* * *

RON WECHSEL, D.C., INC., d/b/a WECHSEL PAIN & REHAB CENTER, a/a/o Stephanie Taylor, Appellant, v. LM GENERAL INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-011192 (AP). L.T. Case No. COWE17-010782. May 21, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Olga Levine, Judge. Counsel: Chad A. Barr, Law Office of Chad A. Barr, P.A., Altamonte Springs, for Appellant. Gary J. Guzzi, Akerman LLP, Miami, for Appellee.

OPINION

Ron Wechsel, D.C., Inc. appeals an order of the county court granting LM General Insurance Company's Motion for Summary Judgment Regarding Plaintiff's Petition for Declaratory Relief. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the order of the county court is hereby **REVERSED**. *See Sea Spine Orthopedic Inst., LLC (a/a/o Carmen Charriez) v. Liberty Mut. Ins. Co.,* Circuit Case No. CACE17-013776 (Fla. 17th Cir. Ct. April 30, 2020).

Accordingly, the order granting Appellee's Motion is hereby **REVERSED**, and this case is **REMANDED** to the county court for further proceedings consistent with this Opinion. Appellant's Motion for Award of Appellate Attorney's Fees and Costs is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellant's Motion for Award of Appellate Attorney's Fees and Costs is hereby **DENIED** as to costs, WITHOUT PREJUDICE to Appellant to file a motion in the county court pursuant to Florida Rule of Appellate Procedure 9.400(a). *See* Fla. R. App. P. 9.400(a) ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

Criminal law—Driving under influence—Dismissal—Trial court erred in granting motion to dismiss where oath in motion was legally insufficient and allegation in motion that defendant had vehicle keys in his pocket when officer observed him asleep behind wheel established prima facie case of guilt—However, state did not preserve issues for appeal by raising them below

STATE OF FLORIDA, Appellant, v. NOAH HOLLIMAN, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-18AC10A. L.T. Case No. 19-4789MU10A. May 18, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Melinda Brown, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Jennito Simon, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find the trial court erred in granting Appellee's motion to dismiss. The oath in the motion to dismiss was legally insufficient. Furthermore, the facts as alleged by Appellee established a prima facie case of guilt. *See State v. Armstrong,* 616 So. 2d 510, 511 (Fla. 4th DCA 1993). Appellee alleges that the car keys were in his pocket when the officer observed him asleep in the driver's seat, which establishes that Defendant had actual physical control of the car. *See Baltrus v. State,* 571 So. 2d 75, 76 (Fla. 4th DCA 1990) (the presence of the defendant behind the steering wheel prevented the conclusion that, as a matter of law, the defendant was not in actual physical control of the car); *State v. Fitzgerald,* 63 So. 3d 75, 76 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1076a] (defendant was in actual physical control of the car where she was sitting, intoxicated, in the driver's seat of a parked car and readily produced the car key upon the officer's request, even though the officer did not where the key was before the defendant produced it).

Nevertheless, Appellant did not preserve these issues for appeal because they were not raised before the trial court and cannot be raised for the first time on appeal. *See Lloyd v. State,* 876 So. 2d 1227, 1228 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1395b]; *State v. Williams,* 260 So. 3d 472, 474 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2688d]. (FEIN, MURPHY III, and SIEGEL, JJ., concur.)

* * *

PAGE THREE ENTERPRISES, Appellant, v. NORFLETT HARRIS, Appellee.

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Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-003983 (AP). L.T. Case No. COSO17-008468. May 21, 2020.Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Robert W. Lee, Judge. Counsel: Jamie Clark Dixon, Law Offices of Wadsworth Law, LLLP, Miami, for Appellant. Norflett Harris, pro se, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

GEICO GENERAL INSURANCE COMPANY, Appellant, v. ASSOCIATES IN FAMILY PRACTICE OF BROWARD, LLC, a/a/o Dmitriy Tener, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-024738 (AP). L.T. Case No. COCE17-003704. May 21, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Daniel J. Kanner, Judge. Counsel: Rebecca O'Dell Townsend, Dutton Law Group, P.A., Tampa, for Appellant. Douglas H. Stein, Douglas H. Stein, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Order Granting Final Summary Judgment (Disposition) and Final Judgment in favor of Plaintiff is hereby **AFFIRMED**. Appellee's Motion for Attorney's Fees is hereby **GRANTED**, as to appellate attorney's fees, with the amount to be determined by the county court upon remand. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

GEICO GENERAL INSURANCE COMPANY, Appellant, v. PRECISION DIAGNOSTIC OF LAKE WORTH, LLC, a/a/o Theresa Derosa, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-021613 (AP). L.T. Case No. COCE16-001051. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Betsy Benson, Judge. Counsel: Christopher E. Marshall, Law Offices of George L. Cimballa, III, Plantation, for Appellant. Steven Lander, Law Office of Steven Lander & Associates, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the brief, the record, and the applicable law, the final judgment is hereby **AFFIRMED**. (BOWMAN and FAHNESTOCK, JJ., concur. LOPANE, J., dissents without opinion.)

* * *

ESTHER MEIROVICI, Appellant, v. BELUGA INVESTMENT, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-010148 (AP). L.T. Case No. COCE19-000563. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Daniel J. Kanner, Judge. Counsel: Justin Zeig, Zeig Law Firm, PLLC, Hollywood, for Appellant. Sean Conway, Sean Conway Law Firm, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the county court orders rendered on March 20, 2019 and May 6, 2019 are hereby **AFFIRMED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

JOHNNIE RUTLEDGE, Appellant, v. INVERRARY 441 APARTMENTS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-028987 (AP). L.T. Case No. COCE17-021496. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Mardi Levey Cohen, Judge. Counsel: Johnnie Rutledge, Pro Se, Fort Lauderdale, Appellant. Jason D. Berkowitz, BT Law Group, PLLC, Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the dismissal order is hereby **AFFIRMED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

YEISY FANORY VARGAS, Appellant, v. IMOR AZANI and IGAL AZANI, Appellees. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-003295 (AP). L.T. Case No. COWE17-023706. May 21, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Jane D. Fishman, Judge. Counsel: Nicolas Lampariello, Lampariello Law Group, LLP, Sunrise, for Appellant. Imor Azani and Igal Azani, Pro Se, Plantation, Appellees.

OPINION

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

* * *

Small claims—Dismissal—Trial court erred in denying incarcerated plaintiff's motion to appear telephonically at pretrial hearing in small claims action without making written findings supporting that decision—Order dismissing case for failure to appear at pretrial hearing is reversed

TAVARES EQUEL FELTON, Appellant, v. CITY OF FORT MYERS POLICE DEPARTMENT ON BEHALF OF CANDICE PETACCIO, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 17-25 AP. L.T. Case No. 17-2915 SC. December 10, 2019. Appeal from the County Court for Lee County; H. Andrew Swett, Judge. Counsel: Tavares Equel Felton, Pro Se, Atlanta, Georgia, Appellant. City of Fort Myers Police Department, Fort Myers, Appellee.

(PER CURIAM.) The issues before this Court are whether the trial court violated Appellant's due process rights when it dismissed Appellant's claim without affording him the right to appear telephonically at a hearing and whether the trial court abused its discretion by failing to grant Appellant a telephonic hearing when Appellant is incarcerated in another state. The appellate court reviews a trial court's denial of a motion to appear telephonically on an abuse of discretion standard. *See Brown v. Sheriff of Broward County Jail*, 502 So. 2d 88, 88-89 (Fla. 4th DCA 1987).

Appellant was the plaintiff in a small claims court action below, at which he sued the Fort Myers Police Department for having wrongfully confiscated $1,500.00. Appellant sought in an October 5, 2017 motion to appear telephonically at a mandatory pre-trial hearing. That motion, however, was denied. The pre-trial conference was held on October 11, 2017, Appellant was not present, and the court dismissed Appellant's claim as a result of Appellant's failure to appear. The instant appeal followed.

In his first claim, Appellant alleges that the trial court violated Appellant's due process rights when it dismissed Appellant's claim without affording him the right to appear telephonically at a hearing.

Generally, an "incarcerated party has a right to be heard in civil matters if the party has brought to the court's attention his or her desire to appear personally or telephonically." *Miranda v. Munoz-Ortiz*, 75 So. 3d 843, 844 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2699a]. "When a party is incarcerated and cannot physically appear in a civil matter, the trial court normally should grant a request to hold necessary hearings by telephone . . . as an alternative to requiring that the inmate be transported to the hearing by the state." *Butler v. Norton*, 158 So. 3d 750, 751 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D493d].

Additionally, dismissal of a claim or cause of action based on an incarcerated party's failure to appear, unaccompanied by findings of fact on the issue, has been deemed to be error. *See Adkins v. Winkler*, 592 So. 2d 357, 361 (Fla. 1st DCA 1992) ("Pertinent case law

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indicates that when an inmate is involved in civil litigation, it is improper to enter a default because he or she is unable to attend a hearing or trial, in the absence of findings regarding the inmate's ability to be present."). "Moreover, as alternatives to ordering an inmate's physical presence at a proceeding, the trial court may properly consider conducting the hearing by telephone, or permitting the taking of the inmate's deposition pursuant to the various methods afforded by the Florida Rules of Civil Procedure. See *Gosby v. Third Judicial Circuit*, 586 So. 2d 1056 (Fla. 1991)." *Conner v. Conner*, 590 So. 2d 513, 514 (Fla. 1st DCA 1991). In a case where an inmate plaintiff provided to prison authorities a motion to appear telephonically six days before it was received by the court, that sixth day being the day before the scheduled hearing on the matter, the appellate court found error where the trial court attempted to call the prison, but was unable to reach the inmate, and consequently dismissed his cause of action. *Butler v. Norton*, 158 So. 3d 750, 751 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D493d]. Rather, the trial court should have issued an order requiring the "inmate to appear for a hearing by telephone on a specific date and at a specific time." *Id*. Additionally, it appears that in the absence of a "transcript of the hearing on the motion or evidence in the record supporting the judge's decision" enabling the appellate court to "determine if the judge considered [the] appellant's inability to be present," reversal was warranted in order for the trial court on remand to "specifically address the issue of the prisoner's inability to appear and make findings on the record in support of his decision." *Leone v. Florida Power Corp*., 567 So. 2d 992, 994 (Fla. 1st DCA 1990). This, however, is the general civil rule.

"[S]mall claims cases are different from most civil cases. Small claims actions are processed through Florida's county courts under a set of rules with a stated goal to reach a 'simple, speedy, and inexpensive' resolution of these cases." *In re Amendments to Florida Small Claims Rule 7.090*, 64 So. 3d 1196, 1198 (Fla. 2011) [36 Fla. L. Weekly S207a] (Pariente, J., concur). "The current procedural structure provides for only two appearances: a pretrial conference, at which mediation may take place, and a trial. The stated goals and tight timeframes in the rules make it clear that additional appearances, as well as an active motion practice, are discouraged." *Id*. The Small Claims Court does permit appearance by telephone, although the only rule which clearly provides for it is that which pertains to trial, Rule 7.140. There does not appear to be any authority as to whether this provision is intended to apply to the pretrial conference as well. The Florida Supreme Court itself noted that "plaintiffs are required to attend the pretrial conference . . . [and] if a plaintiff fails to attend the pretrial conference, the court dismisses the case." *In re Amendments to Florida Small Claims Rules*, 200 So. 3d 746, 748 (Fla. 2016) [41 Fla. L. Weekly S377a].

There is, however, a provision in this Circuit's Administrative Order 1.10, which provides for telephonic hearings in civil proceedings that are less than 15-minutes in length. The order cites to and mirrors the language of then-rule of judicial administration 2.071(c), which was renumbered to current rule of judicial administration 2.530 in 2006. The order specifically provides that in "instances where a civil motion hearing is scheduled for not longer than fifteen (15) minutes, a party may file a written request to participate via conference or speaker telephone . . . and shall provide notice to the Court and the parties to the motion." Administrative Order 1.10. "Notice by the requesting party must be provided by mailing a copy of the written request at least five (5) days prior to the day of hearing . . ." Administrative Order 1.10. It further states that the "requesting party shall be responsible for contacting the trial court's Judicial Assistant and ensuring that appropriate arrangements have been made to permit participation through . . . speaker telephone . . . on the scheduled date and time." Administrative Order 1.10. "Absent a showing of good cause, and in accordance with . . . Rule 2.071(c) (2005), the trial judge shall grant the request and make reasonable accommodations to permit the requesting party's participation through . . . speaker telephone . . ." Administrative Order 1.10.

In sum, the general rule is that when an inmate notifies the court of his desire to appear telephonically, the court should grant the motion. If the court denies the motion, the order denying should contain findings supporting that decision.

The record reflects that Appellant's motion seeking to appear telephonically failed to include Appellee, then defendant, in the certificate of service. Thus, it appears that Appellant's motion was facially insufficient. The record also reflects that the order denying the motion simply denied it without explanation.

The question then becomes whether the general civil rule that requires a court order denying motions to appear telephonically to include written findings extends to small claims court orders disposing of facially insufficient motions. A review of district court and circuit court decisions suggests that while small claims court proceedings may differ somewhat from other civil proceedings, they do not substantively differ from them. Consequently, it would appear that the trial court should also have included written findings supporting its denial of the motion to appear telephonically.

In his second claim, Appellant alleges that the trial court abused its discretion by failing to grant Appellant a telephonic hearing when Appellant is incarcerated in another state. This claim appears to differ from the first in that Appellant specifies that a plaintiff incarcerated in another state is entitled to appear telephonically at small claim court proceedings. As it appears from the first claim that the trial court did err and deny Appellant due process by failing to grant Appellant a telephonic hearing, and as this claim is essentially a derivation of the first, there is no need to further address this issue.

Consequently, as the trial court erred by failing to grant Appellant a telephonic hearing, the October 26, 2017 "Order of Dismissal," is reversed and the cause is remanded for proceedings consistent with this opinion. (H. HAYES, CARLIN, and L. HAYES, JJ., concur.)

* * *

Landlord-tenant—Eviction—Default—Trial court erred in entering default judgment of eviction and denying motion to vacate default where landlord waived right to evict by accepting full payment of past due rent

NOEMI TRUJILLO, Appellant, v. MOHAMMED M. RAHMAN, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 18-05 AP. L.T. Case No. 17-1842 CC. May 2, 2019. Appeal from the County Court for Collier County; Michael J. Provost, Judge. Counsel: Cathy L. Lucrezi, Naples, for Appellant. Mohammed M. Rahman, Pro Se, Naples, Appellee.

(PER CURIAM.) Appellant, Noemi Trujillo, is appealing the entry of a default final judgment and denial of her Motion to Vacate Judgment. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). Rule 1.540 provides that the "appellate standard of review for an order denying a motion for relief from a judgment is whether there has been an abuse of discretion." Fla. R. Civ. P. 1.540. We reverse.

The Appellant argues that the Trial Court erred in granting the Judgment of Eviction and denying the Emergency Motion to Stay Writ of Possession. In the Emergency Motion the Appellant contends the reason she did not file an Answer and did not make payments into the court's registry is because she paid the Appellee the total balance plus $210 for court costs on November 8, 2017. Appellant argues that she reasonably believed the payment satisfied the eviction complaint. Proof of payment is found in Attachment A of Exhibit A in the Emergency Motion. Furthermore, Appellant claims that Appellee accepted the monthly rent for December, 2017 and January, 2018. Pursuant to Rule 1.540, the Court may grant relief from a judgment, "due to a mistake, inadvertence surprise, excusable mistake. . .

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misrepresentation. . .or if it is no longer equitable that the judgment should have prospective application." Fla. R. Civ. P. 1.540 (b).

According to Florida Statutes, "If a tenant does not pay rent when it is due and default continues for three days, [excluding the weekends and holidays], the landlord may terminate the rental agreement," but the landlord must first give the tenant a three-day notice. §83.56 (3), Fla. Stat. Once a three-day notice has expired and payment has not been made, the landlord has a right to evict a delinquent tenant and terminate the tenant's lease by proceeding with an eviction action. §83.56 (3), Fla. Stat. However, once a landlord accepts full payment of rent past due, the right to proceed with an eviction is waived. According to Florida Statute §83.56, "if the landlord accepts rent with actual knowledge of a noncompliance by the tenant, the landlord waives his or her right to terminate the rental agreement or to bring a civil action for that noncompliance." §83.56 (5), Fla. Stat. In *Haines City Community Dev. v. Heggs*, the District Court affirmed the Circuit Court's decision of reversing a final judgment evicting a tenant for not paying rent. *Haines City Community Dev. v. Heggs,* 647 So. 2d 855 (Fla. 2d DCA 1994); *See Nick Moskos v. Hand,* 247 So. 2d 795 (Fla. 4th DCA 1971) (Landlord is estopped from asserting forfeiture for breach of contract, or waives right to forfeiture, when he accepts rent from tenant with knowledge of breach).

Accordingly, we REVERSE and remand to the trial court for further proceedings. (ADAMS, FULLER, and HAWTHORNE, JJ., concur.)

* * *

Homeowners associations—Dues—Trial court erred in entering summary judgment for homeowners association where there were contested issues as to defendant's liability for prior owners' unpaid dues and amount of past due balance as well as procedural errors from hearings

JUBILATION COMMUNITY ASSOCIATION, INC., a Florida not-for-profit corporation, Appellant, v. ROMELIA DURAN, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 18-06 AP. L.T. Case No. 16-725 CC. April 29, 2019. Appeal from the County Court for Collier County; Mike Carr, Judge. Counsel: Chene M. Thompson, Fort Myers, for Appellant. Cathy L. Lucrezi, Naples, for Appellee.

(PER CURIAM.) Appellants, Jubilation Community Association, Inc., are appealing the granting of Appellee's, Romelia Duran, motion for summary judgment. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). On appeal of an order rendered on a motion for summary judgment, the standard of review is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. We reverse. For summary judgment to be granted, "the evidence on file must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510. Case law emphasizes that, "if the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper" *Holland v. Verheul*, 583 So. 2d 788, 789 (Fla. 2d DCA 1991).

Because there are contested issues of material fact as to the Appellee's liability of the property's unpaid dues by the prior owners and the amount of the past due balance, as well as procedural errors from the January 18, 2018 hearing and February 26, 2018 hearing, the trial court should not have granted summary judgment in favor of Appellee.

Accordingly, we REVERSE and remand to the trial court for further proceedings. (ADAMS, FULLER, and HAWTHORNE, JJ., concur.)

* * *

Criminal law—Violation of probation—Jurisdiction—Expiration of probationary term—Tolling—Where law at time that defendant's initial warrant for violation of probation was issued required both affidavit and valid warrant for new crime to toll probationary period, warrant for defendant's technical violations did not toll his probation—Trial court lost jurisdiction to adjudicate violation of probation after expiration of untolled probationary period—2017 amendment to section 948.06(1)(f), which now provides that warrant for any violation of probation will be sufficient to toll probationary period has not been deemed to apply retroactively

BRENT LEE SCHAEFER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 17-AP-23. L.T. Case No. 14-CT-500288. September 6, 2019. Appeal from the County Court for Lee County; Archie B. Hayward, Jr., Judge. Counsel: Heather Sutton-Lewis, Assistant Public Defender, Fort Myers, for Appellant. Ashley N. Hubble, Assistant State Attorney, Fort Myers, for Appellee.

(PER CURIAM.) This case involves the trial court's denial of Appellant's motion to dismiss a violation of probation. The record reflects that Appellant pled no contest to driving under the influence on February 3, 2014 and was placed on probation. On April 21, 2014 an affidavit of violation of probation was filed, and a warrant for violation of probation was issued on April 23, 2014. Appellant was arrested on the warrant on September 25, 2017 in Manatee County. An amended affidavit for violation of probation was filed on September 29, 2017, adding a count for a new law violation. Appellant filed a motion to dismiss, and argued at the revocation hearing that the trial court did not have jurisdiction because probation expired on February 2, 2015, and the time period for probation had not been tolled. The Appellee called the probation officer, who testified that Appellant's failure to report for probation "technically" qualified as absconding, although she had not stated that Appellant absconded in the affidavits. The trial court denied the motion to dismiss, finding that probation had tolled.

On appeal, Appellant argued that the trial court lacked jurisdiction, citing *Shenfeld v. State*, 14 So.3d 1021, 1023 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D999a]. Appellee conceded error, stating that Appellant's arguments were well founded and sound.

Probation can be tolled for one of three specific reasons: (1) the person is incarcerated on different charges during the probationary period, *Bowman v. State*, 86 So.3d 354 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D822c]; (2) the probationer absconds from probation, *Francois v. State*, 695 So. 2d 695, 697 (Fla. 1997) [22 Fla. L. Weekly S343a]; and (3) upon the filing of an affidavit and arrest warrant under Florida Statute §901.02, a warrantless arrest, or a notice to appear. *Mobley v. State*, 197 So.3d 572 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D912a]. At the time the *Mobley* decision was rendered, and when Appellant's initial warrant for violation of probation was issued, Fla. Stat. §948.06(1)(f) required both an affidavit and a valid warrant to toll probation. In *Mobley*, the Court distinguished between "crimes" and "technical" violations of probation. The Court found Mobley's technical violations were not crimes under the warrant requirements of Fla. Stat. § 901.02[1], which required that the trial court find probable cause that a crime had been committed within the trial court's jurisdiction before a warrant could issue. Thus, *Mobley* found that only a new law violation was a "crime" which would result in a valid warrant under the statute. The Legislature subsequently revised the language of Fla. Stat. §948.06(1)(f) to cure the defect exposed by *Mobley*. Effective July 1, 2017, the statute now provides that a warrant for any violation of probation, whether a new law violation or a technical violation, will be sufficient to toll the probationary period pending a hearing on the violation of probation charge, upon the issuance of either a warrant or a notice to appear.

However, the 2017 amendment to the statute has not been deemed

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to apply retroactively. Accordingly, under the law that existed at the time, Appellant's violations were technical violations, not crimes pursuant to *Mobley*. Appellant's probation expired on February 2, 2015, was not tolled, and the trial court lost jurisdiction after that date.

Accordingly, under the law applicable at that time, the trial court's denial of Appellant's motion to dismiss is REVERSED. Appellant's sentence for violation of probation is VACATED. This matter is REMANDED to the trial court to issue an order dismissing the violation of probation and vacating the violation of probation sentence. (MCHUGH, CARLIN, and L. HAYES, JJ., concur.)

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[1]As referenced in Appellant's brief, the language under Fla. Stat. §948.06 requiring compliance with Fla. Stat. §901.02 was removed, effective July 1, 2017.

* * *

Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Where there is no finding of good faith on part of counsel, counsel must pay half of sanctions ordered under section 57.105(1) irrespective of language in order stating that attorney's fees are to be paid "by the plaintiff"—To extent that order can be read as holding that half of costs imposed under section 57.041 must also be paid by counsel, order is erroneous

RESTORATION 1 OF FORT MYERS, LLC, a/a/o RONALD ZIENKA, Appellant, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Appellee. v. MAGNOLIS DEJESUS VILAR LAUZAO, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 19-03 AP. L.T. Case No. 17-107 CC. April 20, 2020. Appeal from the County Court for Lee County; Tara Pascotto Paluck, Judge. Counsel: Scott G. Millard, Maitland, for Appellant. Jessica L. Donner, Fort Lauderdale, for Appellee.

(PER CURIAM.) Appellant, a disaster/flood repair company, appeals an award of attorney's fees granted in favor of Appellee, an insurance company. For the reasons stated below, we reverse in part and remand to the lower court for entrance of an order in conformity with this opinion.

The available record on appeal reflects that during the litigation of the case below, Appellee moved for sanctions against Appellant for filing a frivolous lawsuit under Fla. Stat. 57.105. The sanctions were granted and additional costs were also ordered under Fla. Stat. 57.041. Appellant appealed the sanctions, but they were affirmed on appeal in 2018.

Following the conclusion of the appeal, Appellee filed new motions for contempt and sanctions in the lower court claiming that Appellant was refusing to comply with the plain language of section 57.105 that requires any attorney's fee sanction awarded under it to be paid in equal parts by both the plaintiff and plaintiff's counsel. A hearing was held on Appellee's motions on November 7, 2018; however, no transcript of this hearing was entered into the appellate record or included in either party's appendix.

On November 28, 2018, the lower court entered an "Order Denying in Part Motion for Contempt." In its order, the court ruled that while Appellant's counsel was not in contempt, its prior order *did* require Appellant's attorney to pay half of the ordered sanctions because section 57.105 clearly put the attorney on notice of his responsibility for half of any sanctions awarded under the statute. Moreover, the Court held that Appellee was entitled to additional attorney's fees associated with enforcing the order of sanctions. This appeal followed.

A trial court's determination that a party is entitled to attorney's fees is a question of law subject to de novo review, while the *amount* of attorney's fees is a question of fact subject to the abuse of discretion standard. *Hinkley v. Gould, et al.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007) [33 Fla. L. Weekly D74a]. Generally, a court may only award attorney's fees if authorized by a statute, rule, or contract. *Bane v. Bane*, 775 So.2d 938, 940 (Fla. 2000) [25 Fla. L. Weekly S1070a].

Fla. Stat. 57.105(1) authorizes awards of attorney's fees as sanctions when the court finds that a litigant has raised a claim or defense in bad faith. Sanctions ordered under section 57.105(1) must be paid in equal parts by the losing party and the losing party's attorney, according to the plain language of the statute:

> (1) Upon the court's initiative or motion of any party, the court shall award *a reasonable attorney's fee, including prejudgment interest*, to be paid to the prevailing party *in equal amounts by the losing party and the losing party's attorney* on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

(emphasis added). Once the court finds that the losing party knew or should have known that the claim or defense was frivolous, the burden is on the losing party to show good faith. *Horticultural Enterprises v. Plantas Decorativas, LTDA*, 623 So.2d 821, 822 (Fla. 5th DCA 1993).

Numerous district courts have held that sanctions awarded under section 57.105(1) cannot include costs. This includes costs associated with expert witness testimony needed to prove the reasonableness of the attorney's fees awarded as sanctions under 57.105(1). *See*, *e.g.*, *In re Estate of Assimakopoulos*, 228 So. 3d 709 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2232c]. However, expert witness costs may be awarded pursuant to the prevailing party standard of Fla. Stat. 57.041.

In the present case, Appellant argues that the second award of sanctions served to improperly and retroactively alter the first award of sanctions and that Appellant's due process rights were violated because it was not put on notice that the lower court was going to reconsider or amend its prior order. The Court does not find Appellant's arguments regarding the violation of his due process rights to be persuasive or in need of lengthy discussion. Moreover, to the extent that Appellant continues to argue on appeal that the awards under Fla. Stat. 57.105(1) need not be split between both client and counsel, its fails.

Both attorney's fee sanctions were imposed under Fla. Stat. 57.105(1). Under Fla. Stat. 57.105(1), attorney's fees must be split equally between both the party and the party's attorney unless the party's attorney can establish good faith. *See* Fla. Stat. 57.105(1). Neither order contains a finding of good faith shown by Appellant's counsel. The language of the statute does not give the lower court any discretion on whether or how to divide the sanction between the attorney and the client. Thus, counsel must pay half of the sanctions ordered under the statute. In light of this, the language in the order stating that the attorney's fees are to be paid "by the Plaintiff" is unable to override the statute's mandate that the award of attorney's fees under 57.105(1) be paid in equal halves by Appellant and Appellant's counsel.

However, upon review of the lower court's orders imposing sanctions, the Court noticed that discrepancies in the language used between the two orders created an ambiguity or potential error regarding the imposition of additional sanctions as costs under Fla. Stat. 57.041. The order presently on appeal fails to specify whether Appellant's attorney is required to pay half of *all* sanctions ordered or only those imposed under Fla. Stat. 57.105(1).

Simply put, Fla. Stat. 57.105(1) only allows for the award of attorney's fees, not costs, and there is no basis in the case law interpreting Fla. Stat. 57.041 to allow a judge to require counsel to be personally responsible for half of the prevailing party's costs. This

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includes costs associated with proving attorney's fees, such as the testimony of a fees expert. The case of *In re Estate of Assimakopoulos*, 228 So. 3d 709, 713 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2232c], is directly on point.

Therefore, to the extent that the order on appeal may appear to "clarify" that the $2,600.00 in costs must also be split with Appellant's counsel, it is erroneous and should be reversed. This ambiguity between the two sanction orders is most likely the result of a clerical or scrivener's error caused by a failure to account for the fact that $2,600.00 of the ordered monetary sanctions were imposed under section 57.041, not 57.105. Clerical mistakes, scrivener's errors, oversights, and omissions can be corrected by a court at any time under Fla. R. Civ. P. 1.540(a).

In summation, the lower court appears to have overlooked that $2,600.00 of the sanctions imposed in 2017 were costs under Fla. Stat. 57.041, not attorney's fees under Fla. Stat. 57.105(1), at the time it entered its order on Appellee's motion for contempt and additional sanctions. Sanctions under Fla. Stat. 57.041 carry no requirement to be paid in part by counsel. To the extent that the lower court's order failed to specify that its ruling regarding Fla. Stat. 57.105(1) does not apply to the $2,600.00 in costs, it is reversed and a corrected order should be entered in its place. (B. KYLE, SHENKO, and L. PORTER, JJ., concur.)

* * *

Criminal law—Post conviction relief—Ineffective assistance of counsel—Failure to advise of immigration or deportation consequences of plea—Trial court erred in determining that trial counsel's deficient performance did not result in prejudice to defendant

BERTO VENEGAS VILLA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 19-11 AP. L.T. Case No. 16-01 MM. February 11, 2020. Appeal from the County Court for Collier County; Tamara L. Nicola, Judge. Counsel: Neil Morales, Naples, for Appellant. Amira D. Fox, State Attorney, Naples, for Appellee.

(PER CURIAM.) Appellant, Berto Venegas Villa, is appealing the denial of his motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c)(1). On appeal of an order denying a Fla. R. Crim. P. 3.850 motion where the postconviction court has conducted an evidentiary hearing, the Appellate Court will defer to the factual findings of the postconviction court so long as those findings are supported by competent, substantial evidence, but will review the application of the law to the facts *de novo*. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) [41 Fla. L. Weekly S629a]. We reverse.

On January 29, 2016, Appellant was charged by way of information with one count of violating an injunction against domestic violence, in violation of § 741.31(4), Fla. Stat., and one count of criminal mischief, in violation of § 806.13(1)(b), Fla. Stat. Appellant was represented at the trial level by counsel, Salim Joseph Bazaz, Esq. Appellant entered a negotiated plea of no contest, resulting in an adjudication of guilt on the violation of injunction against domestic violence charge and the State's dismissal of the criminal mischief charge. Appellant filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850, alleging that counsel was ineffective because he did not inform Appellant of the deportation consequences of his plea and that, but for counsel's deficient performance, Appellant would not have accepted the plea and would have insisted on going to trial. The postconviction court denied Appellant's motion following an evidentiary hearing, and found that while counsel's performance was deficient, Appellant did not demonstrate prejudice.

Appellant argues that the postconviction court should have granted his Fla. R. Crim. P. 3.850 motion, because he demonstrated a reasonable probability that prejudice resulted from counsel's deficient performance. To demonstrate prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*., at 694. Additionally, in a claim for postconviction relief based on an inadequate warning by counsel of immigration consequences of a plea, a movant must establish that, "if the movant had been accurately advised, he or she would not have entered the plea. *Cano v. State*, 112, So.3d 646 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D925a]. In making this determination, a court "should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial." *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004) [29 Fla. L. Weekly S125a]. However, the Supreme Court of the United States has held that, with regard to an attorney's representation of a noncitizen, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla v. Kentucky*, 559 U.S. 356 (2010) [22 Fla. L. Weekly Fed. S211a]. Here, upon a review of the record, we find that Appellant demonstrated prejudice under the second prong of *Strickland* based on the totality of the circumstances surrounding his plea.

We find that the trial court erred, as a matter of law, when it determined that counsel's deficient performance did not result in prejudice to Appellant, and denied Appellant's motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850.

Accordingly, we REVERSE, vacate the judgment and sentence, and remand to the trial court for further proceedings in accordance with this opinion. (B. KYLE, SHENKO, and L. PORTER, JJ., concur.)

* * *

Criminal law—Sentencing—Counsel—Waiver—Where trial court failed to renew offer of counsel prior to sentencing defendant who had previously waived counsel, case is remanded for resentencing

NICOLE C. CHRISTIAN, Appellant, v, STATE OF FLORIDA, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 18-103AP. L.T. Case No. 18-357MM. September 18, 2019. Appeal from the County Court for Charlotte County; Paul Alessandroni, Judge. Counsel: Heather Sutton-Lewis, Assistant Public Defender, Punta Gorda, for Appellant. Shawn Briggs-Seward, Assistant State Attorney, Punta Gorda, for Appellee.

(PER CURIAM.) Nicole Christian appeals her conviction and sentence for resisting without violence. We affirm the conviction for resisting without violence and the finding and sentence imposed for direct criminal contempt without comment. We reverse and remand for resentencing on the conviction for resisting without violence only, as the trial court failed to renew the offer of counsel prior to sentencing. See Fla. R. Crim. P. 3.111(d)(5) (2013); *Ingraham v. State*, 32 So. 3d 761, 768-69 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D948a] (holding that sentencing is a critical stage of a criminal proceeding and therefore the offer of counsel must be renewed even if the defendant has previously waived counsel).

Accordingly, we REVERSE and REMAND for resentencing in accordance with this opinion. (KRIER, K. KYLE, and MASON, JJ., concur.)

* * *

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Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Expert testimony—Where *Frye* standard was the law when insurer filed its initial brief arguing that trial court erred in discrediting its expert's affidavit, and *Daubert* standard was the law when medical provider's answer brief was filed, insurer did not waive right to argue that court erred in discounting affidavit under *Daubert* standard—Abuse of discretion to exclude expert's affidavit on ground that her testimony is based on hearsay where expert relied on own extensive experience and did not become conduit for hearsay—Trial court further abused its discretion by rejecting affidavit within summary judgment order without *Daubert* motion or hearing on affidavit's admissibility that would have afforded insurer the opportunity to amend affidavit

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Lidia Bermudez, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-164-AP-01. L.T. Case No. 13-11920-SP 23 (01). June 3, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Myriam Lehr, Judge. Counsel: Michael Neimand, House Counsel for United Automobile Insurance Company, for Appellant. Chad A. Barr, Law Offices of Chad A. Barr, P.A., for Appellee.

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

(PER CURIAM.) Lidia Bermudez was injured in an accident and assigned her personal injury protection benefits to her medical provider, Miami Dade County MRI Corp. ("The Provider" or "Miami Dade MRI"). United Automobile Insurance Company (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider. In granting summary judgment below, the trial court first found that UAIC failed to establish its affirmative defense of accord and satisfaction. The trial court then struck UAIC's affidavit of Denorah Lang, UAIC's adjuster. In refusing to consider UAIC's conflicting affidavit of Denorah Lang, the trial court rendered the evidence uncontroverted, and thereby entered summary judgment for the Provider.

Before reaching the issue on appeal, the Provider argues that the UAIC has waived its right to argue that the trial court erred as a matter of law in declining to consider UAIC's affidavit under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Provider argues that because UAIC argued in its Initial Brief that the trial court erred in discrediting its affidavit under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), it has waived any argument with respect to the application of *Daubert*. To address this waiver argument, it is necessary to describe the timing of Florida's adoption of the *Daubert* amendments.

In 2013, the legislature amended sections 90.702 and 90.704, Florida Statutes, and adopted the *Daubert* standard in lieu of Florida's long-standing reliance upon *Frye* and the "pure opinion" standard articulated in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007) [32 Fla. L. Weekly S750a]. *See* 2013-107, §§ 1,2, Laws of Fla. In 2017, the Supreme Court of Florida in *In re Amends. to the Fla. Evidence Code*, 210 So. 3d 1231 (Fla. 2017) [42 Fla. L. Weekly S179a], declined to adopt procedural rules to conform to these legislative amendments. This decision left Florida courts from 2017 through 2018 in a bit of a quandary—which standard should apply to the admission of expert testimony, *Daubert* or *Frye*? The trial court here applied *Daubert*. It was during this period, on May 29, 2018, that the trial court in this case granted summary judgment and that UAIC appealed.

During the pendency of this appeal, in October 2018, the Supreme Court of Florida expressly held that the legislative changes adopting the *Daubert* standard were unconstitutional. *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a]. UAIC's Initial Brief was filed in January 2019, after the *Daubert* amendments were rejected by the Supreme Court of Florida.

The Provider's Answer Brief was not filed until January 9, 2020. Before the Answer Brief was filed, in May 2019, the Supreme Court of Florida reversed course and adopted procedural rules to conform to the legislative amendments in Chapter 2013-107, §§ 1, 2, Laws of Florida. *In re Amendments to Florida Evidence Code*, 278 So. 3d 551 (Fla. 2019) [44 Fla. L. Weekly S161a]. Thus, when UAIC first briefed this case, *Frye* was the law. And when the Provider briefed its answer, *Daubert* became the law.

Under these circumstances, we do not agree that UAIC has waived its position on appeal. First, both the litigants and the court are obligated to apply the law at the time of the appeal. In *Larocca v. State*, 289 So. 3d 492, 493 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D99a], the Fourth District Court of Appeal explained:

> Although Frye was the relevant standard for assessing expert testimony at the time of the trial, during the pendency of this appeal the Florida Supreme Court adopted the *Daubert* standard for admitting expert scientific testimony. *In re Amendments to Fla. Evidence Code*, 278 So. 3d 551, 551-52 (Fla. 2019) [44 Fla. L. Weekly S161a]. We apply *Daubert* to the facts of this case because the amendment implementing *Daubert* is procedural and so the change applies retroactively. *Id.* at 552; *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 425 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D446a]. Additionally, "[u]nder Florida's 'pipeline rule,' the 'disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered.' " *Kemp v. State*, 280 So. 3d 81, 88 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1974a] (citation omitted)

Accordingly, we find that UAIC has not waived its argument that the trial court erred in discounting the UAIC affidavit under *Daubert*.

The issue on appeal is whether the trial court erred in granting summary judgment for the Provider. The standard of review of a trial court's entry of 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]. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez*, 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b].

The standard of review of an order admitting or excluding expert testimony is abuse of discretion. *See State Farm Mutual Automobile Insurance Company v. CEDA Health of Hialeah, LLC*, 2020 WL 1036485 at * 2 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D505a] (The standard of review of an order granting summary judgment is de novo, while the standard of review of trial court's admission or exclusion of evidence is abuse of discretion.). *See also Lesnik v. Duval Ford, LLC*, 185 So. 3d 577, 579 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D281a] (trial court order striking witness affidavit is reviewed for abuse of discretion).[2]

In granting summary judgment, the trial court found against UAIC on its accord and satisfaction defense. UAIC has not raised any issue with respect to that finding. Therefore, the trial court's determination in favor of the Provider on UAIC's accord and satisfaction defense is the law of the case and may not be reargued on remand. *See Silva v. U.S. Sec. Ins. Co.*, 734 So. 2d 429 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D933b].

Turning to the only issue on appeal, whether summary judgment was correctly entered on the issue of the reasonableness of the cost of medical services, UAIC does not challenge the trial court's finding that the provider established its prima facie case for the reasonableness of its bills by introducing the testimony of the provider.[3] UAIC's only argument is that the trial court erred in excluding UAIC's

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expert's affidavit and in granting summary judgment on the issue of reasonableness. On this issue, we agree and reverse.

The UAIC adjuster, Denorah Lang has worked as an insurance adjuster since 2007. In the course of that experience, she has adjusted hundreds of insurance claims, has personal knowledge of the CPT codes commonly associated with PIP insurance claims and the amounts typically paid to reimburse such claims. In her words, she gained "vast knowledge regarding medical pricing including (a) knowledge of various federal and state fee schedules under state/federal worker's compensation, Tricare and Medicare, (b) knowledge and reimbursement rates from HMOs/PPOs are generally at a rate less than 200% of Medicare Part B, (c) knowledge that other insurers, specifically PIP insurers, were reimbursing at rates equal to 200% of Medicare Part B Fee Schedule, and (d) experience negotiating claims with providers which resulted in providers being reimbursed at rates less than 200% of Medicare Part B." In addition to her practical experience, she has taken courses in medical billing and pricing. She is certified as a medical claims and billing specialist.

While a trial court has discretion on the admission and exclusion of evidence, "[t]he trial court's discretion, however, is constrained by the evidence code and applicable case law." *Ortuno v. State*, 54 So. 3d 1086, 1088 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D471a]. Here, it was an abuse of discretion to find that the expert's testimony should be excluded because it is based on hearsay. If the expert here relied upon hearsay, that is permitted. An expert witness is permitted to rely upon hearsay—so long as she does not become a conduit for hearsay. *See Tolbert v. State*, 114 So. 3d 291, 294 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D961a], *citing Linn v. Fossum,* 946 So. 2d 1032, 1037-38 (Fla. 2006) [31 Fla. L. Weekly S741a].

Moreover, this expert did not become a conduit for hearsay. Her testimony relied in part upon her extensive experience with these fee schedules in reaching her opinions. It was not a conduit for hearsay testimony. Further, in her capacity as an insurance adjuster, she was permitted to consider these fee schedules as part of her job. Section 627.736(5)(a) specifically permits an insurer to take all the above information into account when determining whether a medical charge is reasonable. Accordingly, it was an abuse of discretion to strike her testimony.

Additionally, the trial court here found that the affidavit did not meet the requirements of *Daubert.* It should be noted that the trial judge's order passed upon *Daubert* in the context of a summary judgment order, without a *Daubert* motion or hearing on the admissibility of UAIC's evidence. Had there been a proper hearing, the insurer could have corrected or amended its affidavit. Merely rejecting evidence within a summary judgment order without giving the proponent the opportunity to amend the affidavit is an abuse of discretion. *See United Auto. Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 3d 127, 131 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1934a].

As this panel and the majority of prior panels from this Court have found, because the trial court misapplied the law under *Daubert*, it was an abuse of discretion to exclude the affidavit. Taking UAIC's affidavit into account, it was error to grant summary judgment. *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). Accordingly, the summary judgment and final judgment entered below are hereby **REVERSED**, and this cause is **REMANDED** to the trial court.

Appellee's Motion for Attorney's Fees is **DENIED**.[4] Appellant's Motion for Attorney's Fees is conditionally **GRANTED** (conditioned upon Appellant ultimately prevailing and the enforceability of the proposal for settlement) and **REMANDED** to the trial court to fix amount.

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[1]Judge de la O did not participate in oral argument.

[2]We are bound by these decisions requiring that we apply an abuse of discretion standard to the trial court's decision rejecting UAIC's affidavit in this summary judgment order. However, the trial court's order was based on a finding that the witness' opinion was based on hearsay (contrary to law), a determination of the weight given to her testimony (contrary to law) and a conclusion that the witness may not rely on the Medicare fee schedules for her opinion (contrary to law). Where analysis of a legal principle is involved, the standard of review generally is de novo. *Demircan v. Mikhaylov*, 2020 WL 2550067 (Fla. 3d DCA May 20, 2020) [45 Fla. L. Weekly D1201a], *citing Credo LLC v. Speyside Invs. Corp.*, 259 So. 3d 893, 898 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2049a] ("If a legal principle is involved, the standard of review is de novo.") (citations omitted). Thus, the trial court's rejection of the UAIC affidavit was based on misapplication of law and should, in our view, be subject to a de novo standard of review. While we are bound to apply an abuse of discretion standard, we suggest that the appropriate standard of review should be clarified by the higher courts. Regardless, as set forth below, in this case, we find that the trial court's decision was an abuse of discretion. *See United Auto. Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 3d 127, 131 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1934a] (finding abuse of discretion in striking a defective affidavit without granting leave to amend or correct).

[3]*See 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).

[4]UAIC did not challenge the trial court's order on the accord and satisfaction defense. Accordingly, the Appellee is not entitled to a conditional order on fees for its work on this issue, as it was never raised.

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Volume 28, Number 4
August 31, 2020
Cite as 28 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Insurance—Property—Discovery—Depositions—Plaintiff may take depositions of insurer's corporate representative and desk adjuster and ask questions seeking relevant non-privileged information and information regarding any documents in claims file that insurer intends to introduce into evidence—Insurer must produce relevant non-privileged documents but is not required to produce entire claims file—Court declines to give advisory opinion on objectionable question and documents; specific objections to questions and documents must be made in accordance with rules of civil procedure

MASON DIXON CONTRACTING, INC., a/a/o Gloria Castaneda, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY d/b/a SECURITY FIRST FLORIDA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 19-58-CA. May 5, 2020. David Frank, Judge. Counsel: Roger Hatfield, Morgan & Morgan, P.A., Orlando, for Plaintiff. Joshua C. Barrows and Steven K. Richardson, Pensacola, for Defendant.

ORDER ON DEFENDANT'S OBJECTIONS AND MOTION FOR PROTECTIVE ORDER REGARDING THE DEPOSITION OF DEFENDANT'S CORPORATE REPRESENTATIVE AND "DESK ADJUSTER"

This cause came before the Court for hearing on April 16, 2020 on defendant's objections and motion for protective order regarding the deposition of its corporate representative and "desk adjuster," and the Court having reviewed the objections, motion, and responses, and all supporting and opposing materials submitted, heard argument of counsel, and being otherwise fully advised in the premises, finds

On October 10, 2018, the insured's property was damaged in Hurricane Michael. There is no dispute that the insured notified defendant of the loss, and that defendant initiated the claims process without asserting any wholescale coverages exemptions or challenges, such as a lapse in payment or taking the position that the policy was not in effect on the day in question.

On February 9, 2019, the insured signed a post-loss assignment of benefits and rights to the plaintiff for services rendered or to be rendered to repair the damage.

On June 13, 2019 plaintiff filed an Amended Complaint alleging that defendant, ". . .has failed or refused to fully perform under the policy, fully value Insured's losses and failed to fully pay for all of Insured's losses. . . ."

In its answer, defendant acknowledged coverage by stating, "Admitted that Defendant extended coverage for damages under the policy; otherwise, denied."

Defendant asserted the affirmative defenses of: a hurricane deductible; wear and tear; the insured's faulty, inadequate, or defective maintenance or neglect; mitigation of damages; prior existing damage; and failure to provide a sworn proof of loss.

Plaintiff seeks to depose the defendant's corporate representative and "desk adjuster." The defendant is concerned that these witnesses will be required to produce documents or answer questions that would offend a valid protection or privilege from discovery. The primary concern appears to be claims handling information.

After filing their briefs, providing the Court case law, and arguing their points at the hearing, the parties further provided the Court a copy of a standard protective order used in another circuit and some (partially) agreed upon language for a proposed order. The Court does not believe either of these satisfactorily covers the issues at hand and, therefore, provides its own guidance.

As to the very specific issue of "claims handling" information, there is little doubt that the majority view and starting point is, "[U]ntil the obligation to provide coverage and damages has been determined, a party is not entitled to discovery related to the claims file[ ] or to the insurer's business policies or practices regarding handling of claims." *Homeowners Choice Property & Casualty Ins. Co. v. Mahady,* 284 So.3d 582, 583 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2125b] (internal quotations and citations omitted).

But the analysis does not end there. The fact remains that there is no formal "claims file privilege" in Florida's Evidence Code. *Homeowners Choice Property & Casualty Ins. Co., Inc. v. Avila,* 248 So.3d 180, 184 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D885a]. Instead, Florida's district courts are starting to more expressly rely upon the step-by-step application of the long-established evidentiary doctrines of work product and relevancy.

"Without question, materials within an insurer's claim file will frequently fit within the definition of work product." *Progressive American Ins. Co. v. Herzoff*, 290 So.3d 153, 157 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D292a] (citations omitted). "Ordinarily, materials that constitute an attorney's work product are not discoverable," however, "[t]he work-product privilege is not absolute, and the Florida Rules of Civil Procedure provide a mechanism for invading it. . . . Florida Rule of Civil Procedure 1.280(b)(3) provides that a party may be ordered to produce documents and tangible things prepared in anticipation of litigation 'only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' " *Id.* (citation omitted).

An excellent example of this applied to the "claims file" scenario was the situation in *Avila* where court noted:

> Thus, a specifically-articulated document request for "photographs of the alleged property damage" may require either (a) production of such photographs, or (b) disclosure on a privilege log with a specifically-articulated basis for protection from discovery, even if those photographs have been filed with other non-discoverable, claim-related documents in the insurer's "claims file" and coverage remains in dispute.

Id. at 184-85; see also *State Farm Florida Ins. Co. v. Aloni*, 101 So.3d 412, 414 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2737a].

Before a party can take advantage of the rule permitting the "invasion" of work product, the party must understand the nature of the documents being withheld. "Under Florida Rule of Civil Procedure 1.280, a party withholding information that is otherwise discoverable by claiming that it is privileged must 'make the claim expressly' and 'describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.' Fla. R. Civ. P. 1.280(b)(6)." *Bainter v. League of Women Voters of Florida,* 150 So.3d 1115, 1128 (Fla. 2014) [39 Fla. L. Weekly S689a]. In other words, a privilege log.

A party is not required to file a privilege log until all non-privilege objections have been addressed. *Avatar Property & Casualty Ins. Co. v. Jones,* No. 2D19-243, 2020 WL 1222732, at *3 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D588a]. If the sole objection to discovery were that it sought privileged documents, a party would need to file a privilege log, ". . .prior to any hearing on the objection as the information contained in the privilege log would be necessary to 'assess the applicability of the privilege or protection.' " *Gosman v. Luzinski,* 937 So.2d 293, 296, n.1 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2402a].

A trial court has the discretion to deem a privilege waived for failure to timely file an adequate privilege log. *Century Business Credit Corp. v. Fitness Innovations & Techs., Inc.,* 906 So.2d 1156

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(Fla. 4th DCA 2005) [30 Fla. L. Weekly D1568a], citied with approval in *Bainter*.

Although waiver may result from the failure to file a privilege log, one is not required if the document requested belongs to a category of documents that is undeniably privileged. *Nevin v. Palm Beach County School Board,* 958 So.2d 1003, 1008 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1365a] (citation omitted). For example, one would be unnecessary for a document identified as a letter from an attorney to a client, and for which there were no apparent exceptions to the attorney—client privilege. Another example is the records of a consulting expert who is not to testify at trial. *Id.*

And then we have relevancy. "As a rule, '[d]iscovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence.' " *Saints 120, LLC v. Moore,* No. 1D19-973, 2020 WL 1429326, at *2 (Fla. 1st DCA Mar. 24, 2020) [45 Fla. L. Weekly D679a], quoting *Allstate Insurance Co. v. Langston,* 655 So.2d 91, 94 (Fla. 1995) [20 Fla. L. Weekly S217a].

Instructive here are some of the documents sought in *Langston.* They were items typically associated with "a claim of bad faith or unfair claims practices"—internal procedural memos, claims manuals, and standards for proper investigation of claims. The *Langston* court quashed the district court decision "to the extent that it permits discovery even when it has been affirmatively established that such discovery is neither relevant nor will lead to the discovery of relevant information." *Id*. at 95.

Finally, an evidentiary hearing may he required to assess the relevancy of documents, such as financial records, and an in camera inspection is required to determine whether a privilege applies. *Hett v. Barron-Lunde,* 290 So.3d 565, 570 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D177a].

The crux of the current motion and objections is in the form of a requested advisory opinion. We really do not yet know the specific questions or the specific documents. Instead, defendant seeks a prophylactic for potential objectionable questions and document requests. The analysis described above does not contemplate advisory opinions, and this Court is uncomfortable giving one. Information protected by the classic privileges, the work product doctrine, and the concept of relevancy can be protected with proper individual objections.

Accordingly, it is ORDERED AND ADJUDGED that

Defendant's objections are SUSTAINED IN PART and OVERRULED IN PART and its motion for protective order is GRANTED IN PART and DENIED IN PART as follows:

1. Plaintiff will be permitted to take the depositions of the defendant's corporate representative and desk adjuster.

2. The defendant will produce non-privileged documents that are relevant to the claims and defenses in this lawsuit, regardless of whether copies are included in the "claims file."

3. Deposition questions that seek non-privileged, relevant information, such as the location of any policy specific language upon with defendant relies for any affirmative defense, are proper.

4. Defendant's corporate representative and desk adjuster are not required to produce the entire claims file. However, if the defendant anticipates introducing any of these documents into evidence, the defendant waives its objections and the plaintiff will be permitted to examine the deponents about the documents and the information contained in them. If this occurs, or the court otherwise orders the production of the documents, after the depositions already have been taken, the plaintiff will be allowed a supplemental deposition of the deponents.

5. Objections to ***specific*** document requests will be made in accordance with Florida Rules of Civil Procedure 1.280, 1.310, 1.350, and 1.351. Objections that cannot be resolved directly by the parties shall be brought to the Court's attention within 10 days of service of the same. The Court will rule on non-privilege objections on the papers and, if applicable, set a hearing on privilege objections and certain relevancy objections. The party opposing disclosure will file a complete and proper privilege log at least five (5) days prior to the hearing and will bring the subject documents to the hearing for an in camera review, if necessary.

6. Objections to ***specific*** questions at a deposition will be made in accordance with Florida Rules of Civil Procedure 1.280 and 1.310. Counsel will instruct their deponents not to answer questions for which they have a good faith basis to believe that the information sought is privileged or subject to a non-disclosure order of the Court. The party asserting an objection that includes an instruction not to answer shall request a ruling from the Court on the matter within 10 days of the deposition.

* * *

Civil procedure—Default—Motion for default final judgment is denied—Final judgment against defaulted defendant must be obtained at trial on liquidated and unliquidated damages

FORD MOTOR CREDIT COMPANY, LLC, Plaintiff, v. SLADE ALLEN CONTRACTING, LLC, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-109-CA. May 26, 2020. David Frank, Judge. Counsel: Michael J. Ingino, Moody, Jones & Ingino, P.A., Plantation, for Plaintiff.

ORDER DENYING MOTION FOR FINAL DEFAULT JUDGMENT

This Cause came before the Court on plaintiff's motion for entry of "final default judgment," and the Court having reviewed the motion and all supporting materials submitted, and being otherwise fully advised in the premises, finds

Ford Motor Credit Company filed a motion asking this Court to enter a judgment against Slade Allen Contracting, a Quincy, Florida company, pursuant to a lawsuit that alleges Slade failed to complete all of the payments on a retail installment contract loan for the purchase of a 2016 Ford F-250 truck. Ford states three things in its three-paragraph motion. First, that it obtained a clerk default Second, that it is entitled to the judgment. And third, that it filed affidavits of indebtedness and costs.

The lawsuit was served on Slade on February 24, 2020. The default was entered on March 20, 2020. On April 14, 2020, Ford submitted a proposed final judgment against Slade in the amount of $63,128.31 plus interest that it wanted the Court to sign without a hearing or any further procedure.

"While a default admits all well-pleaded allegations of a complaint including a plaintiff's entitlement to liquidated damages, it does not admit entitlement to unliquidated damages. It is well settled that a defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation of and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." *Mitchell v. Northstar Panama City Beach, Inc.,* 171 So.3d 833 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1953a] (citations omitted).

When plead properly, principal and interest owed in a lender lawsuit are considered liquidated damages. However, where those amounts are not properly plead, they could be deemed unliquidated and require further inquiry. "Damages are liquidated when the amount to be awarded can be determined with exactness from a pleaded agreement between the parties, by an arithmetical calculation, or by application of definite rules of law." *Yanofsky v. Isaacs,* 277 So.3d 132, 134 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1972a].

Damages sought are unliquidated where, "a court must consider evidence and testimony to arrive at the appropriate amount." *Mitchell.*

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An affidavit of proof simply stating a sum certain or a legal conclusion does not liquidate damages. *Ciprian-Escapa v. City of Orlando,* 172 So.3d 485 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1670a] (citations omitted). For example, damages for attorney's fees and costs are unliquidated. *Id.* (citations omitted); *Keeter.*

And there is no question that almost all, if not all, of the damages sought in this lawsuit are unliquidated.

Florida's Rules of Civil Procedure and Judicial Administration instruct us that, if any damages are unliquidated, a trial must be set via notice mailed by the court, and the trial date cannot be sooner than 30 days after service of the notice. The party seeking a judgment against a defaulted defendant provides the address of the defaulted party.

Florida Rule of Civil Procedure 1.440(c) states:

> If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. **Trial shall be set not less than 30 days from the service of the notice for trial**. By giving the same notice the court may set an action for trial. **In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with Florida Rule of Judicial Administration 2.516**.

Florida Judicial Rule of Judicial Administration 2.516(h)(1) provides:

> A copy of all orders or judgments must be transmitted by the court or under its direction to all parties at the time of entry of the order or judgment. **No service need be made on parties against whom a default has been entered except orders setting an action for trial and final judgments that must be prepared and served as provided in subdivision (h)(2)**.

Florida Judicial Rule of Judicial Administration 2.516(h)(2) provides:

> **When a final judgment is entered against a party in default, the court must mail a conformed copy of it to the party. The party in whose favor the judgment is entered must furnish the court with a copy of the judgment, unless it is prepared by the court, with the address of the party to be served.**

Even if plaintiff were oblivious to the law and procedure outlined above, the Court's Policies and Procedures on the Second Judicial Circuit's website state that final judgment against defaulted defendants must be obtained at a trial on damages (liquidated and unliquidated) and not summary judgment, and certainly not by simply sending in a proposed final judgment for the Court to sign.

Accordingly, it is

ORDERED and ADJUDGED that the motion is DENIED.

* * *

Insurance—Homeowners—Venue—Forum selection clause—Mandatory forum selection clause in assignment of benefits from insured to assignee does not govern venue for breach of contract action brought by assignee against insurer—Where there is no forum selection clause in insurance policy, venue is proper in county in which cause of action accrued, property is located, and insurer has business office—Motion to transfer venue is denied

GSD CONSTRUCTION SERVICES, LLC, a/a/o Vergie Pace, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 19-1133-CA. May 26, 2020. David Frank, Judge. Counsel: Scott Mager, Mager Paruas, LLC, Hollywood, for Plaintiff. Robert Kingsford, Alfano Kingsford, P.A., Maitland, for Defendant.

AMENDED ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE

This cause came before the Court for hearing on Defendant's, STATE FARM FLORIDA INSURANCE COMPANY (State Farm") Motion to Dismiss Plaintiff's, GSD CONSTRUCTION SERVICES, LLC ("GSD"), Complaint for Improper Venue, and the Court having reviewed the motion, the response, and all submissions in support of or opposition to the motion, heard argument of counsel, and being otherwise fully advised in the premises, finds

Procedural History

In October 2018, Hurricane Michael caused damage to the property of Vergie Pace in Gadsden County. Ms. Pace had homeowner's insurance with State Farm. Ms. Pace contends that she was not fully and/or properly compensated for the damage pursuant to the operative insurance policy she purchased from State Farm. Ms. Pace assigned her right to recover—her benefits under the policy—to GSD. GSD filed the present lawsuit in Gadsden County on November 11, 2019.

State Farm moved for the dismissal of this case on the ground that Gadsden County is an improper venue.

Despite concerns about privity, the Court initially granted the motion and dismissed this case at a hearing on May 6, 2020. The only rulings or opinions presented at that hearing that explained their rationale and that were on point were two trial court orders from the same trial judge submitted by State Farm. Those orders support State Farm's position. Since then, the Court became aware of a Second District appellate opinion, a Second Circuit trial court order, and some trial court orders from the Fourteenth Circuit that support GSD's position.

Prior to issuing a written order, the Court *sua sponte* noticed a hearing on reconsideration of the matter for May 20, 2020, for which it reviewed additional submissions, and at which it heard further argument of counsel.

First, there appears to be some confusion over the nature of a motion to "reconsider" versus a motion to "rehear." They are not the same. A motion for rehearing addresses a final judgment that has ended the judicial labor on a case. An order granting a motion to dismiss is not a final judgment for rehearing purposes. *Thompson v. Admiral Manufacturing Housing Community,* 282 So.3d 923, 924 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2374b], review dismissed, No. SC19-2056, 2019 WL 6736910 (Fla. Dec. 11, 2019).

"In contrast to final judgments, interlocutory orders are subject to judges' reconsideration sua sponte, even to the point of withdrawing them completely or reversing the initial ruling." *Campos v. Campos,* 230 So.3d 553, 556 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2257a].

Generally, a plaintiff is the master of his or her complaint. "If, therefore, venue is proper in more than one place, a plaintiff has the privilege of selecting which venue is most favorable to it for any reason and that selection will not be disturbed absent evidence that the chosen venue is either not proper in the place selected or substantially inconvenient to the witnesses or parties. *R.J. Reynolds Tobacco Co. v. Mooney,* 147 So.3d 42, 46 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1386a], citing *Barry Cook Ford, Inc. v. Ford Motor Co.,* 571 So.2d 61, 61 (Fla. 1st DCA 1990) (other citations omitted).

State Farm *does not* assert that plaintiff GSD's venue selection is substantially inconvenient. Rather, State Farm only challenges GSD's choice as improper as a matter of law based on language in the assignment of benefits contract ("AOB").

Specifically, State Farm argues that a mandatory venue clause in the AOB, which was signed and entered into by Ms. Pace and GSD, calls for venue in Orange County. The venue clause states: "*Florida law will govern* ***this assignment****. The sole and exclusive venue for any lawsuit arising out of or relating to same shall be the state courts (not federal) of orange county, Florida.*" (Emphasis added).

The parties spent time covering matters and legal principles that really are not in dispute or central to the issue at hand. There is no real dispute whether the subject venue selection language is "mandatory." It is. There is no dispute whether the insured can assign her benefits.

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She can.

The crux of this matter is State Farm's attempt to transport the venue language of the AOB into the case itself. To do this, State Farm argues two creative applications of known legal tenants. It asserts that Florida law on "incorporation" incorporates the AOB into the cause of action itself and is binding on the parties to the lawsuit. Alternatively, State Farm argues that established exceptions to Florida law on privity apply here and, therefore, it has acquired the privity needed to enforce the AOB. State Farm misapplies both concepts.

There Is No Incorporation

State Farm's first argument is that the venue clause is "incorporated" into the lawsuit because it is attached to and mentioned in the complaint.

The current lawsuit centers on the method of assessing damage and the calculation of monies owed to repair damage under the subject insurance policy. The insurance policy is attached as exhibit A to the complaint. The dispute is not regarding the nature of benefits Ms. Pace conferred on GSD, or any other aspect of the AOB. State Farm itself acknowledged this in the first paragraph of its motion to dismiss where it states, "Plaintiff purports to assert a breach of contract action for damages arising out of Hurricane Michael at the home of STATE FARM's insured, VERGIE PACE." Motion to Dismiss at 1.

The claims in this lawsuit do not "arise out of the AOB.[1] The operative contract on which this lawsuit is based is attached as Exhibit 1 to the complaint. It is the subject insurance policy. That's where the terms and conditions that govern the method of assessing damage and the calculation of monies owed are found.

The AOB attached to the complaint is not incorporated into the cause of action, it is to show standing only. This is like a foreclosure action for which a plaintiff would attach a copy of the note, but also a copy of an assignment to enforce the note, if the plaintiff is not the original contracting party. In that scenario, the contract sued upon is the note, not the assignment, the assignment is attached simply to establish standing. *Ham v. Nationstar Mortgage.,* LLC, 164 So.3d 714 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1112a]; see also *Progressive Express Insurance Co. v. McGrath Community Chiropractic,* 913 So.2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

In addition, State Farm seems to be mixing the concepts of "exhibit to a complaint" incorporation with standard contract "incorporation." Standard contract incorporation is where one contract clearly expresses the intention of the contracting parties to include and be bound by the terms and conditions outlined in another document in a way that makes the terms and conditions of both documents the controlling agreement. The main problem applying that idea to the present case is that the complaint is not a "contract" entered into by State Farm and GSD and into which the terms and conditions of another document could be incorporated. It is a lawsuit.

State Farm's own primary authority for its incorporation argument makes this clear, "A document may be incorporated by reference *in a contract if the contract* specifically describes the document and *expresses the parties' intent to be bound by its terms.* The contract must contain more than a mere reference to the collateral document. . . ." *Management Computer Controls, Inc. v. Charles Perry Construction, Inc.,* 743 So.2d 627 (Fla. 1st DCA1999) [24 Fla. L. Weekly D2458c] (emphasis added).[2] The defendant in *Management Computer Controls* was a party to the contract that contained the venue clause. Moreover, even if being sued could somehow turn State Farm into a "contracting party," the complaint does not express a clear desire to adopt the terms and conditions of another document, the AOB. Indeed, it states that Gadsden County is the proper venue.

There is another aspect to the ruling in *Management Computer Controls* that works against State Farm's argument. Although the court held that the venue clause in the second contract was legally incorporated into the first and, thus, binding on the parties, it did not conclude the same regarding the FUDPTA claim. *Id*. The reason—the FUDPTA claim did not "arise from the contract." *Id.* The court explained:

> Because [all the claims other than FUDPTA] arose out of the contract, they are governed by the parties' agreement concerning venue. We conclude, however, that the venue clause cannot be applied to [the FUDPTA claim]. The unfair trade claim is an independent statutory claim that is severable from all the remaining claims. It does not arise out of the contract, nor does it exist solely for the benefit of the parties to the contract. Our conclusion that the unfair trade practices claim is beyond the scope of the venue clause is supported by the analogous decision of the [Third District].

Management Computer Controls at 632; see also *Gordon v. Sandals Resorts International, Ltd.,* 418 F. Supp. 3d 1132 (S.D. Fla. 2019), citing *Management Computer Controls.*

The First District later clarified that the rule in *Management Computer Controls* is based on language that dictates venue for causes of action arising out of the contract containing the language. *SAI Insurance Agency, Inc. v. Applied Systems, Inc.,* 858 So. 2d 401 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2543a]. It distinguished cases in which the contracting parties agreed to a specific venue, "for any action or claim between the parties." *Id.*

In the present case, venue applies to actions arising or relating to the assignment of benefits, not to anything at all between the parties. This means that, even if State Farm were a contracting party to the AOB, the mandatory venue selection likely would not be triggered based on the nature of the present lawsuit and the scope of the clause.

The Basic Doctrine of Privity Prevents State Farm from Enforcing the AOB

Florida law is unassailable when it comes to the concept of privity. A person who is not a party to a contract may not enforce its terms because they are not "in privity" with those who formed the contract. *Esposito v. True Color Enterprises Const., Inc.,* 45 So.3d 554 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2297b]. There is no (valid) dispute regarding the identity of the parties to the AOB. They are Ms. Pace and GSD. State Farm is not a party, does not have "privity," and cannot enforce any of its terms.

Therefore, even if the AOB contained language that would trigger the mandatory venue clause based on the nature of the lawsuit, State Farm is not in a position to invoke or enforce it.

Most importantly, this core principle was addressed by at least one appellate court in Florida. The Second District addressed a lack of privity in a similar scenario involving the same defendant:

> The agreements between the homeowners and [a repair company assignee] appear to be mandatory. But State Farm is not a party to those agreements. . . . The assignments did not alter the fact that the homeowners reside in Palm Beach County where the damage occurred and where the critical witnesses are located.

RJG Environmental, Inc. v. State Farm Florida Insurance Co., 62 So.3d 678, 680 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1077a].

State Farm argues that there is authority for the opposite conclusion. Its argument centers on the rule applied in *Antoniazzi v. Wardak,* 259 So.3d 206 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2348a] where a "non-signatory" enforced a mandatory venue clause in a contract.

The appellants in *Antoniazzi* filed a motion to dismiss the complaint for lack of jurisdiction, ". . .alleging that the forum selection clause contained in the agreement was mandatory and unambiguous, and that the exclusive forum for this action was Brazil." *Id.* The appellees countered that the forum selection clause was permissive, not mandatory, and that the ambiguous wording of the agreement

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permitted the filing of the lawsuit in Miami. *Id.* Although two parties were not "signatories" to the agreement, they had close commercial relationships with a signatory (a strategic trading partner of the bank and the financial adviser to the bank) based on the very agreement at issue. *Id.*

The issue in *Antoniazzi* was contract construction—whether the venue selection clause was mandatory and what forums were included. That is not the controlling issue here. The present parties agree that the language of the subject venue clause is mandatory and there is no ambiguity over multiple locations.

The *Antoniazzi* court did, however, address State Farm's contention that a mandatory venue clause could be enforced by someone other than "signatories to the contract." The court stated in a footnote: "[T]his Court has previously held that the mandatory nature of a forum selection clause 'equally applies to the non-signatory defendants due to the fact that the claims arise directly from the agreement, as well as due to the nature of the commercial relationship of the parties as it relates to the agreement itself.' " *Id.* (citations omitted).

At first glance, this footnote dicta seems very supportive of State Farm's position. But a second glance tells us this exception to the privity rule does not apply to the facts of this case. The key to triggering the exception is twofold. First, the claims must arise from the subject agreement. And second, there must be a close commercial relationship between the non-signatories and the signatories. Later in the footnote the court notes, "Here, the actions asserted in the complaint arise directly out of the Banking Agreement, and the only commercial relationship between the parties is the banking relationship governed and established by the Banking Agreement." *Id.*

This is not the situation with the present case. First, the claims for property damage arose from a hurricane and compliance with an insurance policy contract, not some dispute over how benefits were assigned, see discussion above. Second, the signatories and non-signatories don't have the required close commercial relationship. State Farm has no such relationship with GSD and the only relationship it has with Ms. Pace is the insured—insurer relationship that springs from the insurance policy, not the AOB.

Venue is Determined by Florida Statute 47.051

GSD stands in the shoes of its assignor, Ms. Pace. *United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co.,* 173 So. 3d 1025, 1027 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1569a]. To determine venue for this case then, we look to the alternatives available to an insured when suing an insurer for breach of an insurance contract.

Venue arises from either a contract clause (that applies), or if there is no controlling contract clause, the venue statutes. As discussed above, the controlling contract here is the subject insurance policy and State Farm acknowledges that it does not contain a venue selection clause. We, therefore, must look to the venue statutes.

Section 47.051, Florida Statutes (2019), provides: "Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located."

Gadsden County qualifies as a proper venue under the Section 47.051 criteria. It likely is where the cause of action accrued.[3] It is where the property in litigation is located. And State Farm "has, or usually keeps, an office for transaction of its customary business" there.[4]

Accordingly, it is

ORDERED and ADJUDGED that defendant's motion is DENIED. Defendant shall answer the complaint within 20 days from the date of this order.

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[1]The Court is aware of the appellate case law that gives the phrase "relates to" a slightly more inclusive effect than that given to the phrase "arises out of." Nonetheless, even if the presence of the words "relates to" could stretch far enough to connect the AOB to the alleged insurance policy breach here, State Farm's motion would still fail because of the lack of privity.

[2]The contention that State Farm somehow acquires privity to enforce the AOB because the words "insured," "insurance," and "insurance policy" and the claim number appear in the AOB is wholly without merit.

[3]A thorough discussion of determining where a cause of action accrues for purposes of venue when an insured sues an insurer for property damage is beyond the scope of this ruling.

[4]The allegations of the complaint indicate that State Farm (Florida) is a domestic corporation with a business office in Gadsden County.

* * *

Attorney's fees—Proposal for settlement—Counties—School boards—Amount of fees—Considerations—In awarding fees and costs to school board that prevailed in suit brought by student who alleged that board did not take measures to protect him from bullying, court cannot consider equitable principles pertaining to young age of student, fact that he proceeded pro se, or likelihood that he would not have resources to pay significant fee award

KYLECOVEY SMITH, Plaintiff, v. GADSDEN COUNTY SCHOOL BOARD, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 13-874-CA. April 24, 2020. David Frank, Judge. Counsel: Kylecovey Smith, Pro se, Plaintiff. Gwendolyn P. Adkins and William B. Armistead, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS AND FINAL JUDGMENT

This cause came before the Court on defendant's motion for attorney's fees and costs and the Court having reviewed the motion and response, reviewed all submissions supporting and opposing the motion and response, considered the evidence presented and the Court's own knowledge of the case and experience with attorney's fees in the relevant legal community, heard argument of defense counsel and the plaintiff pro se, and being otherwise fully advised in the premises, finds

This case formally began with the filing of the original complaint on August 28, 2013. Plaintiff alleged that the school he was attending was negligent under Florida's common law and based on the violation of Florida Statute 1006.147. Specifically, plaintiff alleged that "Defendant knew or should have known that Plaintiff was and had been bullied by other students, but after notice of such conduct failed to take corrective or remedial measures and Plaintiff was again harmed."

On November 2, 2015, defendant served plaintiff a proposal for settlement in the amount of $2,500.00 and another on October 26, 2018 in the amount of $15,000.00.

Plaintiff rejected both proposals by allowing them to expire without acceptance.

Prior to the jury trial of this case, plaintiff's counsel withdrew for irreconcilable differences and plaintiff insisted on doing the trial himself with the assistance of his mother and against the strenuous advice from the Court to accept a continuance and seek other counsel.

On November 19, 2019, after a two-day jury trial, the jury returned a verdict for the defendant. The defendant was the prevailing party.

On December 16, 2019, the Court entered final judgment in favor of defendant.

On January 15, 2020, defendant filed a motion for attorney's fees and costs based on Florida Rule of Civil Procedure 1.442 and Florida Statutes 768.79 and 57.041.

In response, plaintiff filed a 74-page document titled, "Motion to the court to dismiss defendants Motion for Attorney Fees." Although impressive in size, the "motion" did not serve the plaintiff very well as a response to the pending matter of attorney's fees. Instead, it

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simply reargued the issues decided by the jury, with the added twist of accusing defendant's witnesses of perjury. The motion will be denied under separate cover.

The Court heard argument of counsel for the defendant and the plaintiff, pro se, at a hearing on the motion on March 31, 2020. It is important to note that at the hearing, plaintiff did not offer any evidence or argument why the events and sequence outlined above would not entitle defendant to proposal for settlement fees or prevailing party costs:

> . . .[I]f a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Fla. Stat. 768.79(1) (2019).
>
> The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment. . . . Fla. Stat. 57.041(1) (2019).

Accordingly, the Court issued an order on April 3, 2020 granting defendant's motion as to entitlement to attorney's fees from the date of service of the first proposal for settlement and to prevailing party costs.

It is also important to note that at the hearing, plaintiff also did not present any evidence or argument that disputed or rebutted in any way defendant's presentation as to the amount of fees or costs—the attorney time records, costs itemization, and the reasonable hourly rates sought. The Court spent a considerable amount of the hearing time explaining to the pro se plaintiff that he had to present evidence or legal argument that addressed the issues at hand—reasonable hourly rates and the reasonable amount of time expended. Instead, plaintiff attempted to re-argue the issues of the case that had already been decided by the jury.

The Court, however, expressed concern that 1) there was no testimony by an expert witness supporting the reasonableness of the hourly rate sought and hours claimed, as required in this District, *Capital Health Plan v. Moore,* 281 So.3d 613, 617 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2590a], and 2) that it was not clear whether the Court could consider equitable principles regarding facts such as the young age of the plaintiff, that the plaintiff was pro se for the trial and post-trial motions, and that plaintiff is very likely without the resources to pay a significant fee award. Because of these concerns, the Court reserved its ruling on the amount of fees and costs.

In its April 3, 2020 order, the Court directed defendant provide by no later than April 10, 2020, a supplemental brief on two items—the requirement to present expert testimony and whether equitable principles may be considered.

Defendant filed its Supplemental Memorandum on Attorney's Fees on April 9, 2020. Regarding the requirement of presenting fee expert testimony, defendant conceded this point and cured the deficiency by attaching the affidavit testimony of fee expert Steven Carter to the memorandum. Regarding the Court's authority to consider equitable principles, the Court disagrees that the case cited by defendant stands for an express rejection. However, the Court agrees that there is no apparent statutory, case law, or other authority for the proposition. Accordingly, the Court has determined that it may not rely on equitable considerations, that are not included in the factors listed below, as a rationale for its ruling in the present matter.

Plaintiff filed a voluminous response to defendant's supplemental memorandum that did not factually or legally contest or rebut defendant's evidence on the amount of fees and costs. Instead, plaintiff again attempted to re-argue issues from the trial, made unsupported conclusory statements that the relief requested was excessive, levied personal attacks against the attorneys who withdrew from representing him, the attorneys for defendant, and the Court, and discussed various inapplicable legal tenants and rules incoherently and ad nauseam.

Florida Patient's Compensation Fund v. Rowe remains the polestar case that guides this Court's ruling:

> In determining the hourly rate, the number of hours reasonably expended, and the appropriateness of the reduction or enhancement factors, the trial court must set forth specific findings. If the court decides to adjust the lodestar, it must state the grounds on which it justifies the enhancement or reduction. In summary, in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims.

472 So.2d 1145 (Fla. 1985), modified by *Standard Guaranty Insurance Company v. Quanstrom,* 555 So.2d 828 (Fla. 1990).

"In determining reasonable attorney fees, courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility (currently Rule 4-1.5(b)(1) of the Rules Regulating the Florida Bar)." *Id.* ("Rowe factors"). When determining the reasonableness of the amount of an award of attorneys' fees pursuant to a proposal for settlement, "the court shall consider," along with all other relevant criteria, the factors listed in Rule 1.442(h)(2) of the Florida Rules of Civil Procedure. Fla.R.Civ.P. 1.442.

"The time billed is viewed as the most useful starting point for determining the amount of a reasonable fee. The attorney fee applicant should present records detailing the amount of work performed. Once the prevailing party produces adequate billing records, the fee opponent then has the burden of pointing out with specificity which hours should be deducted." *Rodriguez v. GEICO General Insurance Company,* No. 619CV1862ORL4OGJK, 2020 WL 1451659, at 3 (M.D. Fla. Mar. 25, 2020) (citations and internal quotations omitted); *Centex-Rooney Construction Company, v. Martin County,* 725 So.2d 1255 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D336a].

Conclusory challenges of "duplicative" or "excessive" are insufficient grounds to deduct time entries. *Fleming v. Fleming,* 279 So.3d 763 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2216a].

The Rowe Factors

(A) the time and labor required, the novelty, complexity, difficulty of the questions involved, and the skill requisite to perform the legal service properly;

The Court is aware of the credentials, qualifications, and accomplishments of defense fee expert Steven Carter. He is a very experienced trial attorney who excels in the various areas of litigation that were in play in this case. He has an outstanding reputation in the community. His testimony is very credible. His qualifications are covered in more detail in the beginning of his affidavit testimony. Mr. Carter pointed to the defense tasks that were "complicated and difficult to litigate" due to the absence of an attorney for the plaintiff during the trial and pre-trial period, and because of the nature of the claims involved in the lawsuit—a negligence action based on a statute that addresses bullying.

The court observed the same. The plaintiff was contentious, uncooperative and dilatory, and the issues were robust and required extensive briefing and hearings.

Defendant filed very well-kept and precise time records for all attorneys and paralegals/clerks who are seeking fees. Mr. Carter

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concluded that the number of hours logged for the work completed by the defense team was reasonable. The Court agrees and finds the following to be the reasonable amount of compensable time expended:

Attorneys		Paralegals and Clerks	
Mr. Armistead	578.9	Ms. Marchena	260.3
Ms. Adkins	140.0	Ms. Henry	35.3
Mr. Scharlepp	1.0	Ms. McDowell	10.0
Ms. Dincman	.7	Ms. LaVoy	6.4
Mr. Seagle	.2	Mr. Carlson	2.3
		Ms. Delk	.3

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

Although not directly addressed by defendant, logic dictates that a case that has lasted for as long as this case, and that has required as much litigation as this case, undoubtedly precluded the defense law firm from accepting other cases and assignments.

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

The Court agrees with Mr. Carter that, pursuant to prevailing, relevant market, the hourly rates of the defense team easily could be as high as $450 per hour for the more experienced attorneys. They are, however, only claiming the top rate of $175 per hour, which is in essence a windfall for the plaintiff. There is no doubt that the rates charged by the talented and diligent insurance defense counsel in this circuit are severely depressed for work provided by insurance carriers and other volume clients.

Mr. Carter concluded that the hourly rates being claimed by the defense team are reasonable and similar to that which is customarily charged. The Court agrees and finds the following to be the reasonable hourly rates for the defense team's work on this case, and as adjusted up to account for the passage of time (the increase in experience):

Attorneys		Paralegals and Clerks	
Mr. Armistead	$140 for 341.6 hours	Ms. Marchena	$80 for 167.2 hours
	$145 for 237.3 hours		$85 for 93.1 hours
Ms. Adkins	$165 for 26.6 hours	Ms. Henry	$40 for 35.3 hours
	$170 for 58.1 hours	Ms. McDowell	$80 for 10.0 hours
	$175 for 55.3 hours	Ms. LaVoy	$85 for 6.4 hours
Mr. Scharlepp	$140 for .3 hours	Mr. Carlson	$80 for 2.3 hours
	$175 for .7 hours	Ms. Delk	$85 for .3 hours
Ms. Dincman	$165 for .5 hours		
	$175 for .2 hours		
Mr. Seagle	$165 for .2 hours		

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

The attorneys and staff seeking fees had complete responsibility for the defense of the case and representation of their client for the entire span of six years. The possibility the defendant would have to pay an undetermined sum of money if it lost was not the entire import of the case. Its standards and procedures for monitoring and supervising students were at stake. The result obtained was the maximum result possible—a defense verdict.

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

This was not addressed by defendant.

(F) the nature and length of the professional relationship with the client;

This was not addressed by the defendant.

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

Mr. Carter testified that he ". . .was familiar with and/or [had] reviewed the professional backgrounds" of the attorneys seeking fees, and that he is "also familiar with their reputation and skill." He concluded that their experience, reputation and ability substantiate the hourly rates sought and more. In addition, the Court observed the defense team's efficient handling of the case.

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

There is no indication that the fee was anything but fixed or that the client's ability to pay was dependent in any way on the outcome of the case.

Rule 1.442 Factors

(A) The then-apparent merit or lack of merit in the claim.

This was not addressed by the defendant.

(B) The number and nature of proposals made by the parties.

Defendants served two proposals for settlement as described above. The plaintiff did not serve any.

(C) The closeness of questions of fact and law at issue.

See the discussion in Rowe factor A above.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

There is no indication the defendant unreasonably refused to furnish such information.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

The suit was not in the nature of a test case.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

The amount of the additional delay, cost and expense that the defendant making the proposal reasonably would be have expected to incur if the litigation were to be prolonged at the time the proposal was made was extensive. Indeed, the cost was manifested and can be seen in the current motion.

Finally, the Court finds that each of the costs claimed by defendant were reasonable and necessary to the defense of the case. Moreover, there were no objections filed, or cognizable legal arguments made, regarding the appropriateness of the costs claimed prior to the hearing. See *Field Club, Inc. v. Alario,* 180 So.3d 1138 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D2734b]; *Wilkerson v. Johnson,* 139 So.3d 965 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1212a]. The total compensable costs, therefore, are $8,856.27.

Accordingly, it is ORDERED and ADJUDGED that

1. The motion is GRANTED now as to both entitlement and amount.

2. Defendant is awarded attorney's fees in the amount of $106, 491.00.

3. Defendant is awarded paralegal/clerk fees in the amount of $24, 255.00.

4. Defendant is awarded costs in the amount of $8,856.27.

Pursuant to the evidence presented

IT IS ADJUDGED that defendant, GADSDEN COUNTY SCHOOL BOARD, whose principal address is 631 S. Stewart Street, Quincy, Florida 32351, recover from plaintiff, KYLECOVEY SMITH, whose principal address is 422 Sand Pine Drive, Midway, Florida 32343, the sum of $130,746.00 with costs in the sum of $8,856.27, making a total of $139,602.27, that shall bear interest at the

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rate of 6.66%, for which let execution issue.

* * *

Insurance—Property—Coverage—Based on property owner's deposition testimony that leak in closet at rental property persisted over five months and caused mold, claim falls squarely under policy exclusions for leakage of water that occurs over a period of time and fungus

SPEED DRY, INC., a/a/o Jorge and Carmen Medina, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-001286-O. October 28, 2019. Patricia L. Strowbridge, Judge. Counsel: David R. Heil, David R. Heil, P.A., Winter Park, for Plaintiff. Robert A. Kingsford, Alfano Kingsford, P.A., Maitland, for Defendant.

FINAL SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, STATE FARM FLORIDA INSURANCE COMPANY

THIS MATTER came before the Court on the "Defendant's First Motion for Final Summary Judgment," filed on January 10, 2019, and heard on September 24, 2019. The Court, having reviewed the relevant pleadings, filings, and record evidence, having heard arguments from both counsel, and being otherwise duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

The basic facts of this case are not in dispute. On December 13, 2016, the insureds, Jorge and Carmen Medina, reported a water leak under their insurance policy issued by the Defendant for a loss that manifested with mold and was first found in a closet at the Medinas' Las Palmas Circle rental property. The Medinas later assigned their claim to Speed Dry, Inc. When the Defendant was investigating the claim, it retained Engineering Systems, Inc. to determine the cause and origin of the moisture intrusion. Engineering Systems prepared a report that indicated that the water damage and resulting mold "were caused by the leak from the Qest fitting used on the water supply line to the toilet inside the wall cavity" and "the leak was occurring for at least two months prior to the date of loss." Based on this report, the Defendant denied coverage for the claim and indicated that this occurrence was excluded under the policy.

On February 5, 2018, the Plaintiff filed its "Complaint for Declaratory Relief," requesting that the Court determine coverage for its claims under the insurance policy issued by the Defendant. On April 19, 2018, the Defendant filed its "Defendant's Answer, Affirmative Defenses, and Demand for Jury Trial," wherein it posited that the Plaintiff's requested relief was excluded under the policy. On January 10, 2019, the Defendant filed its "Defendant's First Motion for Final Summary Judgment," and the Court heard the motion on September 24, 2019 and took the matter under advisement. This Order follows.

STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. *Sunshine State Ins. Co. v. Jones,* 77 So. 3d 254 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D164a].

The Defendant argues that the insurance policy contains the following provisions that preclude the Plaintiff's suit as a matter of law:

SECTION I—LOSSES INSURED
COVERAGE A—DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as for provided in **SECTION I—LOSSES NOT INSURED.**

* * *

SECTION I—LOSSES NOT INSURED

* * *

1. We do not insure for loss to the property described in Coverage A and Coverage B either consisting of, or directly and immediately caused by, one or more of the following:

* * *

h. continuous or repeated seepage or leakage of water or steam from a:

(1) heating, air conditioning or automatic fire protective sprinkler system;

(2) household appliance; or

(3) plumbing system, including from, within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings, or floors.

Which occurs over a period of time;

i. wear, tear, marring, scratching, deterioration, inherent vice, latent defect and mechanical breakdown;

j. rust, mold, or wet or dry rot;

* * *

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

* * *

(d) Neglect, meaning neglect of the insured to use all reasonable means to save and preserve property at and after the time of a loss, or when the property is endangered.

* * *

3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1 and 2 immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:

* * *

(b) defect, weakness, inadequacy, fault or unsoundness in:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, construction, grading, compaction;

(3) materials used in construction or repair; or

(4) maintenance

Of any property (including land, structures, or improvements of any kind) whether on or off the residence premises.

* * *

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.

* * *

g. Fungus, including the growth, proliferation, spread or presence of fungus, and including:

(1) any loss of use or delay in rebuilding, repairing, or replacing covered property, including any associated cost or expense, due to interference at the described premises or location of the rebuilding, repair or replacement of that property by fungus;

(2) any remediation of fungus, including the cost or expense to:

(a) remove or clean the fungus from covered property or to repair, restore or replace that property;

(b) tear out and replace any part of the building or other property as needed to gain access to the fungus;

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(c) contain, treat, detoxify, neutralize or dispose of in any way respond to or assess the effects of the fungus; or

(d) remove any property to protect it from the presence of or exposure to fungus;

(3) the cost of any testing or monitoring of air or property to confirm the type, absence, presence or level of fungus, whether performed prior to, during or after removal, repair, restoration or replacement of covered property.

In addition to the cited relevant portions of the policy, the Defendant also relies on Jorge Medina's deposition testimony, wherein Medina indicated that his tenant complained of some black areas to him, and he went to the property and cleaned the affected areas with Clorox and painted over them. Medina stated that he believed that fixed the problem, until his tenant reported that the black areas returned. Medina also testified in his deposition that the leak had been ongoing for around five months. He also admitted that the walls and baseboards were deteriorating and moldy, caused by a long term leak in the house, which caused mold to develop in the walls of the house.

Determining whether alleged damage is subject to an exclusionary clause in an insurance policy is a question of law, and therefore appropriate in a motion for summary judgment. *Fayad v. Clarendon Nat. Ins. Co.,* 899 So. 2d 1082, 1085 (Fla. 2005) [30 Fla. L. Weekly S203a]. Additionally, lain insurance contract must be construed in accordance with the plain language of the policy." *Harrington v. Citizens Prop. Ins. Co.,* 54 So. 3d 999, 1001 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2838a]. Finally, a plaintiff/assignee of insurance benefits is only entitled to those benefits to which the assignor is entitled. *See Law Office of David J. Stern, P.A. v. Security Nat. Svg. Corp.,* 969 So. 2d 962, 968 (Fla. 2007) [32 Fla. L. Weekly S396a].

When tempering Medina's deposition testimony against the policy exclusions, it becomes clear that the claim squarely falls within several of the policy's exclusions. For instance, Medina testified that the leak persisted for around five months, which the policy expressly indicates is not covered. The same is true of Medina's testimony regarding mold in the house and the fungus policy exclusion. Therefore, the Court finds that the Plaintiff's damages are precluded by the insurance policy issued by the Defendant as a matter of law.

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "Defendant's First Motion for Final Summary Judgment" is **GRANTED**.

2. Final judgment in this cause is **hereby entered in favor of the Defendant, State Farm Florida Insurance Company.** The Plaintiff, Speed Dry Inc., shall take nothing by this action against the Defendant, and the Defendant shall go hence without day.

The Court **reserves jurisdiction** over any claims made or to be made by said Defendant for an award of costs and attorney's fees against the Plaintiff.

* * *

Criminal law—Lewd and lascivious molestation and conduct—Evidence—Confession—Trial court cannot determine that defendant's admissions to molesting his three-year-old son, made during interview preparatory to a pre-employment polygraph examination, are trustworthy where there is no competent substantial evidence that corroborates existence of crime and defendant has history of delusions and hallucinations and recent mental health diagnosis—Motion to admit admissions is denied

STATE OF FLORIDA, Plaintiff, v. SAM CHACKO, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CF-009094-A-O, Division 16. December 5, 2019. Elaine A. Barbour, Judge. Counsel: Dave Cacciatore, for State. Jay Rooth and Andrew Moses, Moses and Rooth Attorneys at Law, Orlando, for Defendant.

ORDER ON MOTION REGARDING ADMISSIBILITY OF ADMISSION PURSUANT TO 92.565

THIS CAUSE having come on to be heard on October 28, 2019 and December 4, 2019 upon the State's Motion and this Court having taken testimony, listened to the audio in evidence, heard argument and being otherwise advised finds as follows:

A. As part of a pre-employment examination on 5/22/2019 the Defendant in a pre-polygraph examination made certain admissions of inappropriate sexual conduct against family members as well as his minor son, E.C. E.C. is 3 years of age.

B. As a result of these admissions, an investigation was launched resulting in the charged conduct involving solely E.C.

C. The Defendant is charged by State's Information as follows: Counts 1 and 2: Lewd or Lascivious Molestation in violation of F.S. 800.04(5)(b) and 775.082(3)(a)(4) and Count 3: Lewd or Lascivious conduct in violation of F.S. 800.04(6)(b).

D. At hearing the State presented testimony of Detective Luker and polygraph examiner Brian Gunter dealing with the admissions made by the Defendant and the circumstances surrounding same. The State also introduced into evidence an audio of the Defendant's interview and admissions as well as a copy of his D.A.V.I.D. printout. It appears to this Court that the Defendant's statements were freely and voluntarily given without threat or coercion.

E. The Defendant presented testimony of Dr. Alan Grieco a psychologist and a stipulated expert in psychosexual evaluations. He testified he had evaluated the Defendant. In so doing he reviewed some police reports, spoke to the Defendant, took histories of the Defendant's behaviors from his wife and brother and administered psychological tests to include the Abel assessment. Dr. Grieco opined that the Defendant's sexual interest was limited to adults, he showed no interest in prepubescent children or toddlers. He further opined that the Defendant suffered from Schizoaffective Disorder Bipolar Type, which had been previously undiagnosed. He described a history of delusions, hallucinations and confused speech, which were supported by his wife and brother. Dr. Grieco did not advance any opinion as to whether the Defendant was actively delusional or psychotic at the time of his interview but did state that his admissions or statements are "characteristic of delusions with people with this disorder."

F. No other evidence was presented.

G. This Court has reviewed the evidence and case law presented as well as researched the issue itself. While the Defendant's statements are very troubling and should be the subject of a DCF investigation, the Court is constrained to deny the State's Motion. Apart from the Defendant's admissions there is no other competent substantial evidence which corroborates the existence of a crime. That taken together with the Defendant's mental health diagnosis and history of delusions and hallucinations, the Court cannot find that the statements sought to be introduced are trustworthy.

The State argues that it has introduced vis a vis D.A.V.I.D. other evidence which tends to prove the elements of the crime but the State misses the focus, i.e. trustworthiness vis a vis other corroborating evidence, not trustworthiness vis a vis the statement itself or whether the State can prove other elements of the crime such as the Defendant's age. F.S. 92.565 states, in pertinent part, ". . .(3) Before the court admits the defendant's confession or admission, the state must prove by a preponderance of the evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement by the defendant. . . " (Emphasis added)

So the statute plainly states that it is corroborative evidence which, in part, tends to establish the trustworthiness of a statement. The State points to the dissent in *State v. Tumlinson,* 224 So.3d 766 (Fla 2nd DCA 2016) [41 Fla. L. Weekly D2589b] for its argument that the evidence presented in the case at bar is sufficient for this court to find the statements trustworthy. As noted on the record, the dissent in

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Tumlinson pointed to more corroborating evidence in that case than exists in the case at bar. The majority, on pages 769 and 770, pointed out that it had previously held that "a confession cannot corroborate itself". While the Defendant's admission in the case at bar may be detailed and voluntary, it cannot corroborate itself as the State seems to posit.

As with the *Tumlinson* court this court also finds the court's application of F.S. 92.565 in the case of *Geiger v. State,* 907 So.2d 668 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1815f] to be instructive. In that case the victims were incapacitated. As the victim in the case at bar, they were unable to relate the abuse. *Geiger* confessed his alleged crimes on three (3) separate occasions to three (3) separate individuals so it can be argued that the State's case in terms of the admissions was stronger than the case at bar. Applying F.S. 92.565 the *Geiger* court reversed the trial court finding the trial court erred when it viewed the statements themselves to be credible as there was no other corroborating evidence that *Geiger* committed any crime. Similarly in the case at bar other than the Defendant's statements there is no other corroborating evidence of a crime.

WHEREFORE, for the reasons stated above, the Court denies the State's Motion. There was some loose reference during the hearing to the matter having been reported to the Department of Children and Family Services. The State is directed to follow up and insure that has happened and if it has not, then the Office of the State Attorney is directed to make report.

* * *

Liens—Motor vehicles—Possessory lien—Motor vehicle repair shop—Enforcement of lien by sale of motor vehicle—Owner's action against lienor—Defendant-lienor must be represented by attorney licensed to practice in Florida—Section 713.585(5) obviates necessity for service of process to initiate this special statutory proceeding—Sale of vehicle cancelled—Liens quash/extinguished, and vehicle to be returned to owner—Attorney's fees and costs awarded to prevailing plaintiff

CHRISTEAN MONIKE JOHNSON, a/k/a CHIRSTEAN JOHNSON, Plaintiff, v. J & D AUTO AUCTION SALES, LLC, and BEST LIEN SERVICES, INC. As Agents Of J & D Auto Auction Sales, LLC, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-29156-CA-01, Section CA 21. November 6, 2018. Final Order November 16, 2018. Order on Attorney's Fees February 21, 2019. David C. Miller, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff.

ORDER

- The Defendant-Lienor must be represented by an attorney licensed to practice in Florida per Florida law, therefore proceeding without an attorney any further leaves the Defendant-Lienor at risk of being sanctioned including a judgment in favor of the Plaintiff. David Berry has appeared pro
- The Court also finds that Section 713.585(5) obviates the necessity for service of process [redacted] to initiate this special statutory proceeding.

ORDERED on November___, 2018.

CIRCUIT JUDGE

Service Page Below:

ORIGINAL

JUDGE DAVID C. MILLER

Page 1 of 2

CHRISTEAN MONIKE JOHNSON , a/k/a CHIRSTEAN JOHNSON, Plaintiff, v. J & D AUTO AUCTION SALES, LLC, and BEST LIEN SERVICES, INC. As Agents Of J & D Auto Auction Sales, LLC Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-29156-CA-01, Section CA 21. November 6, 2018. David C. Miller, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff.

ORDER

2018 NOV -6 AM 12:

FILE FOR RECORD

The November 7, 2018 Sale of the 2011 BMW [redacted] by Best Lien Services on the Notice of Lien presented by the Defendant-Lienor, J & D Auto Auction Sales, LLC is hereby CANCELLED, and Notice of lien is stricken until further order of the Court. The Defendant-Lienor J & D Auto Auction Sales, LLC is prohibited from filing or placing any liens on the vehicle described above while this action is Pending. Any party or entity including any agents of the Parties that violates this Order may face Sanctions from the Court.

ORDERED on November___, 2018.

CIRCUIT JUDGE

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JUDGE DAVID C. MILLER

Page 1 of 2

FINAL ORDER GRANTING JUDGMENT IN THE PLAINTIFF'S FAVOR

Vehicle Sale Is Permanently Cancelled, Liens Are Quashed/Extinguished, And The Vehicle Must Be Returned To The Plaintiff/Owner At No Fees Or Costs

1. Judgment is entered in the Plaintiff's favor as more fully detailed below and the Court reserves ruling on attorneys' fees and costs.

2. Defendants J&D Auto Auction Sales, LLC and Best Lien Services, Inc. must release the vehicle at issue, a **2011 BMW Vehicle Identification Number (VIN) #** [Redacted] to the **Plaintiff Christean Johnson also known as Chirstean Johnson or an agent of hers,** preferably a tow truck company. The Defendants shall make prompt arrangements to hand over the keys to the vehicle promptly as well as provide meaningful access for the vehicle's removal. The Court recommends Law Enforcement to be involved for the safety and benefit of all involved.

3. The liens at issue in this case (**Lien Case No. X02603** issued on August 10, 2018 for the Sale date of August 29, 2018 and another lien issued on October 19, 2018 in the same case number for a Sale Date of November 7, 2018) and any other liens imposed by the Defendants or their agents on the Plaintiff are hereby Quashed/Extinguished and any sale date, including any pending sale date, is PERMANENTLY CANCELLED as the liens no longer have any legal effect.

4. Plaintiff is not obligated to make any payments for the release of the vehicle to anyone as the Defendants must immediately release the vehicle at no fees or costs to the Plaintiff.

5. The Plaintiff shall provide the Defendants four (4) hours' notice and any relevant contact information prior to retrieving the vehicle. To make arrangements to retrieve the vehicle, the Plaintiff may contact the Defendant's Attorney, Donald Kreke, ESQ., at [redacted].com and/or [redacted].

6. The Court also retains jurisdiction to enforce this Final Order

ORDER GRANTING PLAINTIFF ATTORNEY'S FEES AND COSTS

The PLAINTIFF's Motion For Attorney's Fees and Costs is

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GRANTED. The PLAINTIFF is awarded Attorney's Fees and Costs pursuant to Section 713.585 and is also awarded costs pursuant to Section 57.041. The PLAINTIFF, who obtained the full relief sought, that is the return of the vehicle without any obligation or payment to be made to the Defendant, is the prevailing party in this matter. Furthermore, this Court's Final Judgment entered on November 16, 2018, which details this Court's findings in this matter provides ample support for granting attorney's fees and costs to the PLAINTIFF as the PLAINTIFF required the aid and guidance of an attorney to obtain the relief sought.

The determination of the amount of attorney's fees and costs shall be determined at a later date to be coordinated with this Court and the parties.

* * *

Creditors' rights—Statutes authorizing judgment creditor to levy upon "any property" of debtor "not exempt" from execution authorizes plaintiff to execute on choses in action owned by debtor, including debtor's claim against plaintiff itself—In instant case, court finds nothing inequitable in allowing judgment creditor with a judgment exceeding $15 million to execute upon debtor's choses in action, including debtor's claim against the judgment creditor

LYON FINANCIAL SERVICES, INC., Plaintiff, v. NATIONAL MEDICAL IMAGING, LLC, et al, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No: 2015-023495-CA-01, Section CA43. April 28, 2020. Michael Hanzman, Judge. Counsel: Patrick G. Brugger, John W Bustard, and Jack C. McElroy, Shutts & Bowen LLP, Miami, for Plaintiff. Paul J. Battista and William B. Blum, Miami, for Defendants.

CORRECTED ORDER GRANTING PLAINTIFF'S MOTION TO SELL CHOSES IN ACTION[1]

Presently before the Court is Plaintiff's Motion to Sell Choses in Action (the "Motion"). The Court, upon careful consideration of Plaintiff's Motion, Defendants' Response, and Plaintiff's Reply, and after entertaining argument of counsel, grants the Motion as: (a) pursuant to Florida Statutes authorizing a judgment creditor to levy upon "any property" of the debtor "not exempt" from execution, Plaintiff has a statutory right to execute on this asset given that it is admittedly "property" of the debtor, and it is admittedly not legislatively or constitutionally "exempt" from execution; and (b) the Court declines to exercise any discretion it possesses to prevent Plaintiff from executing on this non-exempt asset, seeing absolutely no reason why it would be impelled to exercise such discretion under the circumstances of this case.

BACKGROUND

On May 27, 2015, Plaintiff, U.S. Bank N.A., as successor in interest to Lyon Financial Services, Inc. ("Plaintiff" or "U.S. Bank"), obtained a Judgment against National Medical Imaging, LLC ("NMI") and National Medical Imaging Holding Company, LLC ("NMI Holding"), jointly and severally, in Pennsylvania state court in the amount of $12 million (the "Judgment"). The Judgment was based on NMI's and NMI Holding's breach of a Guaranty under which they guaranteed the payment of equipment lease debt.

In 2008, when the guaranty action was filed in a Pennsylvania state court, NMI was operating a medical imaging business in Pennsylvania. NMI ceased operating in 2009, and Plaintiff has not been able to find any real estate or tangible personal property owned by NMI or NMI Holding located in Pennsylvania or elsewhere. NMI has two members, Maury Rosenberg (who is the managing member and owns 1% of NMI) and his wife Sara Rosenberg, as Trustee of the Douglas Rosenberg 2004 Trust (which owns 99% of NMI). Both reside in Miami, Florida. NMI Holding is a wholly-owned subsidiary of NMI. Maury Rosenberg, the managing member of NMI, manages both NMI and NMI Holding from his home in Miami, Florida. Hereafter, NMI and NMI Holding will be referred to collectively as "NMI."

On October 13, 2015, U.S. Bank registered the Pennsylvania Judgment in this Court, along with the statutorily required creditor affidavit. U.S. Bank utilized the procedure for domesticating sister state judgments under Fla. Stat. § 55.505 *et seq.* NMI never objected to the recognition of enforcement of the Judgment in this Court or sought to stay the enforcement of the Judgment. On July 3, 2019, this Court entered an order authorizing post-judgment execution. NMI never objected to the order for execution. U.S. Bank's Judgment has not been paid, in whole or in part. It has been accruing interest at the rate of 6% per annum, the rate applicable to Pennsylvania state court judgments. That amounts to $720,000 per year. The amount presently due on the Judgment (as of April 17, 2020) is $15,525,041.02, without including post-judgment attorney's fees and costs. The per diem interest amount is $1,972.6027.

In its Motion, brought pursuant to Fla. Stat. § 56.29, U.S. Bank now seeks to collect the Judgment, at least in part, through execution on certain choses in action owned by NMI (collectively, the "Choses in Action"), including NMI's claim against U.S. Bank itself (and others) alleging that, in November 2008, U.S. Bank (and others) improperly initiated a bad faith involuntary bankruptcy petition against NMI (the "Bad Faith Claim").[2] NMI's choses in action against U.S. Bank (and others) appear to be NMI's sole remaining assets. U.S. Bank seeks to credit bid at an auction sale of the Choses in Action. If it is the successful bidder, the amount of its credit bid will reduce the judgment and U.S. Bank will obviously not proceed with the case against itself. Rather, it will instead elect to discontinue the action (at least the claims against itself) thereby eliminating the need to expend any further resources in the defense of those claims and, at the same time, eliminate any possible exposure it may have. And if U.S. Bank is not the successful bidder, any amount paid by a third party to acquire the Choses in Action will go toward satisfaction of the judgment. NMI has objected to U.S. Bank's Motion on the following grounds: (1) Miami, Florida is an improper venue for these proceedings supplementary based on a contractual waiver provision contained in NMI's Guaranty; and (2) as a matter of equity and/or public policy, U.S. Bank should not be permitted to execute on any Choses in Action against itself. The Court disagrees.

ANALYSIS

The enforcement of foreign judgments is not a matter of mere grace. *Archbold Health Servs., Inc. v. Future Tech Bus. Sys., Inc.*, 659 So.2d 1204, 1205-06 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1884b]. Instead, it springs from the full faith and credit clause, Article IV, section 1, United States Constitution, and its implementing statute, 28 U.S.C., section 1738, which require every state to give the same effect to judicial proceedings as the rendering state gives them. *Id.* The Florida Enforcement of Foreign Judgments Act, Fla. Stat. § 55.501 *et seq.* (the "FEFJA") satisfies this requirement by providing a procedure for the holder of a foreign judgment to record the judgment and enforce it in Florida courts under Florida rules as if it were a Florida judgment. *See Pratt v. Equity Bank, N.A.,* 124 So. 3d 313, 31516 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D2075a]; *see also* Fla. Stat. § 55.503 (providing that a foreign judgment may be recorded in the office of the clerk of the circuit court of any county, and, once so recorded, the judgment may be enforced as a judgment of a circuit court of this state); *and Fazzini v. Davis,* 98 So.3d 98, 102 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1659a] ("[w]hen a foreign judgment is domesticated, it becomes enforceable as a Florida judgment.").

Here, U.S. Bank has domesticated the Judgment pursuant to the FEFJA and obtained an order authorizing execution. The Judgment

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is therefore now enforceable as a Florida judgment in the courts of this state. For this reason, and because NMI, through its members, is present in Miami, Florida, NMI's venue objection is without merit.[3] These proceedings supplementary have been commenced to enforce what is now a Florida judgment, and the contractual venue provision, contained in NMI's Guaranty, is not applicable to these post-judgment proceedings. Further, the contractual venue provision is, by its terms, not binding on Plaintiff but only on NMI.

Because the Judgment is now enforceable as a Florida judgment, U.S. Bank is entitled to enforce the Judgment pursuant to Florida law. Under Florida law, creditors holding unsatisfied judgments are entitled to use statutory proceedings supplementary to assist them in collecting on those judgments. Specifically, Section 56.29, Florida Statutes, provides: "When any judgment creditor holds an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment creditor may file a motion and an affidavit so stating, identifying, if applicable, the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment creditor is entitled to these proceedings supplementary to execution." Fla. Stat. 56.29(1). Section 56.29 further states that the judgment creditor may pursue execution of "any property" of the judgment debtor that is not "exempt from execution." Thus, Section 56.29(2) provides that the judgment creditor, in a motion or affidavit shall "describe **any property of the judgment debtor not exempt from execution** in the hands of any person or any property, debt, or other obligation due to the judgment debtor which may be applied toward the satisfaction of the judgment." (Emphasis added). Similarly, Section 56.29(6) provides: "The court may order **any property of the judgment debtor, not exempt from execution,** or any property, debt, or other obligation due to the judgment debtor, in the hands of or under the control of any person subject to the Notice to Appear, to be levied upon and applied toward the satisfaction of the judgment debt." (Emphasis added).

The foregoing statutory language makes it clear that U.S. Bank has the right to execute on any property of NMI that is not exempt from execution. And "[e]xemptions are creatures of statute, unknown to the common law . . . . They rest on constitutional or statutory provisions and cannot be created by contract. Thus, assets are generally not exempt from claims of creditors unless specifically exempted by statute; in the absence of a statutory exemption provision, all of a debtor's property must be subject to the payment of debts." 35 C.J.S. *Exemptions* § 1. Our State Constitution, at Article X, Section 4, establishes a constitutional exemption from execution for a person's homestead and personal property up to a value of $1,000. The Florida legislature, in turn, has enacted other clearly defined statutory exemptions which include, among other things, a judgment debtor's life insurance policies, the cash surrender values of life insurance policies, the proceeds of annuity contracts, disability income benefits under any policy or contract of life, health, accident, or other insurance, pension money and certain taxexempt funds or accounts, and a judgment debtor's interest, not to exceed $1,000 in value, in a single motor vehicle. *See* Fla. Stat. §§ 222.01 *et seq.*

There is, however, no Constitutional or statutory exemption from execution for intangible property, and no specific exemption for choses in action or, more particularly, choses in action the debtor may possess against the judgment creditor itself. For that reason this Court would be disinclined to adopt, as a matter of discretion, any judicially-created exemption based on public policy considerations when, as here, the Florida legislature has expressly mandated that "any property" not exempt may be subject to execution and has also proscribed the specific types of property that are exempt from execution, without including an allowance for judicially-created exemptions based upon any public policy considerations. The Florida legislature has specifically identified what property may be executed upon and what property is exempt, and it is not the Court's prerogative to modify, extend, limit or alter its statutory commands. That is a matter of public policy for the Florida legislature to determine, which it has done, and the Court would be loathe, as a matter of "discretion," to find that a chose of action that a debtor possesses against the judgment creditor should be should be "added" to the Legislature's "list" of exempt property (which is essentially what NMI is asking the Court to do). If the Legislature wanted to place this type of asset beyond the reach of judgment creditors (and the Court can see no reason why it would) it knows how to exempt property and has obviously decided that this "asset" is undeserving of statutory protection. *See McDonald v. Roland,* 65 So. 2d 12, 14 (Fla. 1953) ("[w]here the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it, out of any consideration of policy or regard for untoward consequences."); *and Baldwin v. Henriquez,* 279 So. 3d 328, 336 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2311a] (discussing the constitutional homestead exemption) ("[f]inally, where we can discern the constitutional provision's plain, ordinary, and unambiguous meaning, we cannot modify the will of the people in their passage of the constitutional provision based on policy considerations."). *See also Bankston v. Brennan,* 507 So.2d 1385, 1387 (Fla. 1987) ("[w]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch.").

Notwithstanding the foregoing, and in light of the fact that there is no contrary authority from any other Florida appellate court, the Court recognizes that it is bound to follow the holding of the Fourth District Court of Appeal in the case of *Donan v. Dolce Vita SA, Inc.,* 992 So. 2d 859 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2317a]. In the *Donan* case, the Fourth District held that a trial court has the equitable discretion to refuse to allow a judgment creditor to procure a sheriff's sale of a judgment debtor's chose in action against the judgment creditor itself. *Id.* at 861. The Fourth District then found that the trial court had not abused its equitable discretion in doing so under the specific facts of the case, where the judgment creditor was trying to purchase the judgment debtor's claim against itself using a small judgment ($16,954.48) for fees and costs the judgment creditor had incurred in having to respond to the judgment debtor's improperly-filed lis pendens in the underlying action. *Id.* at 860-861 ("[w]e accordingly conclude, that ***under these specific facts,*** the trial court *did not abuse its discretion* in quashing the sheriff's sale.") (Emphasis added). This Court, like any trial court, would never look a gift horse in the mouth and will gladly accept any "discretion" afforded it by our appellate courts. But it sees no conceivable reason to exercise that discretion here in order to block U.S. Bank's execution.

First, and unlike some other courts that have confronted the question, this Court finds nothing inherently "inequitable" or "unfair" about a judgment creditor executing on a chose of action against itself. Whether a judgment creditor executes on a chose of action the debtor has against the judgement creditor itself, or executes on a chose of action the debtor has against a third party, the result is the same from the perspective of the debtor. The asset is sold at a judicial sale for its "market value," the buyer acquires the chose of action, and the debtor loses ownership of the asset. So whether a judgment creditor executes upon a chose of action the debtor has against the judgment creditor itself, or a chose of action the debtor has against a third party, the debtor winds up in the exact same place: namely, without the asset. Furthermore, whether a judgment creditor buys a chose of action against a third party and pursues the claim, or buys a chose of action against itself and discontinues the claim, the debtor is not impacted.

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The asset is sold at a judicial sale and any amount it brings, either through a credit bid or cash sale, is credited against the judgment. And what the creditor does with the asset afterwards has no effect on the debtor and is none of the debtor's business. It is no different than any other levy. If a creditor executes upon a debtor's car, buys it at a judicial sale, and drives it off a cliff, the debtor is not affected one iota. Nor is the debtor affected if the creditor, instead of driving the car off a cliff, sells it for a handsome profit. Likewise, a debtor is in no way adversely affected if a creditor executes upon a chose of action against itself, successfully acquires it via a credit bid, and dismisses the case. The bottom line is that there is nothing inherently "inequitable" about a judgment creditor executing upon a chose of action against itself and, if it successfully acquires the asset at the judicial sale, discontinuing the case in order to cut off any further expenses or exposure.

Although the Court finds nothing inherently "inequitable" in allowing a judgment creditor to execute upon a chose in action against itself, it recognizes, as did the *Donan* court, that there could be circumstances where, given the peculiar facts of the case, such an execution may appear problematic: that being an instance where a creditor holding a small judgment seeks to execute upon a significant (and meritorious) claim against itself. One could argue that in this *unusual* circumstance a court might, as a matter of discretion, consider blocking the execution. Of course, even in that case, one could also persuasively argue that the debtor, in order to preserve that valuable chose in action, can simply satisfy the judgment. And even if the debtor lacks the ability to do that, if the chose of action is truly valuable, the debtor should be able to secure litigation financing in order to satisfy the "small" judgment the creditor seeks to execute upon, and thereby retain the claim. In any event, and as the Court pointed out earlier, *Donan* affords trial courts the discretion to consider the particular facts of each case and, *if* appropriate, prevent execution of a chose of action against the judgment creditor itself when necessary to prevent an unfair **windfall.** Indeed the Fourth District, in reaffirming the general holding of the *Donan* case and distinguishing it from the facts at issue in a later decision, recognized as significant the fact that the judgment creditor in *Donan* had been attempting to obtain a "*windfall*" by using a small claim to eliminate the other party's much larger claim. *Myd Marine Distrib., Inc. v. Int'l Paint Ltd.,* 201 So. 3d 843, 845-46 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2364a] ("[u]nlike the judgment creditor in *Donan,* [the judgment creditor here] is not the defendant in the Lauderdale Marine case and is not seeking to have [the judgment debtor's] rights transferred to dismiss the case ***and obtain a windfall***.") (emphasis added).

Under the specific facts of this case the Court, in the exercise of its equitable discretion, sees absolutely no reason why it should not grant U.S. Bank's Motion and order a sale of NMI's Choses in Action, including NMI's Bad Faith Claim against U.S. Bank, to satisfy, in whole or in part, U.S. Bank's Judgment. Unlike the *Donan* case, U.S. Bank's Judgment is not a small judgment for fees and costs obtained in the underlying action, but instead a more than $15 million Judgment arising out of NMI's default on a commercial guaranty that has gone unpaid for nearly 5 years (with the underlying debt having been owed since 2008). Further, NMI's choses in action appear to be its only assets, since no other assets have been located by U.S Bank nor offered by NMI to satisfy the Judgment.[4] This case also does not involve an attempt by U.S. Bank to obtain a "windfall" by seeking to dismiss NMI's Choses in Action. Again, U.S. Bank has a substantial judgment against NMI in excess of $15 million. NMI has offered no evidence even suggesting (let alone proving) that the value of its Choses in Action, including the Bad Faith Claim, come close to or exceed this amount. To the contrary, the Bad Faith Claim U.S. Bank seeks to execute upon appears to have little value in light of the fact that summary judgment has already been entered against NMI and in favor of U.S. Bank on that claim. The summary judgment is currently on appeal, but at this point the primary benefit U.S. Bank will realize if it successfully acquires this asset, and dismisses the case, is the elimination of any further fee/expense outlay. That is hardly a windfall when compared against an unsatisfied $15 million judgment. And again, the Court does not find that the value of NMI's Bad Faith Claim is all that pertinent to its analysis or that it should provide any grounds for depriving U.S. Bank of the opportunity to have the asset sold in order to satisfy its Judgment. If NMI's Bad Faith Claim against U.S. Bank is, in fact, valuable, then presumably someone will pay a substantial amount of money for it, which money can be used to satisfy, in whole or in part, U.S. Bank's Judgment against NMI (which is to NMI's benefit). And, if U.S. Bank credit bids and acquires the Bad Faith Claim, U.S. Bank's winning credit bid will be applied towards the Judgment and the amount owed by NMI to U.S. Bank will be reduced, thereby relieving NMI of some or all of its liability (again to NMI's benefit). Also, if NMI believes that the value of its Bad Faith Claim exceeds the value of the Judgment, then NMI is, of course, free to bid on the claim and buy it (and presumably NMI could obtain litigation funding for this purpose if the Bad Faith Claim were, in fact, so valuable).

Based on the foregoing, the Court finds nothing inequitable about allowing U.S. Bank, with an over $15 million Judgment, to execute upon NMI's Choses in Action, including the Bad Faith Claim against U.S. Bank. As a general matter of Florida law, a judgment debtor's choses in action are subject to execution pursuant to Florida's proceedings supplementary statute, Fla. Stat. § 56.29. *See*, *e.g., Myd Marine,* 201 So. 3d 843, 845-46 (holding that a chose in action is "property" within the meaning of Fla. Stat. § 56.29); *see also Gen. Guar. Ins. Co. of Fla. v. DaCosta,* 190 So. 2d 211, 213-214 (Fla. 3d DCA 1966) (holding that choses in action may be reached in proceedings supplementary); *and Puzzo v. Ray,* 386 So. 2d 49, 49 (Fla. 4th DCA 1980). The Florida Supreme Court has further held that this proceedings supplementary statute "should be given a liberal construction so as to afford to the judgment creditor the most complete relief possible." *See Richard v. McNair,* 121 Fla. 733, 742-43, 164 So. 836, 840 (1935); *see also Gen. Guaranty Ins. Co. of Fla. v. DaCosta,* 190 So. 2d 211, 213 (Fla. 3d DCA 1966) (same) (*citing, among others, Ryan's Furniture Exchange v. McNair,* 162 So. 483 (1935)); *and Neff v. Adler,* 416 So. 2d 1240, 1242 (Fla. 4th DCA 1982) (same) (*quoting Richard v. McNair*) (superseded by statute on other grounds). And as the Court said earlier, there is simply nothing inequitable about a judgment creditor executing on a judgment debtor's chose in action against itself. A debtor's "day in court" is nothing more than an asset, just like any other asset owned by the debtor. If judgment creditors can deprive judgment debtors of their real estate, their cars, their stock certificates, their jewelry and their other assets, including their choses in action against third parties (all of which are likely sold at sheriff's sales or auction for less than what the judgment debtor believes them to be worth), the Court sees absolutely no reason why a judgment debtor, who is not satisfying a lawfully entered judgment, cannot be deprived of a chose of action against the judgment creditor itself. The Court sees nothing remotely inequitable about it. *See Applied Med. Techs., Inc. v. Eames,* 44 P.3d 699 (Utah 2002) (permitting a judgment creditor to execute on the judgment debtor's claims against him, and, in so doing, overruling the judgment debtor's public policy and constitutional (open courts) objections: "Under the open courts provision [of the constitution], there is no appreciable difference between a defendant purchasing claims against itself and another purchasing those claims. In either case, the original plaintiff is precluded from pursuing those claims.").

Finally, and as the Court said earlier, it sees absolutely no reason to

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exercise its discretion and block U.S. Bank's legislatively authorized execution given the facts of this case, as there has been no evidence presented suggesting that it would be inequitable to allow U.S. Bank to execute on NMI's Bad Faith Claim against U.S. Bank itself (or any of NMI's other Choses in Action). And applying Fla. Stat. § 56.29, as plainly and clearly written, affords U.S. Bank relief explicitly authorized by the Legislature, consistent with our Supreme Court's mandate that these statutes be liberally construed in order to carry out their intended purpose. Accordingly, the Court grants Plaintiff's Motion.

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

1. Plaintiff's Motion to Sell Choses in Action is hereby **GRANTED**.

2. There is currently due and owing upon the Judgment the total amount of $15,525,041.02 which is comprised of (i) principal in the amount of $12,000,000.00, and (ii) post-judgment interest at 6% from May 27, 2015 through April 17, 2020 totaling $3,525,041.02 (with interest accruing at $1,972.6027 *per diem* thereafter) (the "Total Amount Owed").

3. The Miami-Dade County Police Department Governmental Services Bureau's Court Services Section shall conduct an auction, noticed and conducted in a manner **consistent** with the provisions of Fla. Stat. § 56.21, to take place at a time determined by U.S. Bank, of the following property:

> All right(s), title(s), and interest(s) in and to the choses in action of National Medical Imaging, LLC and National Medical Imaging Holding Company, LLC asserted in the following cases, including but not limited to the Bad Faith Claim defined above:
>
> *National Medical Imaging, LLC, et al. v. U.S. Bank, N.A., et al.,* Case No. 2:16-cv05044-CMR in the United States District Court for the Eastern District of Pennsylvania; and *National Medical Imaging, LLC and National Medical Imaging Holding Co., LLC, Appellants v. U.S. Bank, N.A., et al., Appellees,* Case Nos. 19-3057, 19-3058, 19-3059, 19-3254, and 19-3255 in the United States Court of Appeal for the Third Circuit.

4. Pursuant to Fla. Stat. § 56.29(6), in the event that the Miami-Dade County Police Department Governmental Services Bureau's Court Services Section, as a result of a suspension of services due to the COVID-19 pandemic, is unable to confirm that it can schedule a sheriff's sale within sixty (60) days of the date of entry of this Order, the Court directs that the aforesaid property (the above-listed choses in action) may instead be sold at a public online auction through an online auction service used and approved by the Clerk of Court for foreclosure sales or tax sales, with notice of such sale to be published in accordance with Florida Statutes § 45.031 and the sale conducted in accordance with Florida Statutes § 45.031.

5. At the auction, whether conducted in accordance with Paragraph No. 3 or 4 above, U.S. Bank may credit bid up to the Total Amount Owed.

6. Proceeds from the auction, again whether conducted in accordance with Paragraph No. 3 or 4 above, shall be applied to the Total Amount Owed.

7. U.S. Bank is entitled to an award of its reasonable costs and attorneys' fees pursuant to Fla. Stat. §§ 56.29(8) and 57.115.

[1]The corrections are typographical and do not affect the substance of this Order.

[2]After investigation, U.S. Bank has not been able to locate any other assets of value. And NMI has not offered any assets to pay the Judgment, nor has it represented or provided any evidence that it possesses any other assets of value.

[3]The Court also notes that NMI and NMI Holding have not contended that the Court lacks personal jurisdiction over them.

[4]The Court notes that U.S. Bank faced a similar situation with regard to its efforts to execute on a substantial judgment against one of NMI's owners, Maury Rosenberg ("Rosenberg"). In that case, U.S. Bank obtained judgments against Rosenberg in the approximate total amount of $6.5 million. Rosenberg, in turn, obtained his own $6.12 million judgment against U.S. Bank (also based on a bad faith involuntary bankruptcy claim against U.S. Bank). When U.S. Bank then sought to setoff its $6.5 million judgment against Rosenberg's $6.12 million judgment, Rosenberg successfully opposed this relief and forced U.S. Bank to pay the entirety of his $6.12 million judgment. Rosenberg thereafter refused to use the proceeds from his own judgment to satisfy U.S. Bank's $6.5 million in judgments against him, and instead had the proceeds transferred to a family trust before U.S. Bank could reach them (which transfer to the family trust is currently the subject of a fraudulent transfer claim against Rosenberg and the family trust). By executing on the Chose of Action the debtor has against U.S Bank itself, U.S Bank is justifiably attempting to prevent the exact same thing from happening again

* * *

Criminal law—Search and seizure—Defendant who was occupant of residence in which narcotics were observed in plain view during execution of arrest warrant for resident was lawfully detained while officers searched premises—Absent evidence of duration of search other than testimony that search took longer than one hour, duration of detention was not shown to be unlawful—Handcuffing of defendant does not render detention unlawful—Vehicle—Consent—Defendant's consent to search his vehicle, which was parked next door, was voluntary where consent was given after defendant was released from detention, defendant was asked only once for permission to search vehicle and was not threatened in any way, defendant had not been deprived of his vehicle keys or identification, and there was no evidence that defendant's vehicle was blocked in—Motion to suppress narcotics found in vehicle console is denied

STATE OF FLORIDA, v. MARSHALL KING, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F19-12866, Criminal Division. June 10, 2020. Ramiro C. Areces, Judge. Counsel: Simar Khera, Miami-Dade State Attorney's Office, for State. Rosalie Derrett, Miami-Dade County Public Defender's Office, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court on Defendant's Motion to Suppress (the "Motion"), and this Court, having read the Motion, examined the case file, heard testimony and the argument of counsel on June 5, 2020, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is DENIED.

Defendant contends the narcotics discovered in the center console of his vehicle should be suppressed because he did not consent to the warrantless search of the vehicle.[1] The greater weight of the evidence says otherwise.

Florida law clearly provides that "[a] warrantless search is *per se* unreasonable under the Fourth Amendment," but "will be considered lawful if conducted pursuant to consent which was given freely and voluntarily."[2] *Henderson v. State,* 149 So. 3d 61, 64 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1704c]. "The question of whether a consent is voluntary is a question of fact to be determined from the totality of the circumstances." *Reynolds v. State,* 592 So. 2d 1082, 1086 (Fla. 1992). "Ordinarily, where there was no prior unlawful seizure or other police misconduct, the state need prove voluntariness of the defendant's consent by only a preponderance of the evidence." *Gonzalez v. State,* 59 So. 3d 182, 186 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D500a]. If, however, there has been some illegal conduct by the police, the state must prove, by clear and convincing evidence, that the consent "was not a product of the illegal police action." *Id.* at 185.

In this case, there was no evidence the police engaged in illegal conduct. The police arrived at the residence[3] in the early morning.[4] The police were there to execute an arrest warrant for a Mr. Peter Hall. The police knocked on the door. Defendant opened the door. Immediately, Defendant was pulled outside. Mr. Hall and a third occupant, whose name is unknown (the "Third Occupant"), were also brought outside. All three occupants of the residence were handcuffed and

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escorted to the front of the residence. The police, who had seen narcotics in plain view while effectuating the arrest warrant, detained the three occupants while they drafted a search warrant application, electronically submitted the application to the duty judge, obtained the signed search warrant from the duty judge, searched the premises with a canine and then conducted a hand search of the premises without the canine. At the conclusion of their search, Mr. Hall was taken to jail, and Defendant and the Third Occupant were released.

Defendant contends his detention, pending the search of the residence, was illegal. This Court disagrees. The United States Supreme Court has long held "that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted." *Muehler v. Mena,* 544 U.S. 93, 98 (2005) [18 Fla. L. Weekly Fed. S183a] (quoting *Michigan v. Summers,* 452 U.S. 692 (1981)). That this is a "categorical, bright-line rule is simply not open to debate." *Bailey v. U.S.,* 568 U.S. 186, 203 (2013) [24 Fla. L. Weekly Fed. S1a] (Scalia, J., concurring).

Defendant, nevertheless, contends the length of the detention rendered the otherwise lawful detention, unlawful. Defendant, however, failed to present any evidence concerning the length of the detention. At most, Defendant elicited testimony from Sergeant Ortiz, on cross examination, that the search took longer than one hour. Without more, the length of Defendant's detention cannot be said to be unlawful as a matter of law. *See e.g. Muehler,* 544 U.S. at 100 ("However, the 2-3-hour detention in handcuffs in this case does not outweigh the government's continuing safety interests.").[5]

Additionally, the handcuffing of Defendant, and the other two occupants, does not render the detention unlawful. *See e.g. Muehler,* 544 U.S. at 98 ("Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."); *see also Gonzalez v. State,* 59 So. 2d at 187 ("the detention of the defendant while handcuffed was not unlawful."); *Wilson v. State,* 547 So. 2d 215, 217 (Fla. 4th DCA 1989) ("A lawful temporary seizure and detention is not automatically converted into an unlawful arrest because the officers at the scene elect to handcuff a defendant rather than use some other method of restraint for their protection such as holding him on the ground at gunpoint.").

In this case, the only evidence presented by either party demonstrated the three occupants were detained only for as long as was necessary to complete the search of the residence. Moreover, a judge had previously found probable cause for the arrest of one of the three occupants for drug-related offenses,[6] *and* in effectuating said arrest warrant, the officers had found narcotics in plain sight. The testimony revealed two to four officers stayed with the three occupants outside the residence while the subject property was searched. Under the circumstances, and based on the evidence presented at the hearing, the temporary detention of the Defendant, together with the other occupants, pending the search of a home that is known, at a minimum, to contain narcotics was not unreasonable, and certainly not unlawful.[7]

This, of course, does not end our inquiry. Following the search of the residence, Mr. Hall was arrested and taken away. Defendant and the Third Occupant were released and had their handcuffs removed. Once the handcuffs were removed, Detective Ariola, having been advised that Defendant's vehicle was parked next door to the subject property, asked Defendant if he could search his car. Det. Ariola and Sgt. Ortiz both testified that Defendant orally consented to the search of his vehicle. Det. Ariola testified the Defendant reached into his pocket, and handed him the keys. A subsequent search of Defendant's vehicle revealed narcotics in the center console. Defendant was handcuffed again. The Third Occupant left the scene without resistance or further detention by the police.

Defendant's consent to search the vehicle "was free of the taint of prior illegal police action." *Gonzalez,* 59 So. 3d at 187. The State, therefore, need only prove Defendant voluntarily consented to the search by a preponderance of the evidence. *Id.* at 186.

The greater weight of the evidence in this case supports a finding that Defendant gave his consent voluntarily. The State presented two witnesses—Det. Ariola and Sgt. Ortiz—who testified credibly that Defendant orally consented to the search of his vehicle. The State, moreover, elicited testimony from their witnesses[8] that throughout the duration of his detention, Defendant was calm and cordial, had limited interactions with the police, was given a chair to sit in, was allowed to use the restroom, allowed to adjust the handcuffs, and allowed to speak with one or more women who appeared on the scene.[9] The women would stay for the remainder of the search, and, later, for the search of Defendant's vehicle.

Defendant, nevertheless, contends that the totality of the circumstances surrounding his consent render his consent involuntary, or mere acquiescence to police authority. This Court disagrees.

"Generally, the fact that a defendant has been taken into custody or otherwise detained is not sufficient to constitute coercion and render consent involuntary as a matter of law." *Gonzalez,* 59 So. 3d at 186; *see also Wilson,* 547 So. 2d 215; *Henderson v. State,* 149 So. 3d 61 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1704c]. It is true that handcuffing may make it more difficult for the State to show a defendant voluntarily consented to a search. However, the determination of whether a defendant acted voluntarily is still derived from the totality of the circumstances. *See e.g. Ladson v. State,* 63 So. 3d 807, 812 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D945b] (Shepherd, J., concurring) ("However, our job remains to examine the totality of the circumstances, without giving undue weight to any particular factual circumstance, and determine whether the act in question is voluntary within the meaning of the Fourth Amendment.").[10]

In this case, Defendant was not confronted with any evidence of guilt. Defendant was not being held at gunpoint.[11] Defendant would have understood that he was being detained pending the search of the residence. Defendant was not asked any questions. Defendant was, under the circumstances, made reasonably comfortable. Defendant was not prohibited from speaking to one or more family members who remained on the scene. Defendant was calm.[12] Defendant was not, under the circumstances, subjected to an *unreasonable* display of police presence. Defendant was not promised anything. Defendant was not threatened. Defendant would have seen the search come to an end, seen Mr. Hall taken away pursuant to the arrest warrant, and then had his handcuffs removed. Defendant's vehicle was next door, and there was no testimony that the vehicle was blocked in by police. Defendant had his car keys in his possession. Defendant was not asked multiple times if he'd allow a search of his vehicle. Defendant was asked one time if his vehicle could be searched. Defendant could have said no. Defendant said yes.

There has been no evidence presented concerning Defendant's age, education, intelligence, or mental condition that may "suggest he was vulnerable and unable to freely consent to a search." *Gonzalez,* 59 So. 3d at 196. Moreover, Florida courts have rejected the argument that a handcuffed defendant can never voluntarily consent. *See e.g. Wilson,* 547 So. 2d 215; *Henderson,* 149 So. 3d 61; *Reynolds* 592 So. 2d at 1087 ("Although we have found the consent in this case to be invalid, we are reluctant to hold that consent given while handcuffed can never be voluntary under any circumstances.").

Defendant relies on a series of cases in support of his argument. The cases relied on by Defendant, however, are distinguishable. This is not surprising, because the inquiry undertaken by this, or any, Court is factually intensive and based on a totality of the circumstances.

For example, Defendant contends *Monroe v. State* supports his argument that the duration of the detention rendered his consent involuntary. 578 So. 2d 847 (1991). *Monroe,* however, is inapposite.

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First, *Monroe* does not concern the detention of occupants pending a search under *Summers.* Second, the *Monroe* defendants were told by police "they intended to stay there for as long as it took to determine whether there was marijuana in the car." *Id.* at 848. Third, there was evidence that "the officers had parked their vehicles so that appellant could not leave." *Id.* Fourth, the officers "threatened to call a canine unit." *Id.* Finally, the one-hour detention in *Monroe* was directly tied to the search of the vehicle, which is to say the officers waited out the defendants *until* they consented.

In this case, Defendant was an occupant of the residence and was lawfully detained. There was no evidence Defendant was threatened in any way. The canine had left the scene by the time Defendant was asked for consent to search his vehicle. There was no evidence that Defendant's vehicle was blocked. Finally, the length of Defendant's lawful detention was a consequence of a valid arrest warrant and, later, search warrant.[13] His lawful detention was entirely unrelated to the consent that would later be sought from Defendant *after* the search of the residence had been completed and *after* Defendant had been released.[14]

The other cases relied on by Defendant are equally inapposite. *See Sizemore v. State,* 939 So. 2d 209 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2529b] (officer used a canine unit and positioned his car so defendant could not leave the scene even after officer no longer had reasonable grounds for continued detention); *Santiago v. State,* 84 So. 3d 455 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D860a] (officer did not have reasonable suspicion that defendant was armed, and defendant's consent, which came immediately following his being placed in handcuffs was mere acquiescence to authority); *Reynolds,* 592 So. 2d 1082 (consent was not voluntary where defendant was pulled over, told he was under arrest, was handcuffed, was told they were conducting a narcotics investigation, was subject to a pat-down search and was then asked for consent to search inside his vehicle); *Hall,* 201 So. 3d 66 (affirmed trial court's suppression of the evidence where a witness testified they acquiesced to the search of defendant's vehicle after multiple officers blocked the witness' driveway, conducted a pat-down search of the defendant, took the defendant's keys and ID and then asked for consent to search defendant's vehicle).[15]

In this case, Defendant was detained, and in handcuffs, pending the search of the residence. The police did not use, or threaten to use, a canine to intimidate Defendant. Defendant was not put in handcuffs so that he could be questioned. Defendant was not detained any longer than what was necessary to complete the search of the residence. Defendant was not told he was the subject of an investigation. Defendant was not deprived of his ID, car keys or other personal property. There was no evidence Defendant's vehicle was blocked in. On the contrary, the evidence demonstrated Defendant's vehicle was *near* the residence, but on a neighboring property. The uncontroverted evidence is that Defendant was not confronted or threatened pending the search. When the search was over, he was released and his handcuffs were removed. He was, at that time, still in possession of his car keys. There has been no evidence that would suggest that, at that point, Defendant would have felt coerced, or unable to refuse the search of his vehicle, which was parked next door. *See Luna-Martinez v. State,* 984 So. 2d 592, 598 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1506a] ("A defendant's consent will be considered involuntary only if in the totality of the circumstances, the defendant's consent was not his own essentially free and unconstrained choice, because his will had been overborne and his capacity for self-determination critically impaired.")(internal quotation marks and citations omitted).

This Court, of course, understands the burden is on the State to show Defendant's consent was voluntary. However, Defendant has not introduced *any* evidence that may at all cast doubt on what this Court finds to be credible testimony.[16] As a result, to grant Defendant's Motion, this Court would have to hold that a consent to search, following a lawful detention, where the defendant is handcuffed for a period of one or more hours, but is otherwise not subjected to any overt or subtle coercion, is involuntary as a matter of law. This Court declines to adopt such a bright line rule.

Defendant was lawfully detained. The State met its burden to show by a preponderance of the evidence that Defendant consented to the search of his vehicle. Accordingly, Defendant's Motion is DENIED.

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[1]Defendant presented no evidence, but argues that he (1) gave no consent; and, (2) gave consent involuntarily.

[2]It is undisputed that the police searched Defendant's vehicle without a warrant.

[3]No testimony was presented by either side concerning why Defendant was at the residence. His ownership of, or possessory interest in, the residence, if any, was never established.

[4]There was no evidence presented by either Party concerning the precise time.

[5]Defense counsel argued the detention might have lasted six hours, but there was no evidence introduced by way of exhibit, or testimony, that would support a six-hour estimate.

[6]Det. Ariola testified the arrest warrant pertained to a "narcotics investigation." The State elicited testimony that, in the witnesses' experience, executing arrest warrants of this sort is dangerous because of the likelihood that firearms may be present in the home.

[7]The fact that Defendant, at the time of his detention, was not suspected of having committed any crime is irrelevant to whether his detention, as an occupant of the residence, was lawful. *See Bailey,* 568 U.S. at 203 (stating *Summers* applies to occupants—"that is, persons within the immediate vicinity of the premises to be searched.") (Scalia, J., concurring).

[8]Det. Ariola, Sgt. Ortiz and Det. Robles.

[9]Det. Robles testified he understood the women to be part of Defendant's family.

[10]In any event, Defendant was not asked for consent until *after* the search of the residence was completed, his handcuffs were removed and he was released.

[11]The State's witnesses testified that guns were drawn when they first entered the residence. However, Defendant opened the door, was immediately pulled out, and placed outside. There was no testimony that Defendant was otherwise shown a firearm, or had one pointed at him.

[12]There was some testimony that, at first, Defendant appeared confused and shocked, but subsequently became calmer. This would appear to be a natural reaction to unknowingly opening a door to armed officers executing an arrest warrant. However, Defendant was not asked for consent to search his vehicle until at least one hour later. The uncontroverted evidence demonstrated Defendant was calm while detained, was not interrogated, threatened, promised anything or otherwise coerced. Defendant was merely made to wait until the search of the residence was concluded.

[13]Defendant has not argued that the warrants were invalid, or in any other way deficient.

[14]As part of this Court's evaluation of the totality of the circumstances, this Court has considered the fact that Defendant had been handcuffed while detained, and that he appears to have been asked for consent immediately following his release. However, this Court also notes that this is not a case where the consent to search was tainted by prior unlawful police conduct, such that a sufficient break in the chain of events would be required.

[15]No known relation to Mr. Peter Hall—the subject of the arrest warrant in this case.

[16]This Court has considered the arguments of defense counsel, and the testimony defense counsel elicited in cross-examination. Among other things, this Court considered the number of officers involved, the lack of a written consent form and the absence of a warning concerning the right to refuse consent. These are merely *some* of the factors this Court has considered when evaluating the totality of the circumstances. *See Luna-Martinez,* 984 So. 2d at 600 (there is not "a necessary correlation between the number of officers present and the coerciveness of an encounter;" "an inference of involuntariness does not arise from the absence of a written consent;" and, "it is inappropriate to give extra weight to the absence of a warning of the right to refuse consent.") (internal quotation marks and citations omitted).

* * *

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Counties—Land development regulations—Constitutionality—Action by developer seeking declaration that wetland buffer and conservation easement conditions required by county development code and comprehensive plan for property development deprived it of due process and resulted in taking of property—Due process—Facial constitutionality—Code provision that required developer to grant county a conservation easement over existing wetlands and wetland buffers irrespective of wetland impacts created by development violates federal and state constitutions—Challenge to comprehensive plan requirement of wetland buffer fails where requirement is rationally related to legitimate purpose of preserving and protecting wetland areas and drinking water from development activities—Taking—Where terms of easement extracted from developer not only require access by county officials but also deprive developer of all reasonable private economic uses of property burdened by easement, unconstitutional per se taking without compensation occurred

MANDARIN DEVELOPMENT, INC., a Florida Corporation, Plaintiff, v. MANATEE COUNTY, a political subdivision of the State of Florida, Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2015-CA-2563. January 30, 2017. Don T. Hall, Judge. Counsel: William Moore, for Plaintiff. Christopher M. De Carlo, Anne M. Morris, and William E. Clague, Manatee County Attorney's Office, Bradenton, for Defendant.

FINAL JUDGMENT

This matter came before the Court on the non-jury trial of a Complaint seeking declaratory relief by Plaintiff, MANDARIN DEVELOPMENT, INC. ("Mandarin") against Defendant, MANATEE COUNTY, FLORIDA ("the County"). The trial was conducted from November 15-17, 2016, as to (1) Plaintiff's Count I - Violation of Due Process - Facial; and (2) Count III - Violation of Takings Clauses.[1] Having heard the parties' arguments, having received testimonial and documentary evidence, and having considered the court file and applicable law, the Court finds as follows:

The property at issue in the complaint, commonly known as "Riva Trace" (hereinafter referred to as "the Property), is a 41.2-acre land parcel in Manatee County, Florida. Mandarin alleges that certain conditions imposed upon the development of the Property pursuant to Policy 3.3.1.5 of the Manatee County Comprehensive Plan (the "Plan") and Section 706.8.B of the Manatee County Land Development Code (the "LDC")[2], hereinafter collectively referred to as the "Challenged Regulations," deprive it of due process and result in a taking of Mandarin's Property. The basis of Mandarin's claims is an allegation that the Challenged Regulations violate the doctrine of unconstitutional conditions.

Policy 3.3.1.5 of the County's Plan requires buffers a minimum of fifty (50) feet in width for property adjacent to all inflowing watercourses located in the Watershed Overlay and all Outstanding Florida Waters and Aquatic Preserves and a minimum thirty (30) feet for property adjacent to all isolated wetlands. The purpose of the Watershed Overlays is to "[m]aintain or improve the water quality and quantity in Lake Manatee, Evers Reservoir, and Peace River Watershed Overlay (WO) Districts for the purpose of ensuring a continued supply of drinking water at lowest possible cost to the current and future residents of Manatee County and component jurisdictions." *See* Plan, Conservation Element, Objective Section 3.2.1. Among these special overlay districts is the Evers Reservoir Overlay District, of which the Braden River is an inflowing watercourse. *Id.* For areas of significant wetlands and for watershed protection, Policy 3.3.1.5 provides that these buffer widths may be increased. The provision of the LDC challenged by Mandarin implements this policy, restricting development in wetlands and wetland buffers.

Section 706.8.B of the LDC requires developers to grant to the County a conservation easement over existing "wetlands and associated wetland buffers" that developers do not impact as part of their development, for the purpose of enforcing the wetland preservation and buffering requirements of the Plan and LDC. The evidence at trial established that Section 706.8.B requires the dedication of a conservation easement over the wetlands and associated wetland buffers within Riva Trace. The conversation easement provides no right of access to the general public for recreation or any other purpose. The other Challenged Regulation, Policy 3.3.1.5, determines the areas to be protected from development.

In 2004, Kimball Hill Homes Florida, Inc., applied to the County for approval of a Preliminary Site Plan for a 41.2 acre, 152-unit multi-family development on the Property adjacent to the Braden River. The applicant was required, per Plan Policy 3.3.1.5, to delineate a 50′ wide "wetland buffer" contiguous to all wetlands existing on the property. The County's stated purpose behind the buffer requirement was to protect wetlands from post-development activities. That portion of the Property abutting the Braden River triggered an automatic 50′ buffer. An "in-flowing" stream bisecting the site also required the same buffer on both sides of the watercourse. The total area encompassed within the mandated buffer was 6.2 upland acres, comprising roughly 13% of the overall property.

In 2006, after changing the Property's use strictly to single-family, and having reduced the subdivision to 86 units, the applicant's Preliminary Site Plan for "Riva Trace" was approved by the Manatee County Commission. Notably, the extent of the wetland buffer area remained fixed in spite of the applicant's 43% reduction in development density.

On August 27, 2007, the County administratively approved a Final Site Plan for the project. By letter sent to the applicant's representative, the County conditioned its approval upon a list of stipulations set forth by various County departments. One condition required by the County was that "No lots shall be platted through any . . . wetland or wetland buffer." Another condition required by the Natural Resources Division required the dedication to the County of a conservation easement over all wetlands and wetland buffer areas, consistent with Section 719.11.1.3 (now Section 706.8.B) of the LDC. The purpose stated in the LDC for the dedication of the easement was to: (a) preserve and protect the conservation value of the property; (b) allow County access to monitor and enforce its easement; and (c) prevent inconsistent activity. LDC, Section 706.8.B.1-3. Per the explicit LDC requirement, this conveyance of a private property interest to the County was also a prerequisite to plat approval. No compensation to the landowner is provided for this easement.

In December 2007, the undeveloped Property was sold to Riva Trace, LLC. The new landowner changed the subdivision's design and obtained revised Preliminary Site Plan approval. The revised Final Site Plan was approved on August 16, 2010. Included within the County's approval letter was the previous condition mandating conveyance of a conservation easement over the wetlands and wetland buffer areas to the County.

The applicant complied with the required condition and conveyed to the County a 9.55 acre conservation easement over both on-site wetlands and upland buffer areas. The easement was accepted on February 28, 2012. Having conveyed this easement interest, the landowner was then permitted to record its final subdivision plat. On March 15, 2012, title to the property transferred to Mandarin, which was assigned all rights, title and interest therein. Neither Riva Trace, LLC, nor Mandarin, expressed an objection to the buffer/easement conditions prior to plat approval.

Prior to development of the Property, Mandarin made inquiry to County staff regarding the purpose of the mandatory imposition of the wetland buffer, and the necessity for the full 50′ width thereof, but was afforded no relief. Eventually, the landowner retained legal counsel who wrote a letter to the Building & Development Services

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Department asking for a reduction in the buffer area over that portion of the property not adjacent to the Braden River. The response from the County Attorney's Office stated that "[n]either the Comprehensive Plan or the Land Development Code provide legal authority for either the Board of County Commissioners or the staff to reduce the 50-foot-wide wetland buffer." Presently, Riva Trace is a platted and fully constructed residential subdivision.

On June 2, 2015, Mandarin filed a three-count complaint for declaratory relief in the Circuit Court. Mandarin alleged that the required wetland buffer and conservation easement conditions were unlawful exactions of private property in violation of the doctrine of "unconstitutional conditions." Specifically, it alleged that the County's conditions violated Constitutional standards which require governmentally imposed land-use conditions, such as exactions of private property interests, to be "roughly proportionate" to any actual impacts from the proposed development.

Applicable Law

Florida's Constitution, similar to the United States Constitution, prevents government from taking private property for a public purpose without full compensation paid to the owner. Article X, § 6(a), Fla. Const. (1968). Private property is also protected by Florida's Due Process Clause. Article I, Section 9, Fla. Const. (1968); as well as by the Fifth and Fourteenth Amendments to the United States Constitution. A citizen may not be compelled by the government to surrender these, or any other constitutional safeguards, in order to secure a discretionary benefit. *Frost v. Railroad Commission of State of Cal.,* 271 U.S. 583, 592-594 (1926); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). This concept is known as the "doctrine of unconstitutional conditions," and has been applied extensively to land use decisions. *Parks v. Watson,* 716 F.2d 646, 650-653 (9th Cir. 1983).

In the last three decades, the United States Supreme Court has issued opinions regarding land use exactions, whose sum rule states that governmental entities attaching "dedication" conditions to development approvals must tailor these exactions to the negative impacts anticipated to be generated from the proposed development. The three seminal decisions are *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), *Dolan v. City of Tigard,* 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District,* 133 S.Ct. 2586 (2013) [24 Fla. L. Weekly Fed. S435a].

Nollan held that the condition imposed by the government must serve the same purpose as would a refusal to issue the approval, so as not to function as "an out-and-out plan of extortion." *Id.* at 837. In reaching this conclusion, the *Nollan* Court was "inclined to be particularly careful. . .*where the actual conveyance of property is made a condition* to the lifting of a land-use restriction, since in that context there is a *heightened risk* that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841 (emphasis supplied). The Court held that the government's authority to exact such conditions was limited by the Fifth and Fourteenth Amendments in that the government may not require a person to give up a constitutional right—for example, the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property (an "essential nexus" must exist between the "legitimate sate interest" and the permit condition exacted by the government). *Id.* at 837.

The Supreme Court again evaluated the legitimacy of land-use exactions in *Dolan v. City of Tigard.* As a condition of redeveloping her storefront, Ms. Dolan was required to dedicate a public greenspace and pedestrian/bicycle pathway. She challenged the conditions on grounds that the City had failed to demonstrate any "quantifiable burdens" created by her store that would justify the dedication demanded of her. *Dolan,* 512 U.S. at 386. Although finding that the *Nollan* essential nexus requirement had been met by the City, the Court determined that the dedication conditions imposed upon Ms. Dolan had not been *quantified*; and that the City had failed to demonstrate any negative impacts created by the project that would necessitate a mitigating dedication. *Id.* at 393, 395-396.

The *Dolan* Court, then, set forth part two of the land-use exactions test, which required the *government* to make an affirmative showing that the exaction was "roughly proportional" to the anticipated impacts from the development. The Court held that, while "no precise mathematical calculation is required. . .the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The *Nollan* and *Dolan* requirements are nearly identical to the exaction standard previously adopted in Florida law, including the Second District Court of Appeal in *Lee County v. New Testament Baptist Church,* 507 So.2d at 629.

Koontz held that land-use regulatory programs are covered under the *Nollan/Dolan* doctrine, even though the governmental permission is discretionary, and even if the landowners "voluntarily" enter into it. *Id.* 2594. Notably, one of the exactions demanded of the applicant-landowner in *Koontz* was a conservation easement, similar in kind to the easement at issue herein.

Mandarin does not assert that the County's wetland buffer and conservation easement requirements are irrational, nor that they are unrelated to a valid public benefit. Instead, Mandarin argues that both Plan Policy 3.3.1.5 and LDC Section706.8.B violate the "rough proportionality" test from *Dolan* because neither provision is tethered to the anticipated impacts of the proposed development.

Count I - Violation of Due Process - Facial

Count I alleges a "facial" violation of due process under the U.S. Constitution and the Florida Constitution. As noted above, Mandarin alleges that the Challenged Regulations, on their face and by their mere enactment, violate the unconstitutional conditions doctrine.

Only with respect to Section 706.8.B of LDC, because this provision requires the dedication of an interest in land, the Court reviews it under the heightened standard of scrutiny applicable under the federal and state decisions governing exactions. The evidence at trial demonstrated that the conservation easement required by Section 706.8.B applies regardless of the wetland impacts created by the development. Accordingly, Section 706.8.B of the LDC violates the U.S. Constitution and Florida Constitution by requiring an exaction without consideration of the specific impacts of the development.

While Section 706.8.B of the LDC requires the dedication of the conservation easement, it merely references the required wetland buffer in order to determine the size of the conservation easement. By contrast, Plan Policy 3.3.1.5 does not require a dedication of land to the County. Rather, Policy 3.3.1.5 operates as a development restriction and setback, independently of Section 706.8.B. As such, Policy 3.3.1.5. as a matter of law, is not subject to the heightened scrutiny that applies to land use exactions under the federal unconstitutional conditions doctrine. For these reasons, Policy 3.3.1.5 is subject to a standard facial substantive due process inquiry.

Except for judicial review of cases involving land use exactions, long standing and well-settled constitutional law applies the rational basis test as the appropriate standard for determining the legality of a facial substantive due process challenge to a land use regulation under both the Federal and Florida Constitutions. *See, e.g., Gary v. City of Warner Robins, Ga.,* 311 F.3d 1332.,1339 (11th Cir. 2002) [16 Fla. L. Weekly Fed. C44a]; *Haire v. Fla. Dep't of Agric. & Consumer Servs.,* 870 So. 2d 774, 781 (Fla. 2004) [29 Fla. L. Weekly S67a]. Under the rational basis standard of review, "a law will be upheld if it is . . . [ ] . . . fairly debatable whether the purpose of the law is legitimate and it is

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fairly debatable whether the methods adopted in the law serve that legitimate purpose." *Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah,* 188 So. 3d 13, 20-21 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D618a].

Plan Policy 3.3.1.5 seeks to protect statutorily defined wetlands through the use of wetland buffers. Protection of the natural environment and natural resources is a well-recognized legitimate public purpose of land use regulations, and a valid use of local government police power to prevent injury to the public health, safety and welfare. *See, e.g. Dep't of Cmty. Affairs v. Moorman,* 664 So. 2d 930, 932 (Fla. 1995) [20 Fla. L. Weekly S500a]; *Graham v. Estuary Props.,* 399 So. 2d 1374, 1381 (Fla. 1981); *Lee Cty. v. Morales,* 557 So. 2d 652, 655 (Fla. 2d DCA 1990).

The extensive evidence presented by the County at trial established that the wetland buffers required by Plan Policy 3.3.1.5 serve a legitimate purpose of preserving and protecting wetland areas and drinking water from land development activities and that Policy 3.3.1.5 is rationally related to that purpose. Accordingly, Count I fails in challenging the constitutionality of Policy 3.3.1.5. However, this Court finds that the imposition of the conservation easement pursuant only to section 706.8.B does not survive the application of the heightened standard of scrutiny for an exaction. Therefore, the Court finds in favor of Mandarin only as to the challenge to the facial validity of section 706.8.B.

Count III - Violation of Takings Clauses

Count III alleges that the application of Section 706.8.B of the LDC to the Property has resulted in a per se violation of the Takings Clause of the Fifth Amendment to the United States Constitution and of Article X, Section 6(a) of the Constitution of the State of Florida. The complaint asserts that because this requirement was imposed on Mandarin, who did, in fact, accede to the County's demands by conveying an easement over the wetland and buffer area, the County has *per se* taken that property interest.

In Florida, an easement constitutes a property interest within the ambit of constitutional protection. Article X, Sec. 6(b), Florida Constitution (1968); *Kendry v. State Road Department,* 213 So.2d 23 (Fla. 4th DCA 1968); *City of Jacksonville v. Schumann,* 167 So.2d 95 (Fla. 1964). Further, the public conservation easement demanded from Mandarin herein is even more restrictive and more of a "burden" on the land, than that involved in *Nollan* (a joint use, public beach access). The terms of the negative easement exacted from Mandarin not only require public access by County officials at "reasonable times;" but, more significantly, it deprives the grantor-owner of the right to *any* "surface use, except those purposes which retain the land or water area in a natural condition," thus forbidding the "construction of buildings, roads, signs, billboards, or other structures on or above ground." All reasonable private economic uses of the 9.55 acres burdened by the conservation easement are thus eliminated. A loss of the ability to exclude, coupled with the complete loss of all reasonable economic use, without compensation, constitute an unconstitutional taking.

As noted in *Koontz,* "we began our analysis in both *Nollan* and *Dolan* by observing that if government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Koontz,* 133 S.Ct. at 2598-99, citing *Nollan,* 483 U.S. at 831 and *Dolan,* 512 U.S. at 384. The completed conveyance of a public conservation easement to the County falls within the same rule. A *per se* taking occurred in this case on February 28, 2012, the date of acceptance by the County.

The County presents several arguments in defense. It first contends that the conservation easement is not an exaction but instead a mere "development restriction" designed to protect the status quo. The County's contention is belied by the very terms of Section 706.8.B. The owner may not receive plat approval until the easement is dedicated. Additionally, the evidence presented at trial demonstrates that the easement conveyance differs entirely from traditional development restrictions in that it requires an actual *conveyance* of a property interest, through a publicly-recorded instrument. This is unlike any other "traditional" development restrictions such as front, side, and rear yard setbacks, impervious surface ratios, and height constraints, which do not require a recorded conveyance of a property interest to solidify their purpose. The California Coastal Commission, (and the dissent) maintained a similar argument in *Nollan.* The majority responded, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest, but rather (as Justice Brennan contends) '**a mere restriction on its use**,' . . ., is to use words in a manner that deprives them of all their ordinary meaning." *Nollan,* 483 U.S. at 831.

The County further contends that the regulations at issue are not for the 'public benefit," but rather to protect against harm to the environment. However, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the Supreme Court discarded the "harm v. benefit" test in determining compensability for a severe use restrictions, finding that "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern . . . ." 505 U.S. at 1026 (1992). Justice Scalia declared that, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings,' which require compensation, from regulatory 'deprivations' that do not." *Id.* at 1026.

Accordingly, and in harmony with the ruling in Count I, this Court determines that Section 706.8.B requires the exaction of a conservation easement as a blanket condition of plat approval, in violation of the doctrine of unconstitutional conditions. Because this provision was, in fact, applied to Mandarin, who under implicit coercion, conveyed a 9.55 acre conservation easement to the County without compensation, a *per se* taking has occurred.

County's Affirmative Defenses

The County previously raised several affirmative defenses. These defenses were argued at two separate summary judgment proceedings held on September 27, 2016 and November 10, 2016. The Court has previously ruled on these defenses. Those rulings and Orders are incorporated and adopted herein in full: Order on Defendant, Manatee County's Motion For Final Summary Judgment, entered October 13, 2016; Order Denying Defendant, Manatee County's Amended Motion For Final Summary Judgment, entered November 16, 2016; and Order Denying Defendant, Manatee County's Motion For Final Summary Judgment Regarding The Affirmative Defense of Statute of Limitations, entered November 17, 2016.

Accordingly, based on the foregoing, it is hereby **ORDERED, ADJUDGED** and **DECLARED** as follows:

1. With regard to Count I, the Court finds in favor of Mandarin, only as to that part of Mandarin's due process claims in Count I which challenge Section 706.8.B of the Manatee County Land Development Code. In order to allow the County to cure the constitutional defects in Section 706.8.B , the effect of the Court's ruling is abated for 365 days from the date of entry hereof.

2. Mandarin's claim in Count I as to Policy 3.3.1.5 of the Manatee County Comprehensive Plan is **DENIED**.

3. With regard to Count III, the County has *per se* unlawfully taken Plaintiff's property interest by requiring and accepting the conveyance of a conservation easement without compensation therefor.

4. The County is taxed with of all reasonable costs of Mandarin, pursuant to law.

5. The Court retains jurisdiction of this cause for purposes of supplemental relief pursuant to Section 86.061, Fla. Stat.

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[1]On November 11, 2016, the Plaintiff withdrew Count II of the Complaint, the As-applied Violation of Due Process claim, and elected to proceed only on Count I and Count III.

[2]In addition to Policy 3.3.1.5 of Manatee County's Comprehensive Plan and Section 706.8.B of the Land Development Code, Mandarin's complaint also included Sections 706.7, 706.7.A, 706.7.13 and 336.4 of the LDC. At trial, the Plaintiff withdrew its claims as to these additional sections of the LDC.

* * *

Insurance—Motion to strike affidavits which were based on inadmissible hearsay, not personal knowledge, granted

DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. JAMES HARRIS, Defendant/Counter-Plaintiff. JAMES HARRIS, Plaintiff/Counter-Defendant, v. DIRECT GENERAL INSURANCE COMPANY, Defendant/Counter-Plaintiff. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 18-CA-009312. June 1, 2020. Ralph C. Stoddard, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING DEFENDANT HARRIS' MOTIONS TO STRIKE AFFIDAVITS

THIS MATTER having come before the court on May 26, 2020 on Defendant Harris' Motion to Strike Affidavit of Thomas Zuilkowski and Motion to Strike Affidavit of Underwriter, Lisa Robison. The court having reviewed the file, considered the motions, the arguments presented by Plaintiff's counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant Harris filed the deposition of Lisa Robison in support of its Motion to Strike. The deposition transcript reflects that the court is unable to consider Ms. Robison's affidavit and testimony is based on inadmissible hearsay and not personal knowledge. As such, Defendant Harris' Motion to Strike Affidavit of Underwriter, Lisa Robison, is **HEREBY GRANTED**.

2. Similarly, Defendant Harris' Motion to Strike Affidavit of Thomas Zuilkowski is **HEREBY GRANTED** as it is also based upon inadmissible hearsay.

3. Whether Harris made a fraudulent statement is a matter of fact to be decided by the fact finder.

* * *

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Volume 28, Number 4
August 31, 2020
Cite as 28 Fla. L. Weekly Supp. ____

COUNTY COURTS

Attorney's fees—Insurance—Personal injury protection—Claim or defense not supported by material facts or applicable law—Where benefits had been paid in full before medical provider filed suit for additional benefits, insurer is entitled to attorney's fees and costs—Insurer who timely and properly filed motion for section 57.105 sanctions was not required to file second motion regarding entitlement to attorney's fees pursuant to rule 1.525

DODD CHIROPRACTIC CLINIC, P.A., a/a/o Tracy Davis, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2016-SC-000833, Division CC-M. May 26, 2020. Mose L. Floyd, Judge. Counsel: Crystal L. Eiffert and Robert Morris, Eiffert & Associates, P.A., Orlando, for Plaintiff. Christina M. Saad , Dutton Law Group, P.A., Jacksonville, for Defendant.

AMENDED ORDER CLARIFYING THE COURT'S MARCH 4, 2020 ORDER GRANTING DEFENDANT'S MOTION TO TAX FEES AND COSTS

[Original Opinion at 28 Fla. L. Weekly Supp. 71a]

THIS CAUSE came before the Court on Plaintiff's Motion for Rehearing/Reconsideration of this Court's March 4, 2020 Order Granting Defendant's Motion to Tax Fees and Costs, and having hearing arguments of counsel on May 19, 2020, the Court maintains its previous ruling but only amends its March 4, 2020 Order to include an additional finding of fact.

THIS CAUSE came before the Court on January 15, 2020, upon hearing Defendant's motion to tax attorney's fees and costs with regard to its Motion for Sanctions Pursuant to Florida Statute §57.105. Counsel for both parties appeared before the Court. After having heard arguments of counsel, considered all Motions and Responses, and being otherwise duly advised in the premises, the Court finds as follows:

On May 2, 2012, the assignor was involved in a motor vehicle accident. Defendant reviewed and adjusted Plaintiff's bills in accordance with the policy of insurance and the no-fault statute, however, duplicate payments were made in error. This resulted in Plaintiff being paid in full and overpaid. Defendant later received a purported pre-suit demand from Plaintiff. Prior to service of its purported pre-suit demand, Plaintiff was paid in full and, in fact, paid more than was due and owing. Despite this, Plaintiff filed suit.

Defendant asserted in its responsive pleadings that Plaintiff was paid in full, such that no amounts were due and owing. Defendant filed a properly served 57.105 Motion for Sanctions. In its motion, Defendant stated that Plaintiff had been paid in full and moved for this Court to tax attorney's fees and costs to Plaintiff.

This Court finds that Defendant's Motion for Sanctions regarding Plaintiff being paid in full, was filed properly and timely. This Motion served to put Plaintiff on notice that sanctions would be sought if it did not dismiss. Plaintiff did not timely dismiss the case; instead Plaintiff argued that a second motion regarding entitlement to attorney's fees must be filed pursuant to Fla. R. Civ. P. 1.525 in order for Defendant to prevail. This Court disagrees.

The plain language of the §57.105 is explicit that at any time during the preceding the court must award damages, to include attorney's fees, if the moving party prevails. Section 57.105(1-2) explicitly states:

> 57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.—
>
> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> (2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

This Court's reading of the §57.105 is contrary to Plaintiff's argument that there is a specific time frame for the filing such a motion. This Court reading of the §57.105 is that such motions can be filed at any time in any civil mater.

Furthermore, The Florida Supreme Court has analyzed the text of Fla. R. Civ. P. 1.525 in order to decide "whether the time requirement of rule 1.525 established only a narrow window of thirty days following the judgment in which to serve the motion for fees and costs or whether, instead, it prescribed only the latest point at which the motion may be served." *Barco v. Sch. Bd. of Pinellas Cty.,* 975 So. 2d 1116, 1119-20 (Fla. 2008) [33 Fla. L. Weekly S87b]. Based upon the Florida Supreme Court's that ruling in *Barco,* the Defendant's 57.105 motion would still be considered timely served and filed.

Defendant served its 57.105 Motion for Sanctions on August 11, 2017 and filed the motion on March 28, 2018. In its motion, Defendant moved for this court to tax attorney's fees and costs. Defendant's filing of its motion to tax attorney's fees and costs is timely because it was filed prior Plaintiff's dismissal.

This Court also makes the following finds of fact:

1. Plaintiff was in fact paid full prior to the commencement of this action

2. Plaintiff knew or should have known that it was paid in full prior to the commencement of this action, as Defendant asserted in its initial pleadings. It is not necessary for this Court to reach a specific conclusion as to whether the Defendant was aware of the specific means by which Plaintiff was considered paid in full. It is Plaintiff who lodged the complaint and it is Plaintiff who is responsible for ensuring that the case was supported by the facts.

3. At the time Defendant served its 57.105, Plaintiff knew or should have known that its claim for penalty, postage and interest was not supported by necessary material facts and would not be supported by application of then existing law.

4. Plaintiff knew or should have known that its claim for additional benefits was not supported by fact or law. All the facts and evidence needed to determine that Plaintiff had been paid in full under the theory of recoupment was available to Plaintiff at the outset of this case. When recoupment was raised in this case by Defendant, Plaintiff incorrectly argued that the defense was not applicable to this case. Nonetheless, Plaintiff later dismissed the claim against the Defendant.

5. Viewed in total, this Court considers Plaintiff's actions frivolous. However, for the inception of this case, the Court must allow that

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error of oversight may have led to a faulty filing. However, over the course of the four (4) year life span on this case, and this Court's recognition that recoupment is applicable in a PIP claim, this Court has reached the conclusion that the Plaintiff misconstrued facts and aspects of the applicable law. Plaintiff knew or should have known that this case should have been dismissed long before arriving at the eve of a hearing on Defendant's Motion for Summary Judgment.

6. Accordingly, this Court finds that Plaintiff's action was frivolous upon the service of Defendant's 57.105 motion of sanctions. Defendant attached to its §57.105 motion all documents necessary for Plaintiff to determine that the action was frivolous. Also, the frivolous nature of the Plaintiffs claim became clearly evident upon Defendant's corporate representative's testimony at deposition on August 24, 2017. This deposition revealed that double payments of bills related to the Plaintiff's treatment in this case resulted in full payment of Defendant's monetary obligations to the Plaintiff.

7. Plaintiff's claim was devoid of merit both on the facts and the law, such that the claim was untenable.

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that Defendant's Motion to Tax Fees and Costs is **GRANTED**. This Court reserves jurisdiction to determine the amount and allocation of the award of attorneys' fees and costs to be awarded to the Defendant.

* * *

Criminal law—Driving under influence—Search and seizure—Field sobriety exercises—Where defendant, who was lawfully stopped and detained, was never asked if he would consent to field sobriety exercises, but merely submitted to trooper's show of apparent authority that would lead reasonable person to conclude that he was not free to leave or refuse, motion to suppress exercises is granted—Post-arrest evidence is also suppressed where there was no probable cause for arrest without evidence of exercises

STATE OF FLORIDA, v. KEVIN DAUGHTRY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CT-4298, Division O. June 9, 2020. Ronald P. Higbee, Judge. Counsel: Jose Leon, Office of the State Attorney, for State. L. Lee Lockett, LockettLaw, Jacksonville Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This cause came to be heard on Defendant's Motion to Suppress and the Court having received testimony, the benefit of observing the demeanor of the witnesses, and the argument of counsel, the Court finds as follows:

FACTUAL FINDINGS

The following facts were adduced at the hearing on Defendant's Motion To Suppress held on December 20, 2019 as well as the video that was admitted at said hearing. Mr. Daughtry was stopped for exceeding the speed limit by Trp. Farley on March 7, 2018. Trp. Farley measured Mr. Daughtry's speed with his radar equipment. Once blue lighted Mr. Daughtry stopped in a timely and safe manner. A video of the stop and investigation was entered at the hearing by the defense. After a brief encounter with Mr. Daughtry at the driver's side window, Trp. Farley directs Mr. Daughtry to get out of the car. Farley alleged certain observations such as an absence of fine motor skills, bloodshot and watery eyes, flushed face and an odor of an alcoholic beverage.

In the video, Mr. Daughtry is seen getting out of the car just fine without any difficulty and is able to walk around fine thereafter. Farley can be heard advising, not asking, Mr. Daughtry that he's going to be requesting sobriety exercises. Instead of asking if that would be okay with Mr. Daughtry, Trp. Farley never pauses and continues speaking and orders Mr. Daughtry to take his hat off and then tells him where to stand to begin the eye exercise. Instead of asking Mr. Daughtry if he would agree to perform the exercises, Farley begins the instructions and the administration of the exercises. Farley administered the HGN, the walk and turn, one leg stand, finger to nose and the Romberg balance exercise. Mr. Daughtry was subsequently arrested for DUI where he allegedly refused a breath test.

The Defense filed a Motion To Suppress challenging the lawfulness of the stop, detention, evidence of the sobriety exercises and the lawfulness of the arrest. The stop and the subsequent detention were lawful, and therefore those grounds in the motion are DENIED. For the following reasons, this Court finds that Mr. Daughtry did not consent to the sobriety exercises and therefore probable cause for the arrest was lacking.

LEGAL GROUNDS

Because roadside sobriety exercises invoke the protections under the Fourth Amendment of the United States Constitution as well as Article I, Section 12 of the Florida Constitution, police officers must obtain voluntary consent from the subject prior to administering these exercises. *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] (*Quant's request that Taylor perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights*); *State v. Whelan,* 728 So.2d 807 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] (Although no Fifth Amendment implications with respect to sobriety exercises, the Fourth Amendment does in fact apply); *State v. McKenzie,* 14 Fla. L. Weekly Supp. 472b (4th Jud. Cir. Cty Ct. 2006). "Consent is an exception to the warrant requirement, but the state bears the burden of proving that it was unequivocally given. Any doubt concerning a suspect's consent must be resolved in his favor". *Wynn v. State,* 14 So.3d 1094 (Fla. 2nd DCA 2009) [34 Fla. L. Weekly D1158a].

Here, the state was not able to carry their burden because of the contents of the roadside video that was entered into evidence by the defense. In the video, it is clear that Mr. Daughtry was never asked if he would consent to the exercises and instead merely submitted to the show of apparent lawful authority of Trp. Farley. Although officers are not required to advise subjects of their right to refuse to perform the sobriety exercises, this factor can still nonetheless be considered by courts when making a determination on the voluntariness of consent. *Schneckloth v. Bustamante,* 93 S.Ct. 2041 (1973)(While the failure to inform is not a per se basis to invalidate a search, it is the most important factor when determining voluntariness). The language used by Trp. Farley may not be fairly characterized as reflecting a "request". Rather, Farley's directives to Mr. Daughtry such as "take off your hat" and "stand over here" in order to begin sobriety testing without ever stopping to ask Mr. Daughtry would lead a reasonable person to conclude that they were not free to leave or refuse. *State v. Grillo,* Case No. 2016CT-007088-WH (Fla. 10th Jud. Cir. Cty Ct. 2016)(*aff'd on appeal*, Case No. TT-13).

It is therefore:

ORDERED AND ADJUDGED that the Defendant's Motion To Suppress based on involuntary consent to perform the sobriety exercises and a lack of probable cause to arrest (based on the suppression of all the exercises) are GRANTED. Therefore, any and all evidence of any conversations pertaining to, or observations of performance of the sobriety exercises are suppressed as well as any post arrest evidence obtained, including but not limited to any conversations or evidence regarding any subsequent requests to submit to breath testing and any alleged refusals thereto.

* * *

Insurance—Personal injury protection—Discovery—Medical provider lacks standing to compel production of insured's application for insurance and deductible election form

MD NOW MEDICAL CENTERS, INC. d/b/a MD NOW (Patient: Enose Nozinord), Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court,

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15th Judicial Circuit in and for Palm Beach County. Case No. 502019SC009698XXXXSB. May 19, 2020. Marni A. Bryson, Judge. Counsel: Manshi Shah, The Law Office of Jeffrey R. Hickman, West Palm Beach for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER, PLAINTIFF'S MOTION TO COMPEL APPEARANCE OF REPRESENTATIVE FOR DEPOSITION, PLAINTIFF'S MOTION TO CONTINUE HEARING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES TO REQUEST FOR PRODUCTION

THIS CAUSE having come on to be heard on May 6, 2020, on Defendant's Motion for Protective Order, Plaintiff's Motion to Compel Appearance of Representative for Deposition, Plaintiff's Motion to Continue Hearing of Defendant's Motion for Summary Judgment, and Plaintiff's Motion to Compel Better Responses to Request for Production, the Court having reviewed the aforementioned motions, the relevant legal authority, heard argument of counsel, and been sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion for Protective Order is GRANTED.

2. Plaintiff's Motion to Compel Appearance of Representative for Deposition is DENIED.

3. Plaintiff's Motion to Continue Hearing of Defendant's Motion for Summary Judgment is DENIED.

4. Plaintiff's Motion to Compel Better Responses to Request for Production filed May 5, 2020 is GRANTED IN PART AND DENIED IN PART. Plaintiff's Motion to Compel Better Responses to Request for Production is granted as to the Explanation of Benefits for all providers and is denied as to the Insured's application of insurance and deductible election form as Plaintiff' lacks standing.

* * *

Insurance—Reconsideration—Claim that medical provider failed to open emails containing links to insurer's discovery response does not establish excusable neglect warranting reconsideration of, or relief from, judgment entered in favor of insurer based on exhaustion of policy limits

CHIROPRACTIC & ACUPUNCTURE MEDICAL CENTER, a/a/o Sabrina Nguyen, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. 18-006336 SC. October 31, 2019. John Carassas, Judge. Counsel: Gregory Rock, White & Twombly, P.A., Miami Shores, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON PLAINTIFF'S VERIFIED MOTION FOR RECONSIDERATION

[Original Opinion at 27 Fla. L. Weekly Supp. 828b]

THIS CAUSE having come before the Court on Plaintiff's Verified Motion for Reconsideration and the Court having heard argument of counsel on October 24, 2019, and being otherwise advised in the Premises, the Court hereby finds as follows:

On August 7, 2019, this Court heard Plaintiff's Motion to Compel Discovery and denied the same finding that Plaintiff had ample opportunity to review the discovery documents provided by Defendant and that there were no outstanding Discovery Obligations. Defendant produced all Explanations of Benefits, Medical Bills and Non-Privileged discovery, including the PIP Payment Log to enable Plaintiff ample opportunity to prepare and review their case. This Court also heard Defendant's Motion for Summary Judgment on August 7, 2019 on the merits with each side having the opportunity to present its case. At the conclusion of the hearing, this Court ruled in favor of Defendant granting its Motion for Summary Judgment and an Order and Final Judgment was subsequently entered on August 28, 2019.

On August 23, 2019, Plaintiff filed its Verified Motion for Reconsideration seeking relief under Florida Rule, of Civil Procedure 1.540(b) alleging excusable neglect for failure to open a May 1, 2019 and a June 13, 2019 email containing a Dropbox Link to the requested discovery documents provided by Defendant. The Court has reviewed the record and no new evidence or case law was presented.

The Court finds that the Parties had an ample opportunity to complete discovery in this matter and had months to address any issues. Plaintiff brings its Motion under Florida Rifle of Civil Procedure 1.540(b) which states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

This Court recognizes that sometimes a reconsideration is required; however, this is not one of those situations. The Parties in this matter are two entities, both represented by counsel. Both Parties have had months to complete discovery and have an obligation to each other to monitor their emails. The Courts have gone to electronic filing and this places the burden on the Parties to monitor their email and what is going on in the case. Both Parties were given an opportunity to present their case at the August 7, 2019 hearing and the opportunity to be heard was given at that time. To prevail on a Motion for Reconsideration, a party needs more than an allegation or conclusory statement. "The requirement that the defendant demonstrate excusable neglect requires more than a conclusory statement. A party moving to vacate. . .must set forth facts explaining or justifying the mistake or inadvertence by affidavit or other sworn statement. *Inter-Atlantic Inc. Services, Inv. v. Hernandez,* 632 So.2d 1069 (Fla. 3d DCA 1994). The Court haying reviewed the Affidavit of T. Roger White, Jr. and the record in this matter and hearing the argument of counsel finds that Plaintiff has not met this burden.

No new evidence or case law has been provided that would warrant the reconsideration of this matter or alter the Court's decision.

THEREFORE, IT IS ORDERED AND ADJUDGED that Plaintiff's Verified Motion for Reconsideration be, and the same is hereby DENIED. The Order entered on August 28, 2019 Granting Defendant's Motion for Summary Judgment and Final Judgment in Favor of Defendant shall stand. The Court will consider no further Motions for Reconsideration. This Court reserves jurisdiction to tax fees and costs for the Defendant as the prevailing party.

* * *

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Criminal law—Driving under influence—Discovery—Medical records—Investigative subpoena—State met its burden of establishing relevancy and compelling state interest to obtain investigative subpoena for defendant's medical records from date of crash where records were directly related to charge of driving under influence and ongoing criminal investigation—Fact that state already has observations of defendant made by arresting officer not proper basis to exclude observations of medical personnel from subpoena—Court also declines to limit subpoena to information related to alcohol intoxication—Any evidence in medical records that tends to prove or disprove that defendant was under influence of controlled substance is relevant to crime of driving under influence

STATE OF FLORIDA, Plaintiff, v. DAVID LEE LOMAS, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2020-CT-000381-A. Division II. May 22, 2020. Susan Miller-Jones, Judge. Counsel: Andrew McCain, Assistant State Attorney, for Plaintiff. Oran L. Bullock, for Defendant.

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

The trend in the law, from *Hunter v. State*, 639 So. 2d 72 (Fla. 5th DCA 1994), all the way to *State v. Gomillion*, 267 So. 3d 502 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D758a], and *Leka v. State*, 283 So. 3d 853 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2445a], shows that the State must show a compelling state interest in order for this Court to allow the issuance of a subpoena duces tecum for medical records over a patient's objection. The State may show such a compelling State interest by showing that the contents of the medical records are relevant to a criminal investigation. The State may do this through a sworn-to affidavit. *McAlevy v. State*, 947 So. 2d 525 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c]; *Hunter*, 639 So. 2d at 73.

In this case, there is a compelling State interest in the criminal investigation into the crime of Driving Under the Influence as demonstrated by the sworn-to affidavit and crash report attached to the State's motion. The State has shown that it is investigating a crash occurring on February 29, 2020, at around 8:15pm in which the Defendant drove a motor vehicle in Alachua County, Florida, while under influence of alcohol and/or a controlled substance to the extent that his normal faculties were impaired. The sworn to affidavit describes that the Defendant overturned his vehicle after having overcorrected while turning. Trooper W.F. Schrader of the Florida Highway Patrol witnessed the Defendant exhibiting indicators of impairment of his normal faculties by alcohol and/or a controlled substance, including an odor of an alcoholic beverage coming from his person, watery eyes, slurred speech, and difficulties with balance, coordination, and following directions during field sobriety exercises. Trooper Schrader attests that he read the Defendant the implied consent warning and the Defendant refused to provide a sample of his breath for alcohol testing despite knowing the consequences of refusing.

The Defendant argues that this case is similar to *Leka v. State*, 283 So. 3d 853 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2445a]. That case is factually distinct from our own, although the motion and crime under investigation were similar to those before this Court. In *Leka*, the State failed to describe the specific date and content sought by subpoena; the officer that testified never linked Leka to the crime being investigated; and, the State never argued or showed through a crash report or probable cause affidavit that there was a nexus between the records sought and the crime investigated. The case before this Court is very different. Here, the Defendant allegedly admitted to being the driver at the time of the crash and a witness saw the Defendant leave the vehicle. Thus, this case is akin to *State v. Rivers*, 787 So. 2d 952 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1512a], and *McAlevy*, in that the medical records sought are directly relevant to at least one of the offenses being investigated, Driving Under the Influence. The subpoena duces tecum proposed for issuance by the State is narrowly tailored in time—only records from February 29, 2020—and in scope—only those records relevant to the criminal investigation at issue here. Unlike in *Leka* and *Gomillion*, 267 So. 3d 502, here, the State has shown that there is a nexus between the records sought and the crime being investigated.

The Defendant also relies on *Limbaugh v. State*, 887 So. 2d 387 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2213a]. The Court finds that equally distinguishable. There, the State was attempting to use a search warrant to obtain medical records of the Defendant. Here, the State seeks the issuance of a subpoena. In *Limbaugh*, the doctors provided *all* of the defendant's medical records, not just the ones relevant to the criminal investigation. Here, the State has tailored the language of the subpoena to return only those records that are relevant to the crime being investigated.

The Defendant referenced *Carpenter v. United States*, 138 S. Ct. 2209 (2018) [27 Fla. L. Weekly Fed. S415a]. This Court stands by its ruling in the Order Granting Issuance of Subpoena Duces Tecum issued in the case of *State v. Joshua Matz*, 01-2019-CT-001310-A [28 Fla. L. Weekly Supp. 149a], from September 26, 2019. *Carpenter* presented a different issue related to the release of cell records that allowed the government to catalogue the defendant's movements over a large amount of time. The Supreme Court specifically confined the scope of its holding. In light of the dissimilar factual scenario, this Court continues to decline to depart from the law spelled out by the cases cited above.

The Defendant argues that the subpoena should exclude observations of medical personnel because a law enforcement officer was able to make observations. This Court finds that the observations of medical personnel, as limited by the subpoena language sought by the State, would be relevant to the crime of Driving Under the Influence, whether lay observation or that of a medical expert. "The fact that the State ha[s] other incriminating evidence against [a defendant] [is] not a proper basis to prevent execution and issuance of the investigative subpoena." *Rivers*, 787 So. 2d at 954. The Court therefore declines to limit the language further.

Finally, the Defendant argues that the subpoena should be limited to information related to alcohol intoxication because the State has not presented any reason to suspect the Defendant was intoxicated by a controlled substance. The State has shown that it is investigating the alleged crime of Driving under the Influence. Any evidence that the medical records contain that tends to prove or disprove that the Defendant was or was not under the influence of a controlled substance would be relevant to that crime. As such, the State has shown the requisite nexus and the Court declines to limit the subpoena language as requested by the Defendant.

The Court authorizes the State to issue the proposed subpoena duces tecum (updated to correct the date such records should be delivered to the State).

* * *

Insurance—Med pay—Coverage—Exhaustion of policy limits—Insurer's total of $3500 payments did not exhaust benefits under policy providing $1000 med pay coverage and $2500 PIP coverage—Med pay and PIP are separate and distinct coverages and, whether by mistake or otherwise, insurer's explanations of benefits allocated only $41.60 of payments to med pay coverage—Corrected EOB issued after receipt of demand letter is not sufficient to "reallocate" payments to med pay coverage

PASCO-PINELLAS HILLSBOROUGH COMMUNITY HEALTH SYSTEM d/b/a FLORIDA HOSPITAL WESLEY CHAPEL, as assignee of Bryant Kilgore, Plaintiff, v. NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-SC-016920-O. May 14, 2020. Gisela T. Laurent, Judge. Counsel: K. Douglas

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Walker, Bradford Cederberg, P.A., Orlando, for Plaintiff. Nancy Saint-Pierre, Law Office of David S. Lefton, Plantation, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING MEDICAL PAYMENTS COVERAGE

THIS MATTER having come before this Honorable Court on Plaintiff's Motion for Partial Summary Judgment (certificate of service date August, 29, 2019) regarding the issue of Medical Payments Coverage, and Defendant's Competing Motion for Partial Summary Judgment (certificate of service date January 8, 2020), and this Honorable Court having heard arguments of counsel, considered the evidence presented, reviewed all relevant statutes and caselaw provided, and being otherwise fully advised in the premises, the Court makes the following findings:

The subject policy of insurance is an Alabama policy, which provided $1,000 in Medical Payments ("MedPay") coverage. (Torres Aff. ¶6.). The policy was thereafter conformed to provided Florida Personal Injury Protection ("PIP") Coverage up to $10,000.00. *Id.* Florida PIP and the Medical Payments coverages are separate and distinct coverages. (Torres Dep., 14:23-15:4, Feb. 27, 2019).

On or about August 1, 2017, sixteen year-old Bryant Kilgore was injured when he was struck by a car while riding his bike. Bryant Kilgore was taken to the Emergency Room at Florida Hospital Wesley Chapel (Plaintiff), where he received emergency services and care related to his injures. There is no dispute Bryant Kilgore was covered by the Alabama Policy of Insurance described above.

Two providers—(1) Sheridan Radiology Services of West Florida and (2) Plaintiff—submitted bills to Defendant seeking reimbursement for the emergency services and care provided to Bryant Kilgore in the emergency room on or about August 1, 2017. Sheridan Radiology submitted a bill totaling $208.00; and Plaintiff's bill totaled $4,824.32. There is no dispute each of these bills were covered by the subject policy of insurance.

Defendant processed and paid Sheridan Radiology's $208.00 bill as follows: It allowed the charges in full, and paid Sheridan Radiology $208.00. Of the $208.00 paid to Sheridan Radiology, $166.40 was allocated to Florida PIP, and $41.60 was allocated to the $1,000 in MedPay coverage. (Torres Dep. 21:17-21).

The initial Explanation of Review regarding Plaintiff's bill was sent by Defendant on or about November 20, 2017. According to this Explanation of Review, Plaintiff's $4,824.32 bill was allowed at $4,115.00, which was to be paid to Plaintiff. Of the $4,115.00 to be paid to Plaintiff, $3,292.00 was allocated as a PIP payment, and $823.00 was allocated as a payment under the policy's MedPay coverage. Defendant sent, without further explanation, a check to Plaintiff for only $3,292.00—the amount allocated to PIP. The remaining $823.00 indicated as being allocated to Medical Payments Coverage was never paid.

Defendant later testified via its Corporate Representative that the November Explanation of Review was a mistake. (Torres Dep. 26:20-21). The November EOR was approved by Defendant and sent to Plaintiff as the "explanation" of how Defendant would be reimbursing Plaintiff for its submitted charges. A corrected EOR was not sent until March 6,2018 after Defendant received a Demand Letter from one of the providers. (Torres Dep. 28:18-29:4). When asked why a corrected EOR was not sent in November when she noticed the mistake, Defendant's corporate representative testified, "I don't know." (Torres Dep. 27:17).

Plaintiff argues in its Motion for Partial Summary Judgment that, according to Defendant's own documents indicating specific allocations, Defendant paid only $41.60 under the Policy's $1,000 in Medical Payments Coverage. Defendant argues Bryant Kilgore is entitled to only $2,500 of the $10,000 in Florida PIP coverage because there is no affirmative determination Bryant Kilgore suffered from an "emergency medical condition," and that the total payments issued for this claim total $3,500—which this Court should determine as satisfying Defendant's contractual obligation to pay $2,500 in FL PIP, and $1,000 in Medical Payments under the policy of insurance.

The Court is bound by the plain language of the insurance contract. Applying the plain language of the insurance policy to the evidence before this Court, the Court agrees with Plaintiff. According to Defendant's itemized specifications of how each bill was paid, Defendant clearly paid only $41.60 allocated to the $1,000 in available Medical Payments coverage.

Florida PIP and the contractual Medical Payments Coverage are very separate and distinct coverages, which are paid separately. Florida PIP is paid according to section 627.736 of the Florida Statutes; and according to page 10 of 27 of the policy attached to the Affidavit of Nicole Torres, medical payments coverage pays 100% of "usual, customary, and reasonable charges."

The Policy of insurance clearly provides for $1,000 in Medical Payments coverage, and up to $10,000 in Florida PIP. Contrary to Defendant's argument that Defendant exhausted all available benefits at $3,500, the policy does not provide for simply "$3,500 in benefits." Simply paying $3,500 does not adequately exhaust one coverage or the other. The Court cannot rewrite this contract entered into by Defendant and its insured. Accordingly, the Court finds, as a matter of law, the contract of insurance provides $1,000 in medical payments coverage, and up to $10,000 in Florida PIP.[1]

The question then becomes whether Defendant exhausted the $1,000 in Medical Payments Coverage available under the policy of insurance. This Court determines, based on Defendant's own allocations, there is no genuine issue of material fact that Defendant has not exhausted the $1,000 in Medical Payments coverage.

On or around October 16, 2017, Defendant issued an "Explanation of Review" (or "EOR") detailing how the bill from Sheridan Radiology was processed and paid. That EOR indicated an "EOR Check Amount" of $208.00. Of the $208.00 to be paid to Sheridan Radiology, $166.40 was an "Allocated PIP Payment," and $41.60 was an "Allocated MedPay/Medical Expense Payment.' There is no dispute Sheridan Radiology received $208.00 as indicated in the EOR.

On or around November 20, 2017, Defendant issued an EOR detailing how Plaintiff's bill would be processed and paid. That EOR indicated an "EOR Check Amount" of $4,115.00. Of the $4,115.00 to be paid to Plaintiff, $3,292.00 was an "Allocated PIP Payment," and $823.00 was an "Allocated MedPay/Medical Expense Payment.' There is no dispute that Plaintiff received a check for $3,292.00—or the amount allocated by Defendant as a "PIP Payment." The $823.00 "Allocated MedPay/Medical Expense Payment" was never tendered.

Importantly, section 627.736(4)(b)(2) states:

> "If an insurer pays only a portion of a claim or rejects a claim, the **insurer shall provide *at the time of the partial payment*** or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay . . . ."

§627.736(4)(b)(2), Fla. Stat. (2018) (emphasis added). The statutory mandate that an insurer provide an "itemized specification" is commonly achieved via "Explanations of Review" or "Explanation of Benefits" like the ones generated, approved, and sent by Defendant in this instance. Defendant's corporate representative testified she noticed a "mistake" on the November 20, 2017 EOR sent to Plaintiff, but she did not send a corrected EOR at that time. (Torres Dep., 27:14-15). When asked why a corrected EOR was not sent at that time, Defendant's corporate representative testified, "I don't know." (Torres Dep., 14-17).

In addition to the plain language of §627.736(4)(b)(2) stating "the insurer **shall** provide at the time of the partial payment or rejection an

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itemized specification of each item . . .", courts have addressed this issue as it relates to Explanations of Review. *See, e.g., Fidel S. Goldson, D.C., P.A. a/a/o John Gray v. United Auto. Ins. Co.*, 12 Fla. L. Weekly Supp. 161b (Broward Cnty. Nov. 14, 2004). In *Goldson*, the Court explained:

> Florida Statute §627.736(4)(b)(2) provides: "When an insurer pays only a portion of the claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay . . . .this is generally informally referred to as an "explanation of benefits." The statute does not further defined what is meant by an "itemized specification.
>
> Under Florida Law, in the absence of a statutory definition, a word used in a statute is given its standard dictionary definition. The word "specification" is defined as "a detailed precise presentation of something," and "the act or process of specifying." The word "specify" is defined as "to name or state explicitly in detail." *Webster's New Collegiate Dictionary* 1108 (1980).
>
> In the instant case, the insurer has denied the claim in total. The question then for the Court is whether the letters provided by the insurer [complied with the statute]. . . . Rather than "explicitly stating" the reason for the denial, the insured's response to the claim does nothing more than confuse the matter even further. As a result, the Court finds that there is no disputed issue of material fact on this issue. As a matter of law, the Defendant's response does *not* come close to meeting the requirements of Fla. Stat. §627.736(4)(b).
>
> The plaintiff is correct that the provisions of the Florida Statutes governing insurance become a part of the insurance contract between the parties. *Grant v. State Farm Fire & Casualty Co.*, 638 So. 2d 936, 938) (Fla. 1994); *Mia A. Higginbotham, D.C., P.A. v. United Automobile Ins. Co.*, 11 Fla. L. Weekly Supp. 748e (Broward Cty. Ct. 2004). As a result, when the Defendant failed to comply with the mandatory provisions of Fla. Stat. §627.736(4)(b), it breached its insurance contract with the insured.

Goldson, 12 Fla. L. Weekly Supp. 161b.

Defendant now argues a corrected EOR—sent in March 2018 after receiving a demand letter—is sufficient to "reallocate" the payments made to Plaintiff. Defendant has provided no authority to support this type of "reallocation," and the Court finds the March 2018 EOR does not comply with §627.736(4)(b)(2), which mandates insurers provide an "itemized specification" "**at the time** of the partial payment." (emphasis added).

Defendant also argues, relying on *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys.*, 21 So. 3d 124 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2268a], that it is not required to send an EOR within any timeframe, an accurate EOR, or any EOR at all. Notwithstanding the fact the plain language of the statute says an insurer "shall" provided an "itemized specification" "at the time of the partial payment," *United Auto* is clearly distinguishable. In that case, the insurer did not deny or partially pay a claim—it did nothing. The Third DCA reiterated, however, that the mandates of §627.736(4)(b)(2) are in fact triggered anytime an insurer denies or partially pays a claim. *Id.* at 126-27. There is no dispute in the case before this Court that Nationwide partially paid Plaintiff's claim. Nationwide was therefore required by law to provide an accurate itemized specification at the time of the partial payment. *See id*; §627.736(4)(b)(2), Fla. Stat. (2018).

Accordingly, based on the facts before this Court, whether by mistake or otherwise, Defendant allocated only $41.60 to the $1,000 in Medical Payments Coverage available under the policy. Despite Defendant's subsequent allegations that the $3,500 paid for this claim consisted of $1,000 in medical payments and $2,500 in Florida PIP, these conclusory allegations are contradicted by Defendant's own documents showing the specific, itemized allocations for each payment made. The Court, therefore, finds no genuine issue of material fact exists—Defendant paid only $41.60 allocated to the $1,000 in Medical Payments Coverage. *See K.E.L. Title Ins. Agency v. CIT Tech. Fin. Servs., Inc.*, 58 So. 3d 369 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D742a] (holding conclusory allegations that are contradicted by explicit portions of the record are not sufficient to create a genuine issue of material fact).

As a matter of law, therefore, there remains $958.40 in Medical Payments Coverage which can and shall be used to pay claims according to the terms of the policy. Defendant testified it received bills from only Sheridan Radiology and Plaintiff for the emergency treatment rendered to Bryant Kilgore on or about August 1, 2017. Because Sheridan Radiology's $208 bill was paid in full, the remaining Medical Payments coverage should be used to reimburse Plaintiff according to the terms of the policy as it relates to Medical Payments Coverage.

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Partial Summary Judgment is **GRANTED.**

2. Defendant's competing Motion for Partial Summary Judgment is **DENIED.**

3. There remains $958.40 in Medical Payments coverage available for payment of claims related to Bryant Kilgore's injuries sustained on or about August 1, 2017.

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[1]The issue of whether Defendant properly limited the $10,000 in available PIP to $2,500 was not before the Court. The Court, therefore, does not address that issue in this order.

* * *

Landlord-tenant—Eviction—Attorney's fees—Plaintiff entitled to attorney's fees as prevailing party where plaintiff sought possession of property based on defendant's failure to pay rent, defendant filed answer alleging payment and case was set for hearing, plaintiff obtained counsel and request for attorney's fees was included in Notice of Appearance, and parties ultimately stipulated to dismissal because defendant had vacated the property—Where defendant had notice of plaintiff's intention to seek fees, stipulation of parties indicated that court would determine entitlement to fees, and defendant failed to appear at hearing specifically scheduled to determine entitlement to fees, fact that entitlement to attorney's fees was not pled in complaint does not preclude award

CATHERINE CHIBUGO, Plaintiff, v. EXALINE JOSEPH, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-022977-CC-23, Section NDO2. May 26, 2020. Natalie Moore, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff.

ORDER GRANTING ENTITLEMENT TO ATTORNEY FEES

This cause came before the Court on March 12, 2020 on Plaintiff's Motion for Attorney Fees. Counsel for Plaintiff appeared. Defendant did not appear. Upon review, this Court concludes that Plaintiff is entitled to attorney fees.

Plaintiff, Catherine Chibugo, sought to evict Defendant, Exaline Joseph, from a residential property for failure to pay rent. Defendant filed an answer alleging payment and the case was to be set for hearing. Plaintiff then obtained counsel. As part of the Notice of Appearance, there was a request for the Court to award attorney fees. The case was set for hearing. One day prior to the hearing, Ms. Joseph moved to dismiss the case as she had vacated the property. At the hearing the parties entered a stipulated order of dismissal, in which the Court reserved jurisdiction to determine entitlement to, and amount of fees. The dismissal was in light of the fact that Defendant had vacated the premises, the exact remedy that Plaintiff sought, and was forced to file suit to obtain. This motion follows.

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The general rule is that claims for attorney fees, whether based on statute or contract, must be pled and failure to do so constitutes a waiver of the claim. *Stockman v. Downs,* 573 So.2d 835 (Fla. 1991). There is, however, an exception to that rule. When a party has notice of the intention to seek fees and fails to object, that party waives any objection to failure to plead. *Id.* at 838. Here, Plaintiff's counsel filed a notice of appearance indicating an intention to seek fees, the stipulation of the parties indicated that the Court could determine entitlement to fees, and Defendant failed to appear at a hearing specifically scheduled to determine entitlement to fees. The Plaintiff was the prevailing party, and there is a statutory entitlement to fees. While not pled in the initial complaint (filed before Counsel was hired) and no amended complaint was filed, it is clear that Defendant was on notice of the Plaintiff's intention to seek fees and failed to object to the request.

Plaintiff is entitled to fees and may set this case for hearing, with notice to Defendant, to determine an amount of fees to be ordered.

* * *

Insurance—Property—Standing—Action by assignee of property owner against insurer that issued policy to mortgagee of property—Assignee who is not named insured can only proceed in action against insurer as third-party beneficiary of policy—Assignee is not omnibus insured under policy—Count 1 of complaint is dismissed where assignee is not named insured or omnibus insured and has not plead that it is third-party beneficiary of policy—Alternative count asserting claim of implied equitable assignment of benefits is dismissed — Assignee's action based on executed assignment of benefits precludes it from seeking equitable relief

WATER DRYOUT (LLC) Plaintiff, v. INTEGON NATL. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2018-020716-SP-23, Section ND 05. August 8, 2019. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE COMLAINT WITH LEAVE TO AMEND

THIS CAUSE came to be heard on May 2, 2019, on Defendant's Motion to Dismiss the Complaint. Plaintiff and Defendant submitted additional filings on May 8, 2019 and on May 13, 2019. This Court having considered Defendant's Motion to Dismiss as well as Plaintiff's Response, the arguments presented at the hearing, the parties' subsequent filings, and being otherwise fully advised in the premises herein, it is hereby:

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the Complaint is hereby **GRANTED.** Plaintiff does not qualify as a named insured, a first-party claimant, or an omnibus insured under the lender-placed policy issued by Defendant. In addition, since Plaintiff obtained an executed Assignment of Benefits Form, it cannot proceed on an Implied Equitable Assignment of Benefits. Plaintiff will have 30 days to file an Amended Complaint, which the Court acknowledges was done on June 28, 2019.

FACTS

This is a cause of action in small claims for water damages in the amount of $2,651.75 resulting from a plumbing leak to the kitchen of a dwelling property ("Property") owned by Maria Hernandez and Angel Rosales ("Borrowers"). The Property was encumbered by a mortgage held by Seterus, Inc. ("Seterus"). Since the Borrowers failed to obtain an insurance policy to protect the Property, Seterus purchased a policy from Integon National Insurance Co. ("Integon/Defendant"), to insure their mortgagee interests. The policy, which was referenced but not attached to the Complaint, listed Seterus as the "Named Insured" and Maria Hernandez as the "Borrower."[1]

Water Dryout LLC. ("Plaintiff") provided remediation services for the water loss resulting from the plumbing leak. In exchange for Plaintiff's services, Maria Hernandez signed an Assignment of Benefits and Directions to Pay Form ("Assignment of Benefits"). The Assignment of Benefits Form was included in the Complaint and listed Maria Hernandez as the "Client/Insured," "Integon National" as the "Insurer," and referenced the insurance policy purchased by Seterus. The Assignment of Benefits stated that Maria Hernandez assigned "any and all insurance rights, benefits, and proceeds due to [her] under the applicable insurance policy." Ms. Hernandez "authorized [her] Insurance Company to make direct payment of any insurance benefits or proceeds" to Plaintiff for the "services rendered to [her] property."

Under Count I of the Complaint, Plaintiff asserted that Maria Hernandez was a "named insured on the policy" and had an insurable interest in the policy pursuant to Florida Statute §627.405. Plaintiff also claimed first-party status as an "omnibus insured," designated under the "Other Coverages" portion of the subject policy, requiring Defendant to pay reasonable costs for necessary repairs after a loss, to protect the residential property or other structures from additional losses. Under Count II of the Complaint, Plaintiff asserted a claim of Implied Equitable Assignment of Benefits as an alternative to Count I.

In its Motion to Dismiss the Complaint, Defendant argued that Plaintiff had no greater standing to bring an action for breach of contract than Ms. Hernandez. First, Defendant asserted that Ms. Hernandez possessed no rights, under the insurance policy, to assign to Plaintiff; second, that Plaintiff was not a party to the insurance contract and therefore lacked standing to bring suit for its individual benefit; third, that Plaintiff failed to plead an insurable interest under the policy; fourth, that Plaintiff was not an omnibus insured under the policy; and finally, that Count II of the Complaint improperly plead a cause of action for Breach of Contract with Implied Equitable Assignment of Benefits. Attached to the Motion to Dismiss was a copy of the insurance policy.

DISCUSSION

On a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom as allowed in favor of the plaintiff. *Wallace v. Dean,* 3 So. 3d 1035, 1042-43 (Fla. 2009) [34 Fla. L. Weekly S52b]. When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204, 207 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a].

Since Seterus did not assign their benefits to Plaintiff, Ms. Hernandez's interest in the insurance policy, as the assignee of the Assignment of Benefits, must be ascertained. It is undisputed that Ms. Hernandez was the owner of the Property at the time of the loss. As an owner of the Property she would have an economic interest in the safety or preservation of the Property. Seterus would also have an economic interest in the safety or preservation of the Property since a diminution in the value of the Property, caused by a loss, would reduce the value of the collateral securing the loan.

While both Ms. Hernandez and Seterus have an insurable interest in the Policy, Ms. Hernandez was not the named insured on the policy and could only enforce her interest as a third-party beneficiary. Several decisions have considered the issue of a third-party beneficiary in the context of an insurance policy. The Third District Court of Appeal has held that a homeowner could enforce an insurance policy as a third-party beneficiary, even though the policy protecting his property was not in his name since the homeowner possessed an insurable interest in the property. *Schlehuber v. Norfolk & Dedham*

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Mut. Fire Ins. Co., 281 So. 2d 373, 375 (Fla. 3d DCA 1973); *see also Community Bank of Homestead v. American States Insurance Company,* 524 So. 2d 1154, 1154 (Fla. 3d DCA 1988) (an aircraft insurance policy naming the bank who provided the loan to purchase the aircraft as an "additional insured" on the policy "afforded the bank the right to maintain an independent action as an intended third-party beneficiary"); *Mitchell v. Balboa Ins. Co.,* No. 8:11-CV-02580-EAK, 2012 WL 2358563, at 4 (M.D. Fla. June 20, 2012) (Plaintiff, as the property owner, could proceed against insurance company as a third-party beneficiary to enforce his insurable interest in an insurance policy listing the mortgage company as the named insured); *Conyers v. Balboa Ins. Co.,* 935 F. Supp. 2d 1312, 1316 (M.D. Fla. 2013) ("under Florida law, an insurance company's promise to pay the extent of a loss may be enforced by a third-party beneficiary even if he possesses no policy in his name.").

Ms. Hernandez, as the Property owner and mortgagee of the loan issued by Seterus, had an insurable interest in the property and had standing to proceed as a third-party beneficiary to enforce the provisions of the insurance policy issued by Defendant. Payment of the claim would go directly to Seterus, reducing the mount Ms. Hernandez owed on her mortgage. If the amount Ms. Hernandez owed on her mortgage was less than the proceeds from the loss, then the residual amount remaining after the mortgage was paid would go directly Ms. Hernandez, pursuant to the "LOSS Payment" clause of the policy.

Plaintiff, as an assignee to Ms. Hernandez's claim, can only proceed as a third-party beneficiary since Ms. Hernandez is not a named insured. As an assignee of Ms. Hernandez's claim, Plaintiff cannot acquire any greater rights than those possessed by Ms. Hernandez. *Alderman Interion Systems, Inc. v. First National-Heller Factors, Inc.,* 376 So. 2d 22, 24 (Fla. 2d DCA 1979).

In the Complaint, Plaintiff also claimed the status of "omnibus insured," designated under the "Other Coverages" portion of the policy. Florida appellate cases dealing with the award of attorney's fees have defined an omnibus insured as an individual "who is covered by a provision in the policy but not specifically named or designated." *Cont'l Cas. Co. v. Ryan Inc. E.,* 974 So. 2d 368, 374 (Fla. 2008) [33 Fla. L. Weekly S59a]. An omnibus insured's "rights are derived directly from his or her status under a clause of the insurance policy without regard to the issue of liability." *State Farm Fire & Cas. Co. v. Kambara,* 667 So. 2d 831, 833 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D156c]. If an individual can be classified as an omnibus insured, he or she is entitled to first-party benefits. *Id.*

In *Kambara,* a resident of an apartment complex was injured and sued State Farm for reimbursement of his medical expenses pursuant to the medical payment coverage portion of a premises liability policy State Farm had issued for the apartment complex. *Id*. The insurance policy issued by State Farm contained a clause which would "pay medical expenses for bodily injury caused by an accident on your premises you own or rent." *Id*. The appellate court determined that Kambara was an omnibus insured under the policy and awarded Kambara his attorney's fees. *Id*. at 834; *see also Prygrocki v. Indus. Fire & Cas. Ins. Co.,* 407 So. 2d 345, 345-46 (Fla. 4th DCA 1981), *approved,* 422 So. 2d 314 (Fla. 1982) (pedestrian who was struck by insured motor vehicle was an omnibus insured under the personal injury protection coverage portion of an auto policy since the policy required the insurer to pay "any person while a pedestrian, through being struck by the insured motor vehicle"). In a case similar to this one, the Third District Court of Appeals held that a collateral protection insurance policy purchased under the name of the lender did not entitle the borrower to a designation as an omnibus insured since the policy did not contain any "term which would reasonably encompass any other person or entity as an 'insured.' " *Romero v. Progressive Southeastern, Ins. Co.,* 629 So. 2d 286, 287 (Fla. 3d DCA 1993).

The Plaintiff in this case is not an omnibus insured since it is not "an individual" covered by a provision in the existing policy. *Cont'l Cas. Co. v. Ryan Inc. E.,* 974 So. 2d at 374. Plaintiff contends that the "Emergency Repairs" clause in the policy, which states that Defendant "will pay the reasonable cost incurred for necessary repairs that are made solely to protect the RESIDENTIAL PROPERTY or OTHER STRUCTURE from further LOSS," conveys a benefit to Plaintiff. While the clause indicates that payments will be made for reasonable costs for emergency repairs, that does not mean that the entity conducting the repair is somehow a beneficiary under the policy. A pedestrian injured in an auto accident is an omnibus insured of an auto policy because the auto policy insures pedestrians. *Prygrocki* 407 So. 2d at 345. A resident of an apartment complex, insured by a premises liability policy covering bodily injury losses occurring within the complex, is an omnibus insured under that policy because his or her injuries were sustained while residing in the apartment complex. *Kambara,* 667 So. 2d at 833. Under Plaintiff's reasoning, the hospital or medical providers who treated the pedestrian or the injured resident of the apartment complex, would be considered omnibus insureds because they provided the treatment. This Court finds that Plaintiff is incorrect in its interpretation of the clause.

Wherefore, Defendant's Motion to Dismiss Count I of the Complaint is granted since Plaintiff is neither a named insured nor an omnibus insured and Plaintiff did not plead that it was a third-party beneficiary under the policy. Plaintiff will have 30 days from the date of this order to amend its Complaint.

Defendant's Motion to Dismiss Count II is GRANTED. "Florida courts recognize the general rule that where a complaint shows on its face that there exists an adequate remedy at law, there is no jurisdiction in equity." *McNorton v. Pan Am. Bank, N.A.,* 387 So. 2d 393, 399 (Fla. 5th DCA 1980). Here, Plaintiff filed suit pursuant to an executed Assignment of Benefits Form between Plaintiff and Ms. Hernandez. In so doing, Plaintiff sought a remedy at law and is therefore precluded from seeking equitable relief based on a breach of an implied equitable assignment of benefits.

---

[1]Defendant's request for dismissal premised on Plaintiff's failure to attach a copy of the contract sued upon is denied. In their Complaint, Plaintiff indicated that the copy of the policy was not in its possession but would be requested through discovery. *Parkway Gen. Hosp., Inc. v. Allstate Ins. Co.,* 393 So. 2d 1171, 1172 (Fla. 3d DCA 1981).

* * *

Insurance—Personal injury protection—Answer—Amendment—Motion to amend answer to raise allegations of upcoding and deficient record-keeping is denied where proposed amendment is contrary to legislative intent to have those issues addressed and resolved prior to suit, medical provider will be severely prejudiced by amendment that would deprive it of opportunity to cure deficiencies in records and coding prior to suit, amendment would be futile, and insurer waived defenses and abused privilege to amend by failing to plead defenses known to it prior to suit during six years of litigation

SILVERLAND MEDICAL CENTER, LLC., a/a/o Joeanna Garland, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No.2014-002599-CC-25, Section CG03. May 12, 2020. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Sherria Williams, House Counsel for United Auto. Ins. Company, Miami Gardens, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO FILE AMENDED ANSWER

THIS CAUSE came before the Court on May 7, 2020 on Defendant's Motion to File Amended Answer.

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The parties were represented by counsel at the hearing who presented arguments to this Court. Sherria Williams, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Defendant's motion, Plaintiff's Amended Memorandum of Law in Opposition to Defendant's Motion to File Amend Answer, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby enters this Order DENYING Defendant's Motion to File Amended Answer and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

Plaintiff rendered treatment to the claimant from August 9, 2011 through November 28, 2011 in relation to an automobile accident and submitted a claim for payment of Personal Injury Protection ("PIP") benefits to Defendant.

On February 21, 2014, Plaintiff filed the instant lawsuit alleging breach of contract and seeking payment of unpaid PIP benefits. The recommended resolution standard for this action is eighteen (18) months. Fla. R. Jud. Adm. 2.250(a)(1)(B).

On June 6, 2014 Defendant served its Answer and Affirmative Defenses to Plaintiff's Complaint alleging payment and a failure on the part of Plaintiff to timely notify Defendant as defenses to Plaintiff's Complaint.

On April 22, 2015 Defendant secured a peer review report from Michael Weinreb, D.C. pursuant to Fla. Stat. 627.736(7)(a).

On May 15, 2015 Defendant served its Motion to File Amended Answer. This motion sought to raise allegations of deficiencies within Plaintiff's "medical records" and/or "treatment records" ("record keeping defense") as well as an allegation that Plaintiff has "up coded" CPT code 97032 ("upcoding defense").

Defendant did not set its Motion to File Amended Answer for a hearing until year 2020; that is, Defendant sat on its hands for five (5) years before bringing its motion before the Court.

Defendant argues that its motion to amend ought to be granted due to Florida's liberal policy in favor of granting amendments. Defendant also argues that since this matter has not been set for trial there is no prejudice to Plaintiff in allowing the amendment.

Plaintiff argues that given the nature of Defendant's proposed defenses, as applied to the PIP statute, Defendant's motion to amend ought to be denied. Plaintiff argues prejudice, futility, abuse of the privilege to amend, and waiver in support of its argument that Defendant's motion should be denied.

LEGAL ANALYSIS

Florida Rule of Civil Procedure 1.190 (a) provides that "[l]eave of court shall be given freely when justice so requires." Interpreting this rule, Florida precedent provides that a denial of a motion is warranted where (1) the amendment would be futile, (2) the privilege to amend the pleading has been abused, or (3) the amendment would prejudice the opposing party. *Yun Enterprises, LTD. v. Graziani,* 840 So. 2d 420 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D781a].

Fla. Stat. 627.736(7)(a), under title "MENTAL AND PHYSICAL EXAMINATION OF INJURED PERSON; REPORTS", allows an insurance company to obtain reports from medical professionals opining on reasonableness, relatedness, and medical necessity of *treatment* rendered to its insured.

Fla. Stat. 627.736(6)(b),[1] under title "DISCOVERY OF FACTS ABOUT AN INJURED PERSON; DISPUTES", provides an insurer with an express statutory mechanism for obtaining *medical records* and/or information from a medical provider so as to authenticate a claim prior to making payment. Once such a request is made the claim of the medical provider is not "overdue" until it has complied with the request. This is commonly referred to as a (6)(b) request.

Fla. Stat. 627.736(5)(b)(1)(e),[2] under title "CHARGES FOR TREATMENT OF INJURED PERSONS", also provides an insurer with an express statutory mechanism for addressing *coding* issues prior to making payment. The statute permits an insurer to make coding changes but requires the insurer to first contact the medical provider so as to discuss the reasons for the insurer's change and the medical provider's reason for the coding or have documented in its claim file that it made a reasonable good faith effort to do so.

"As always, legislative intent is the polestar that guides a court's inquiry under the No-Fault Law, including the PIP Statute." *Geico General Ins. Co. v. Virtual Imaging Services, Inc*., 141 So. 3d 147, 154 (Fla. 2013) [38 Fla. L. Weekly S517a]. "Such intent is derived primarily from the language of the statute. Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Law." *Id.*

In the present case, in addition to its statutorily prescribed purpose, Defendant seeks to utilize the report it obtained from Michael Weinreb, D.C. pursuant to Fla. Stat. 627.736(7)(a), so as to raise affirmative defenses relating to Plaintiff's *medical records* and *coding*.

Setting aside whether Defendant is permitted to utilize a report obtained under Fla. Stat. 627.736(7)(a) so as to attack the *medical records* and *coding* of a medical provider post-suit, it is clear that the plain language of the PIP statute reflects a legislative intent and mechanism for medical records and coding issues to be addressed and resolved by an insurer at the claims stage and prior to the institution of litigation. This is so since the statute provides that a claim is not "overdue" until a provider complies with a (6)(b) request and further conditions any changes to a provider's coding by requiring communications with the provider prior to effectuating any such changes.

In the present case, to allow Defendant's proposed amendment flies in the face of the legislative intent to have issues pertaining to medical records and/or coding addressed and resolved prior to suit.

"Under Rule 1.190, a test of prejudice to the [party opposing an amendment] is the primary consideration in determining whether a motion for leave to amend should be granted or denied". *Lasar Mfg. Co. v. Bachanov,* 436 So.2d 236, 237-38 (Fla. 3d DCA 1983); *Leavitt v. Garson,* 528 So.2d 108, 110 (Fla. 4th DCA 1988); *Newman v. State Farm Mut. Auto. Ins. Co.,* 858 So.2d 1205, 1206 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2590a].

As more fully set forth below, this Court finds that Plaintiff will be severely prejudiced by Defendant's belated proposed amendment given the statutory scheme outlined above, as applied to the facts of this case.

Defendant did not make a (6)(b) request or raise any issues with Plaintiff's medical records prior to institution of this action. Likewise, Defendant did not contact the Plaintiff to discuss any coding issues prior to suit. In sum, the facts of this case reflect that Defendant did not take advantage of the statutory mechanisms established by the legislature for addressing any purported medical record and/or coding issues prior to suit. Instead, Defendant sought to raise these issues only after obtaining a peer review report post-suit.

The statutory scheme reflects that the legislature has provided the insurer with a remedy to obtain and/or address any issues pertaining to medical records and/or coding issues prior to suit. In doing so, it has also provided the medical provider with an equal opportunity to cure any alleged deficiencies pertaining to medical records and/or coding issues. These mechanisms were created by the legislature to facilitate "swift and automatic" payment of PIP benefits.

To allow Defendant to now raise its purported defenses serves to circumvent the express statutory scheme put in place by the legislature. More importantly, allowing the Defendant to circumvent the statutory scheme is prejudicial to the Plaintiff since it has been deprived of a legislatively crafted opportunity to cure any deficiencies in its medical records and/or coding prior to suit, thereby securing

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"swift and automatic" payment of PIP benefits.

The Court also finds that Plaintiff will be prejudiced by Defendant's belated amendment as it has now expended time and resources prosecuting this matter and rejected a prior offer of judgment served by the Defendant premised on the issues as framed by the pleadings. *See e.g. Saunders v. Goulard,* 569 So.2d 1305, 1306-07 (Fla. 5th DCA 1990).

Furthermore, this Court finds that there is merit to Plaintiff's argument that Defendant's belated proposed amendment should be denied as futile. "A proposed amendment is futile if it is insufficiently pled or is insufficient as a matter of law." *Armiger v. Associated Outdoor Clubs, Inc.,* 48 So.3d 864, 871 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2194a].

Defendant's "upcoding defense" is futile since the facts of this case reflect that the Defendant failed to contact the Plaintiff to discuss any coding issues as otherwise required by the statute to avail itself of the defense. In fact, Defendant neither alleges compliance with the statutory pre-requisites nor can same be alleged since the defense is premised upon the post-suit peer review of Michael Weinreb, D.C.

Defendant's "record keeping" defense is likewise futile. Defendant's proposed defense states merely a legal conclusion alleging a failure to comply with certain administrative requirements without setting forth any factual basis in support of same. "Certainty is required when pleading affirmative defenses and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient." *Cady v. Chevy Chase Sav. & Loan, Inc.,* 528 So. 2d 136, 138 (Fla. 4th DCA 1988); *see also Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach,* 318 So. 2d at 176 (stating that "the requirement of certainty will be insisted upon in the pleading of a defense").

Finally, "[a]ffirmative defenses required to be defensively pleaded under Rule 1.110(d) are waived if not timely raised by motion to dismiss or responsive pleading." *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 140.11[1][d]; Fla. R. Civ. Pro. 1.140(h)(1)* ("A party waives *all defenses* . . . that the party does not present either by motion . . . or, if the party has made no motion, in a responsive pleading . . .") (emphasis added); *See Mangum v. Susser,* 764 So.2d 653, 654-55 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1216a]; *see also Wolowitz v. Thoroughbred Motors, Inc.,* 765 So.2d 920, 923 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2033a] (defense of accord and satisfaction waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Fisher v. Fisher,* 613 So.2d 1370 (Fla. 2d DCA 1993) (defense of laches waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Miami Elec. Ctr., Inc. v. Saporta,* 597 So.2d 903 (Fla. 3d DCA 1992) (defense of illegality waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Kersey v. City of Rivera Beach,* 337 So.2d 995 (Fla. 4th DCA 1976) (defense of estoppel waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *St. Paul Fire & Marine Ins. Co. v. Walsh,* 501 So.2d 54 (Fla. 4th DCA 1987) (holding that settlement is an affirmative defense that ought to be pled or waived pursuant to R. 1.140(h)).

Binding decisional precedent holds that waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right". *Raymond James Financial Services v. Steven W. Saldukas*, 896 So. 2d 707 (Fla. 2005) [30 Fla. L. Weekly S115a].

Defendant has been in possession of Plaintiff's medical record and bills for the subject treatment since year 2011. Thus, Defendant had all the documents it needed to have previously asserted the defenses prior to this action even being filed. Nevertheless, Defendant failed to raise its "record keeping" and "coding" defenses at inception of this case as is otherwise required by the applicable rules of procedure. Defendant declined to utilize the mechanisms provided in Fla. Stat. 627.736(6)(b) and Fla. Stat. 627.736(5)(b)(1)(e) thereby preventing Plaintiff from having the opportunity to address and cure any issues with its "record keeping" and/or "coding" prior to suit. Moreover, although Defendant filed its motion to amend and peer review with the Court in 2015, Defendant did not bring its motion before the Court for the next five (5) years instead continuing to travel under the issues as originally framed by the pleadings.

Based on the foregoing, this Court finds that Defendant, by its own conduct, has waived its right to raise its proposed defenses in this case.

For similar reasons, the Court finds that Defendant has abused the privilege to amend since "the amendment [was] sought extremely late in the proceedings, without justification for the delay, [and] the facts were long known" to the Defendant. *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 190.3[3][b]* (noting that there appears to be two kinds of circumstances that fall under the "abuse of privilege to amend" category: "one, where a party has already been given numerous, and arguably sufficient, opportunities to amend; *and another, where the amendment is sought extremely late in the proceeding, without justification for the delay, as where the facts were long known to the party belatedly seeking leave*"); *see also Wooten v. Wooten,* 213 So.2d 292 (Fla. 3d DCA 1968) (denied proposed amendment to complaint seeking to add cause of action at late stage of proceedings where plaintiff knew of underlying facts before the complaint was even filed); *Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prod., Inc.,* 553 So.2d 336 (Fla. 4th DCA 1989) (denied leave to add setoff defense three days before trial where previously known to defendant and prejudicial to plaintiff); *United States v. State,* 179 So.2d 890 (Fla. 3d DCA 1965) (denied impleader amendment where the movant knew for more than two years that the party sought to be impleaded had an interest); *Aydelott v. Greenheart (Demerara) Inc.,* 162 So.2d 286 (Fla. 2d DCA 1964) (proposed counterclaim "was not seasonably filed" since "the matters attempted to be raised by the tardy counterclaim were essentially within the knowledge of the defendant at the time he filed his answer"); *Mrmich v. Switzer,* 553 So.2d 1308, 1309 (Fla. 3d DCA 1989) (affirming denial of amendment and finding no abuse of discretion where "the action had been pending nearly five years" and that "no valid excuse was offered below for waiting this long period").

Therefore, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Defendant's Motion to File Amended Answer is DENIED.

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[1]Fla. Stat. 627.736(6)(b) provides in pertinent part:

Every. . .clinic. . .providing. . .services. . .*shall, if requested to do so* by the insurer. . .*furnish forthwith* a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment

. . .

If an insurer makes a written request for documentation or information. . .the amount or the partial amount which is the subject of the insurer's inquiry *shall become overdue. . .within 10 days after the insurer's receipt of the requested documentation or information*. . .

[2]Fla. Stat. 627.736(5)(b)(1)(e) provides in pertinent part:

To facilitate prompt payment of lawful services, *an insurer may change codes* that it determines to have been improperly or incorrectly upcoded or unbundled, and may make payment based on the changed codes, without affecting the right of the provider to dispute the change by the insurer, *provided that before doing so, the insurer must contact the health care provider* and discuss the reasons for the insurer's change and the health care provider's reason for the coding, or make a reasonable good faith effort to do so, as documented in the insurer's file.

* * *

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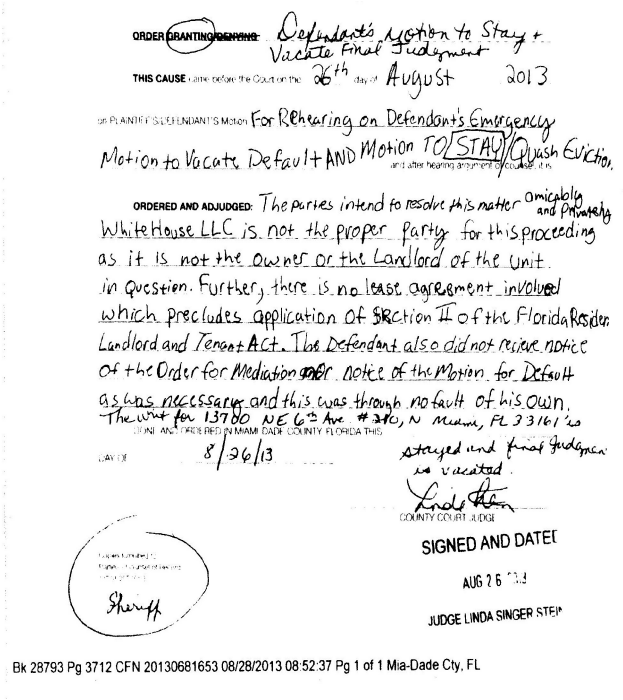
Landlord-tenant—Eviction—Standing

WHITE HOUSE LIQUIDATION, LLC., a Corporation, Plaintiff, v. JAMIL SAINTASSE, a person, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 13-11690-CC-23(03), Section 03. August 26, 2013. Linda Singer Stein, Judge. Counsel: Karl Schumer, Karl Schumer, P.A., Aventura, for Plaintiff. Hegel Laurent, Laurent Law Office, P.L., North Miami, for Defendant.



ORDER ~~GRANTING/DENYING~~ Defendant's Motion to Stay + Vacate Final Judgment

THIS CAUSE ... before the Court on the 26th day of August 2013

on PLAINTIFF'S/~~DEFENDANT'S~~ Motion For Rehearing on Defendant's Emergency Motion to Vacate Default AND Motion TO STAY/Quash Eviction, and after hearing argument by counsel, it is

ORDERED AND ADJUDGED: The parties intend to resolve this matter amicably and Privately White House LLC is not the proper party for this proceeding as it is not the owner or the Landlord of the unit in question. Further, there is no lease agreement involved which precludes application of Section II of the Florida Residential Landlord and Tenant Act. The Defendant also did not recive notice of the Order for Mediation nor notice of the Motion for Default as was necessary and this was through no fault of his own. The unit for 13700 NE 6th Ave #376, N Miami, FL 33161 is

DONE AND ORDERED IN MIAMI DADE COUNTY, FLORIDA THIS

DAY OF 8/26/13

stayed and final judgment is vacated.

COUNTY COURT JUDGE

Sheriff

SIGNED AND DATED

AUG 26 '13

JUDGE LINDA SINGER STEIN

Bk 28793 Pg 3712 CFN 20130681653 08/28/2013 08:52:37 Pg 1 of 1 Mia-Dade Cty, FL

* * *

Insurance—Personal injury protection—Discovery—Motion to compel production of medical records that do not pertain to medical provider's assignor is denied—Pursuant to order to provide underwriting materials for "subject policy," insurer must produce materials for policy under which claim was filed irrespective of whether it provides PIP coverage—Failure to comply—Sanctions—Where privilege log filed by insurer in response to request that it produce items for inspection claimed privilege for items that do not exist, and improper privilege log caused unnecessary litigation, motion for sanctions for fraud on court is granted

MANUEL V. FEIJOO, M.D, et al., a/a/o Angel Montero, Plaintiffs, v. GEICO CASUALTY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-005099-SP-25, Section CG02. June 17, 2020. Elijah A. Levitt, Judge. Counsel: Maylin Castaneda, Law Office of Kenneth B. Scurr, P.A., Coral Gables, for Plaintiff. Peter Winstein, for Defendant.

OMNIBUS ORDER ON PLAINTIFF'S MOTIONS FOR SANCTIONS FOR FRAUD ON THE COURT AND MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This cause came before the Court on Plaintiff's Motions, and the Court being advised in the premises hereby ORDERS and ADJUDGES as follows:

1. The Motion to Compel Medical Records from the privilege log is DENIED. The records in the privilege log do not pertain to Plaintiff's assignor in this case.

2. The Motion to Compel Underwriting materials is GRANTED for the second time. Instead of complying with the Court's December 23, 2019, Order requiring production of the "underwriting materials for the subject policy," on March 20, 2020, Defendant wrote the Court a letter to advise that "no underwriting guidelines exist as it pertains to Personal Injury Protection Benefits since Oklahoma policies do not provide PIP coverage."[1] The Order does not say anything about a PIP policy; the Order is clear that it pertains to "the subject policy." Defendant needs to comply with the Court Order. Defendant has fifteen (15) days from the date of this Order to produce the "underwriting materials for the subject policy" as previously ordered. To clarify, the subject policy means the policy for the insured under which Plaintiff filed the claim for benefits in this case.

3. Plaintiff's Motion for Sanctions Based on Fraud on the Court is GRANTED in part. The Court grants sanctions under Florida Rule of Civil Procedure 1.380(a). The Rule provides, in pertinent part,

> (a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows:. . .
>
> (2). . .[i]f a party in response to a request for inspection submitted under rule 1.350 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested. . .the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection. . .
>
> (3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer shall be treated as a failure to answer.
>
> (4) Award of Expenses of Motion. If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, that the opposition to the motion was justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.

The Court finds that Plaintiff made a good faith effort to obtain the discovery without court intervention, the opposition to the motion was not justified, and that the interests of justice are served by granting this Motion.

On May 5, 2017, and March 1, 2019, Plaintiff requested certain items be inspected and produced through the discovery process. Defendant objected to the production of some of these items and, on March 29, 2019, filed a privilege log, which the Court later reviewed *in camera* upon Plaintiff's Motion to Compel.

The basis for the Motion for Sanctions is that the privilege log listed items that do not exist, namely items 3, 4, and 5 of its "Relevancy Log" section on pages 3 and 4. After the Court reviewed the identified documents *in camera,* the Court found that items 3, 4, and 5 were missing. The Court informed the parties in open court that those items were missing and asked Defendant to research the missing items.

In its March 20, 2020, letter to the Court, Defendant confirmed that most of those items never existed. As such, Defendant's initial privilege log was an evasive and incomplete answer, which shall be treated as a failure to answer. *See* Fla. R. Civ. P. 1.380(a)(3). On May 27, 2020, the Court held a hearing on Plaintiff's Motion for Sanctions for Fraud on the Court. The Court also reviewed Defendant's written June 11, 2020, Response to the Motion.

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After review of the evidence and court docket, the Court finds Defendant's improper privilege log caused unnecessary litigation, impeded Plaintiff's investigation, and negatively impacted the efficient administration of justice in this case. Accordingly, Defendant is required to pay for Plaintiff's reasonable expenses that Defendant caused Plaintiff to incur.

Wherefore, pursuant to Rule 1.380(a)(4), Plaintiff is entitled to its reasonable expenses, including attorney's fees, incurred for its investigation of Defendant's privilege log items 3, 4, and 5, and the Court grants Plaintiff's Motion for Sanctions for Fraud on the Court as provided herein.

Within thirty (30) days of the date of this Order, Plaintiff shall provide to Defendant, and file with the Court, timesheets and supporting affidavits, including an expert's affidavit, for the fees, costs, and interest incurred for the improper filing of privilege log items 3, 4, and 5. Defendant shall also pay Plaintiff's expert for the expert's costs and fees. Within thirty (30) days of receipt of Plaintiff's timesheets and affidavits, Defendant may respond to the reasonableness of Plaintiff's timesheets and provide an expert affidavit in support of its position. Within fifteen (15) days of receipt of Defendant's response, Plaintiff may file a reply to Defendant's response. Based on the evidence provided, the Court may impose costs and fees in favor of Plaintiff without a hearing. Plaintiff's attorneys shall not obtain a duplicate recovery for these costs and fees under Florida Statute Section 627.428 and Florida Rule of Civil Procedure 1.525. Conversely, Defendant's costs and fees will not be reduced by the amount awarded to Plaintiff's attorneys under this Order.

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[1]The letter and exhibits attached thereto are being submitted with this Order. [Editor's note: attachments omitted]

* * *

Insurance—Homeowners—Coverage—Reasonable emergency measures—Where homeowners policy provides that insurer will not pay more than $3,000 for reasonable emergency measures to protect property from further damage unless insurer provides approval within 48 hours of receipt of request to exceed that limit, insurer fully satisfied its obligation by paying $3,000 to plaintiff that did not submit request to exceed policy limit—No merit to argument that insurer's failure to respond within 48 hours of receipt of invoice for completed work entitles plaintiff to additional benefits under policy provision that allows insured to exceed $3,000 limit if insurer fails to respond to request to exceed limit within 48 hours

ELITE WATER RESTORATION, INC., a/a/o Olga Lopez, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-005867-CC-05, Section CC-06. May 13, 2020. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came before the Court on April 6, 2020, on Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment and the Court having heard the argument of counsel, having reviewed the Motions, Plaintiff's Response to Defendant's Motion for Final Summary Judgment, the summary judgment evidence, the pertinent case law, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED:

Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Motion for Partial Summary Judgment is DENIED. This matter is hereby dismissed, and Defendant shall go hence without day.

STATEMENT OF UNDISPUTED FACTS

On or about October 12, 2017, the home of Olga Lopez ("Insured") sustained water damage. At the time of the loss, the Insured's residence was insured by Citizens Property Insurance Corporation ("Defendant"). Elite Water Restoration, Inc., ("Plaintiff") provided water mitigation services to dry out the property. *See Deposition of Janelle Acosta.* Prior to providing its services, the Insured assigned her right to collect payment for those services to Plaintiff.

Pursuant to the insurance Policy issued by Defendant, the Insured has a duty to "[t]ake **reasonable emergency measures** that are necessary to protect the covered property from further damage". *Citizens Dwelling Property 3—Special Form Policy, CIT DP-3 10 16* at 15. (emphasis added). Under Reasonable Emergency Measures,

> **a.** We will pay up to the greater of $3,000 or 1%[1] of your Coverage **A** limit of liability for the reasonable costs incurred by you for necessary measures taken solely to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against.
>
> **b.** We will not pay more than the amount in **a.** above, unless we provide you approval within 48 hours of your request to us to exceed the limit in **a.** above. In such circumstances, we will pay only up to the additional amount for the measures we authorize.
>
> If we fail to respond to you within 48 hours of your request to us and the damage or loss is caused by a Peril Insured Against, you may exceed the amount in **a.** above only up to the cost incurred by you for the reasonable emergency measures necessary to protect the covered property from further damage.
>
> * * *

Id. at 5.

On November 21, 2017, Plaintiff submitted an invoice to Defendant for $6,170. Neither the Plaintiff nor the Insured requested prior approval from Defendant to exceed the $3,000 limit for reasonable emergency measures. On January 2, 2018, Defendant paid Plaintiff the policy limit of $3,000.

SUMMARY OF ARGUMENT

Defendant moved for final summary judgment arguing that Plaintiff was paid $3,000 which was the policy limit for reasonable emergency measures. Plaintiff countered that since Defendant failed to respond within 48 hours of Plaintiff's submission of its invoice, they cannot rely on the $3,000 policy limit.

LEGAL ANALYSIS

To render this decision, the Court looks to the interpretation of the insurance contract. When "interpreting an insurance contract," the Court is "bound by the plain meaning of the contract's text." *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569 (Fla. 2011) [36 Fla. L. Weekly S469a]). "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Wash. Nat. Ins. Corp. v. Ruderman,* 117 So.3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S616b].

Under the plain language of the Policy, Defendant has fully satisfied its obligation by paying the $3,000 policy limit for reasonable emergency measures. Defendant's failure to respond within 48 hours of Plaintiff's submission of its invoice does not entitle Plaintiff to anything other than the $3,000 limit. While Defendant is required to respond, within 48 hours, to a request to exceed the policy limit, it is not required to respond to a demand for payment for work that has already been completed.

Plaintiff contends that the submission of its invoice, demanding payment, is equivalent to a request to exceed the policy limit. This Court disagrees. According to the Policy, Defendant could waive the $3,000 limit if they receive a request to exceed that limit. A request means "to ask for something or for permission or authority to do, see, hear, etc., something; to solicit; and is synonymous with beg, entreat,

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and beseech." Request, *Black's Law Dictionary* (4th ed. 1968). A demand for payment, after the work has been completed, is not the same as asking for permission to exceed the $3,000 limit. A demand for payment of an invoice connotes a claim or a right to that payment while a request to exceed a policy limit is preconditioned on Defendant's acceptance of the request. Therefore, at a minimum, the request must occur before the work is completed and a final invoice is sent to the insurer. This is the only reasonable interpretation of the Policy which would give an insured the ability to contract for reasonable emergency measures to prevent further loss to the property, while at the same time, allowing the Defendant the ability to authorize additional reasonable measures when needed. *See All Insurance Restoration Services, Inc. v. Citizens Property Ins. Corp.,* No. 2018-000911-sSP-26 (Miami-Dade County, December 12, 2019).

On November 21, 2017, Plaintiff sent Defendant an email with their invoice for services rendered from October 12, through October 17, 2017. Neither the invoice nor the email contained a request to exceed the $3,000 policy limit for reasonable emergency measures. Accordingly, the Court finds that the $3,000 payment tendered by Defendant fully satisfied its obligation under the Policy.

Therefore, it is ORDERED and ADJUDGED that:

1. Defendant's Motion for Final Summary Judgment is GRANTED and Plaintiff's Motion for Partial Summary Judgment is DENIED.

2. Plaintiff, Elite Water Restoration, Inc., shall take nothing, and Defendant, Citizens Property Insurance Corporation, shall go hence without day.

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[1]The policy limit for Coverage A is $223,100, which corresponds to $2,231 under the 1% limit.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Where identical parties have previously litigated identical issue of reasonableness of medical provider's charges for same CPT codes, parties had full and fair opportunity to litigate issue and did litigate issue in prior proceedings, and issue is critical and necessary part of litigation, all elements necessary for application of doctrine of collateral estoppel are met—It is immaterial that prior adjudications pertained to different accidents, patients, claims, causes of action, and assignments of benefits than present case—No merit to argument that doctrine of collateral estoppel should not be applied because insurer believes that prior adjudications constituted error where insurer allowed those adjudications to become final without appeal—No merit to argument that court is barred from applying doctrine of collateral estoppel because it was not raised in provider's reply, as rules and law did not permit provider to file reply asserting collateral estoppel— Provider is entitled to judgment on reasonableness issue as matter of law

DOCTOR REHAB CENTER, INC., a/a/o Winston Pineda, Plaintiff, v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-002967-CC-21, Section HI01. April 20, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi, Brad Blackwelder, and David Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ORDER PRECLUDING AND/OR SUMMARY JUDGMENT AS TO THE REASONABLENESS OF PLAINTIFF'S CHARGES BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

THIS CAUSE came before the Court on 02/21/20 on Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel (Issue Preclusion).

The parties were represented by counsel at the hearing who presented arguments to this Court. Paula Elkea Ferris, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq., Brad Blackwelder, Esq., and David Mannering, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel.

Background & Factual Findings

Winston Pineda was involved in an automobile accident on January 30, 2010 and treated with Plaintiff from March 15, 2010 through December 30, 2010 in relation to injuries sustained in said accident.

Plaintiff submitted its bills for treatment of Winston Pineda to Defendant for payment of Personal Injury Protection ("PIP") benefits containing the following thirteen (13) charges: *99203* ($250; initial examination), *97124* ($60; massage), *97530* ($65; therapeutic activities), *97010* ($50; hot/cold pack), *97110* ($60; therapeutic exercises), *97012* ($40; mechanical traction), *97014 / G0283* ($50; electric stimulation), *98940* ($85; chiropractic adjustments), *98941* ($95; chiropractic adjustments), *99213* ($150; patient evaluation), *97112* ($70; neuromuscular reeducation), *97140* ($70; manual therapy), *97035* ($50; ultrasound).

Plaintiff's motion reflects that a court of competent jurisdiction has previously adjudicated through final judgment the reasonableness of Plaintiff's charges in the following two (2) cases against Defendant:

i. *Doctor Rehab Center, Inc., a/a/o Julian Grillo v. United Automobile Insurance Company,* Case No. 11-01877 SP 26;[1]

ii. *Doctor Rehab Center, Inc., a/a/o Jose Miranda v. United Automobile Insurance Company,* Case No. 11-01982 SP 26.[2]

Plaintiff argues that the doctrine of Collateral Estoppel and/or Issue Preclusion precludes Defendant from re-litigating the identical issue of reasonableness of Plaintiff's charges for the very same treatment and/or CPT codes previously litigated through final judgment between the very same parties. Plaintiff argues that since all of the requisite elements for application of the doctrine of Collateral Estoppel and/or Issue Preclusion have been met this Court is mandated to apply the doctrine in this case.

Defendant argues that the doctrine of Collateral Estoppel does not apply since the "operative facts" such as the claim #, date of loss, and patients are not identical in the instant action and the prior adjudications. Defendant also argues that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits from a different insured. Defendant further argues against application of the doctrine of Collateral Estoppel claiming error on the part of the court in the prior adjudications although it is undisputed that the Defendant did not appeal the final judgments in those cases and allowed same to become final without attack. Finally, Defendant argues that this Court is barred from considering Plaintiff's Collateral Estoppel arguments

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and motion since the issue was not raised in a reply to Defendant's affirmative defenses.

Summary Judgment Standard

Florida Rule of Civil Procedure 1.510 provides that "[t]he judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] (citing *Menendez v. Palms West Condominium Ass'n*, 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a].

In a PIP case, the Plaintiff's burden of proof in establishing its prima facie case to recover PIP benefits requires proof that its bills and/or charges for the services rendered are reasonable in price. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

Legal Analysis

Doctrine of Collateral Estoppel (Issue Preclusion)

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (citing to *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (action by oil companies should have been dismissed under doctrine of collateral estoppel since identical issue of Attorney General's authority was previously determined by the Fifth District Court of Appeal); *see also, Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976) (approving the District Court of Appeal's affirmance of lower court's grant of partial summary judgment as to issue of liability based on doctrine of collateral estoppel or estoppel by judgment); *Weiss v. Courshon,* 768 So.2d 2 (Fla. 2000) [25 Fla. L. Weekly D1237a] (applying the doctrine of collateral estoppel to prevent relitigating an action for accounting and breach of fiduciary duties which was decided in federal Court); *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel).

"The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute". *Id.* (citing *Zimmerman v. State of Florida Office of Insurance Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a]). The doctrine "serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *United States v. Mendoza,* 464 U.S. 154, 158 (1984) (citing *Allen v. McCurry,* 449 U.S. 90, 94 (1980)).

Florida jurisprudence reflects that courts have applied the doctrine to various areas of law and causes of action such as breach of contract[3], wrongful death[4], negligence[5], declaratory relief[6], dissolution of marriage[7], uninsured motorist claim[8], constitutional challenges[9], action for accounting and breach of fiduciary duties[10], and appeals from administrative rulings[11].

"The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (quoting *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977)); *Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976).

The Third District Court of Appeal has articulated and held that the following elements must be met for the application of the doctrine of Collateral Estoppel and/or Issue Preclusion: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding. *See e.g., Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] (citing to *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a]; *see also Carnival Corp. v. Middleton,* 941 So.2d 421 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2480a].

As it pertains to the *first element,* the record before this Court reflects that in Case No. 11-01877 SP 26 and Case No. 11-01982 SP 26, the identical parties to this action previously litigated the reasonableness of Plaintiff's charges for the very same CPT codes at issue in this case: 99203 ($250), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), 97014 / G0283 ($50), 98940 ($85), 98941 ($95), 99213 ($150), 97112 ($70), 97140 ($70), 97035 ($50). As such, the first element for application of the doctrine has been met.

As it pertains to the *second and fifth elements,* the record before this Court reflects that in the prior cases litigated between the parties they had a full and fair opportunity to fully litigate the issue of reasonableness of Plaintiff's charges and the issue was actually litigated through final judgment after extensive motion practice, discovery, presentation of evidence, and service of affidavits and record evidence as to the central issue of reasonableness of Plaintiff's charges. As such, the second and fifth elements for application of the doctrine have been met.

As it pertains to the *third element*, "[a]n issue is a critical and necessary part of the prior proceeding where its determination is essential to the ultimate decision." *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474, 478 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (citing *Porter v. Saddlebrook Resorts, Inc.,* 679 So.2d 1212, 1215 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1881a]). In the context of PIP litigation, the issue of reasonableness of charges is not only "a critical and necessary part" of the litigation, but same is in fact part and parcel of Plaintiff's prima facie burden of proof. *See Derius v. Allstate Indemnity Co.,* 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. As such, the third element for application of the doctrine has been met.

As it pertains to the *fourth element,* the parties to the instant action are clearly the identical parties in Case No. 11-01877 SP 26 and Case No. 11-01982 SP 26 cases where the issue of reasonableness of Plaintiff's charges was litigated through final judgment. As such, the fourth element for application of the doctrine has also been met.

Binding decisional precedent holds that once the elements are met, a court is obligated to apply the doctrine of collateral estoppel. *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel); *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (remanding action to trial court with directions to have action by oil companies dismissed under doctrine of collateral estoppel since the issue pertaining to Attorney General's authority was previously adjudicated adversely to the companies by the Fifth District Court of Appeal). Additionally, our own Circuit, sitting in it appellate capacity just recently affirmed the entry of final judgment against the Defendant on the issue of reasonableness of charges holding that United was "precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel," citing to *Pearce v. Sandler*, 219 So.3d 961 (Fla. 3d

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DCA 2017) [42 Fla. L. Weekly D1214b], *see* (Case No: 2018-228-AP-01: *United Automobile Insurance Company v. Doctor Rehab Center, Inc.*, Lower Case No: 2011-1980-SP-26, *Not a Final until disposition of any timely filed motion for rehearing, clarification, or certification).

Based on the foregoing, this Court finds that all elements for application of the doctrine of Collateral Estoppel have been met. As such, Plaintiff is entitled to judgment as a matter of law as to reasonableness of its charges for CPT codes 99203 ($250), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), 97014 / G0283 ($50), 98940 ($85), 98941 ($95), 99213 ($150), 97112 ($70), 97140 ($70), 97035 ($50) and Defendant is precluded from re-litigating same. To hold otherwise would circumvent the purpose and intent of the doctrine, result in unnecessary repetitious litigation, undermine the parties' reliance on prior adjudication, allow inconsistent decisions, and needlessly expend otherwise scarce judicial resources.

Accordingly, although the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action, the question or issue of reasonableness of Plaintiff's charges was common and litigated through final judgment in the prior actions. It is immaterial that the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action than in the instant case as there is no element requiring "identity in the thing sued for" and/or "identity of the cause of action" for application of the doctrine of Collateral Estoppel (Issue Preclusion).

Similarly, Defendant's argument that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits (commonly abbreviated as "AOB") from a different insured is without merit.

In *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976) the Supreme Court of Florida rejected the same argument in the context of Collateral Estoppel. In *Seaboard Coast,* a guardian on behalf of a minor brought a successful suit for the wrongful death of the minor's mother establishing liability against a railroad company. The minor then brought a second suit for the wrongful death of his father and the trial court found that the railroad company was collaterally estopped on the issue of liability. On appeal the Supreme Court of Florida rejected the railroad company's argument that "there [was] no identity of the parties since the action is derivative in nature and stems from deaths of different persons", finding that the doctrine of Collateral Estoppel applies "in situations where the actions were derivative". Accordingly, although the instant action and the prior adjudications derive from different assignors, it is the very same Plaintiff medical provider—Doctor Rehab Center, Inc.,—that brought both this action and the prior adjudications, thereby meeting the identity of parties element for purposes of Collateral Estoppel.

Defendant's assignment of benefits argument also fails since under Collateral Estoppel only an "identity of the parties" is required and there is no element requiring "*identity of the quality or capacity*" of the parties.[13] Defendant argues that the Plaintiff, in this as well as the prior actions, is only acting in a "representative capacity" standing in the shoes of the assignor, as opposed to its "individual capacity" as a medical provider and corporate entity organized and existing under the laws of this State. Accordingly, even if it could be said that the Plaintiff was acting in different "capacities" in this and the prior actions, any such distinction is immaterial for purposes of Collateral Estoppel.

Moreover, this Court notes that the identity of parties element under the doctrine of Collateral Estoppel extends to parties "*and their privies*". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987); *see also*, *Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995) [20 Fla. L. Weekly S208a]; *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano*, 450 So.2d 843 (Fla. 1984) ("collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies"). Clearly, there is privity between the Plaintiff in the instant action as well as the Plaintiff in the prior PIP actions it filed, since both "have an interest in the action such that [they] will be bound by the final judgment as if [they] were a party". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987). Regardless of the assignee, Doctor Rehab Center, Inc. is a single corporate entity organized and existing under the laws of this State. It is this entity that is entitled to payment of PIP benefits, it is this entity that collects, deposits, and files suits for PIP payments from insurers, and it is this entity that would bound by any judgments in cases it filed as assignee of a PIP insured.[14]

Defendant's argument that the doctrine of Collateral Estoppel should not be applied since it believes the prior adjudications constitute error is also unavailing. This same argument was expressly rejected by the Supreme Court of Florida in *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976):

> "We conclude that *there is no merit in petitioner's argument and that it is bound by the result of the first action*.
>
> We further hold that the *respondent may not now contest the propriety of applying the percentage of liability determination made by the jury in the first suit.* ***The respondent allowed the first judgment to become final without attack, and he cannot now collaterally attack that result***. The petitioner's 15% nonliability as determined by the jury in the first trial is therefore applicable in the second action for damages."

As in *Seaboard Coast*, Defendant did not appeal any of the prior final judgments relied upon by the Plaintiff in asserting the doctrine of Collateral Estoppel. Defendant allowed the prior adjudications "to become final without attack" and "cannot now collaterally attack that result", that is, "it is bound by the result of the [prior] action[s]". *Id.*

Finally, the Court rejects Defendant's argument that it is barred from considering Plaintiff's Collateral Estoppel arguments and motion since the issue was not raised in a reply to Defendant's affirmative defenses. Fla. R. Civ. P. 1.100(a) requires filing of a "reply" to an affirmative defense only when the opposing party seeks to "avoid" that defense. Indeed, a plaintiff who "does not seek to avoid the substantive allegation of the defendant's affirmative defense. . .need not file, indeed, is precluded by the rules from filing, a reply". *Kitchen v. Kitchen*, 404 So.2d 201 (Fla. 2d DCA 1981). Plaintiff did not raise the doctrine of Collateral Estoppel to "avoid" any affirmative defenses pled by the Defendant. Instead, the doctrine was raised in regard to an element of Plaintiff's own prima facie burden of proof, to wit, the reasonableness of Plaintiff's charges. Accordingly, the rules and applicable law did not require, or even permit, Plaintiff to file a "reply" asserting the doctrine of Collateral Estoppel in this case.

Conclusion

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel is hereby GRANTED. Plaintiff's charges for treatment and/or CPT codes 99203 ($250), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), 97014 / G0283 ($50), 98940 ($85), 98941 ($95), 99213 ($150), 97112 ($70), 97140 ($70), 97035 ($50) are reasonable in price as a matter of law and Defendant is precluded from re-litigating same pursuant to the doctrine of Collateral Estoppel and/or Issue Preclusion.

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[1]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 97124 ($60), 97530 ($65), 97010 ($50), 97012 ($40), G0283 ($50), 98940 ($85), 98941 ($95), 99213 ($150), 97112 ($70), 97140 ($70), 97035 ($50). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[2]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), 97014 ($50), 98940 ($85), 98941 ($95), 99213 ($150), 97112 ($70), 97140 ($70), 97035 ($50). In this case Defendant, after much litigation, confessed to judgment. The mere fact that Defendant confessed to judgment does not make the prior final adjudication any less binding upon the parties. *See e.g., Eastern Shores Sales Co. v. City of North Miami Beach*, 363 So.2d 321 (Fla. 1978) ("[t]he fact that the [prior] decree. . .was by consent did not make it any less conclusive or binding on the parties"); *Hay v. Salisbury*, 92, Fla. 446, 109 So. 617 (Fla. 1926) ("[a] judgment by default or upon confession is, in its nature, just as conclusive on the rights of the parties before the court, as a judgment upon demurrer or verdict"); *In re Zoernack*, 289 B.R. 220 (M.D. Florida, 2003) [16 Fla. L. Weekly Fed. B43a] (federal court applying Florida law on the doctrine of collateral estoppel found that a consent to judgment is treated the same as any other judgment and carries issue preclusion under the doctrine); *Arrieta-Gimenez v. Arrieta-Negron,* 551 So.2d 1184 (Fla. 1989) (rejecting argument "attempt[ing] to differentiate between a consent judgment and a final judgment entered after trial on the merits" and finding that a consent judgment is entitled to preclusive effect); *see also, Cabinet Craft, Inc. v. A.G. Spanos Enterprises, Inc.,* 348 So.2d 920 (Fla. 2d DCA 1977) ("for purposes of res judicata, a judgment entered upon default is just as conclusive as one which was hotly contested").

[3]*See e.g.*, *West Point Const. Co. v. Fidelity and Deposit Co. of Maryland*, 515 So.2d 1374 (Fla. 3d DCA 1987); *Daniel Intern. Corp. v. Better Const., Inc*., 593 So.2d 524 (Fla. 3d DCA 1991); *Wise v. Tucker*, 399 So.2d 500 (Fla. 4th DCA 1981); *Provident Life and Accident Insurance Company v. Genovese*, 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b].

[4]*See e.g.*, *Rehe v. Airport U-Drive, Inc.*, 63 So.2d 66 (Fla. 1953); *Seaboard Coast Line Railroad Co. v. Cox*, 338 So. 2d 190 (Fla. 1976).

[5]*See e.g.*, *Shearn v. Orlando Funeral Home, Inc.*, 88 So.2d 591 (Fla. 1956); *Lorf v. Indiana Insurance Co.*, 426 So.2d 1225 (Fla. 4th DCA 1983); *Husky Industries, Inc. v. Griffith*, 422 So.2d 996 (Fla. 5th DCA 1982).

[6]*See e.g.*, *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1977); *Paresky v. Miami-Dade County Bd. Of County Com'rs*, 893 So.2d 664 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D462b]; *Essenson v. Polo Club Associates,* 688 So. 2d 981 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D552a].

[7]*See e.g.*, *Field v. Field*, 91 So.2d 640 (Fla. 1956).

[8]*See e.g.*, *U.S. Fidelity & Guar. Co. v. Odoms,* 444 So. 2d 78 (Fla. 5th DCA 1984).

[9]*See e.g.*, *GLA and Associates, Inc., v. City of Boca Raton*, 855 So.2d 278 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2318a].

[10]*See e.g.*, *Weiss v. Courshon*, 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a].

[11]*See e.g., Zimmerman v. State Office of Ins. Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a].

[Editor's note: Footnote 12 omitted from order.]

[13]As discussed above, the element requiring "identity of the quality or capacity" of the parties is applicable in the context of Res Judicata, not Collateral Estoppel. *Pearce v. Sandler,* 219 So.3d 961, 966-67 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b].

[14]To illustrate this point, suppose Defendant had prevailed in a suit brought by Plaintiff as assignee of an insured, resulting in Defendant obtaining a judgment for attorney's fees incurred in the litigation. Plaintiff could not avoid payment of the judgment by asserting that it was merely acting in a "representative capacity" in the suit and that the entity as assignee does not have a bank account or any funds to its name. Clearly, Plaintiff in its "individual capacity" as a corporate entity would be required to pay the judgment.

* * *

Insurance—Personal injury protection—Answer—Amendment—Insurer's motion to file amended answer to allege fraud defense is denied where motion is based on surveillance report that insurer obtained seven years ago, prior to filing of suit—Denial of motion to amend answer is warranted where insurer has abused privilege to amend by seeking amendment extremely late in proceedings without justification, and medical provider will be severely prejudiced by proposed amendment

C & D MEDICAL CENTER, a/a/o Lazaro Rodriguez Leon, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-010037-CC-25, Section CG01. June 3, 2020. Linda Diaz, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Ari Neimand, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO FILE AMENDED ANSWER

THIS CAUSE came before the Court on May 14, 2020 on Defendant's Motion to File Amended Answer.

The parties were represented by counsel at the hearing who presented arguments to this Court. Ari Neimand, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Defendant's motion, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby enters this Order DENYING Defendant's Motion to File Amended Answer and makes the following factual findings and conclusions of law.

Plaintiff rendered treatment to the claimant from December 10, 2012 through January 28, 2013 in relation to an automobile accident and submitted a claim for payment of Personal Injury Protection ("PIP") benefits to Defendant.

On June 3, 2013, Plaintiff filed the instant lawsuit alleging breach of contract and seeking payment of unpaid PIP benefits. The recommended resolution standard for this action is eighteen (18) months. Fla. R. Jud. Adm. 2.250(a)(1)(B).

On June 21, 2013 Defendant served its Answer in this matter and did not plead any affirmative defenses to Plaintiff's claim for PIP benefits.

Accordingly, since the inception of this case, the only issues framed by the pleadings have been the reasonableness, relatedness, and medical necessity of treatment rendered by the Plaintiff.

On October 3, 2016 Plaintiff filed a summary judgment motion as to the relatedness and medical necessity of its treatment.

On February 15, 2017 Defendant filed the instant Motion to File Amended Answer seeking to raise, for the first time, a fraud defense related to date of service January 24, 2013.

On March 19, 2020, three (3) years after filing its Motion to File Amended Answer, Defendant noticed a hearing on its motion to occur on May 14, 2020.

At the hearing defense counsel advised the Court that the fraud defense that the Defendant now seeks to raise is in fact premised upon a purported surveillance report procured by the Defendant prior to the filing of this action; that is, no less than seven (7) years ago.[1]

In sum, the record before this Court reflects that Defendant, despite its purported evidence obtained no less than seven (7) years ago, litigated this matter without ever attempting to raise any fraud defenses to Plaintiff's Complaint. Defendant did not provide this Court with any explanation or justification for its belated attempt to amend.

Fla. R. Civ. Pro. 1.110(d) provides in pertinent part:

RULE 1.110. GENERAL RULES OF PLEADING

(d) Affirmative Defenses. In pleading to a preceding pleading *a party shall set forth affirmatively . . . fraud . . .* and any other matter constituting an avoidance or affirmative defense.

Fla. R. Civ. Pro. 1.140(h)(1) provides:

RULE 1.140. DEFENSES

(h) Waiver of Defenses.

(1) A party *waives all defenses* and objections *that the party does not present* either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, *in a responsive pleading* except as provided in subdivision (h)(2).

"Affirmative defenses required to be defensively pleaded under Rule 1.110(d) are waived if not timely raised by motion to dismiss or responsive pleading." *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 140.11[1][d]*; *Fla. R. Civ. Pro. 1.140(h)(1)* ("A

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party waives *all defenses* . . . that the party does not present either by motion . . . or, if the party has made no motion, in a responsive pleading . . .") (emphasis added); *See Mangum v. Susser,* 764 So.2d 653, 654-55 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1216a]; *see also Wolowitz v. Thoroughbred Motors, Inc.,* 765 So.2d 920, 923 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2033a] (defense of accord and satisfaction waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Fisher v. Fisher,* 613 So.2d 1370 (Fla. 2d DCA 1993) (defense of laches waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Miami Elec. Ctr., Inc. v. Saporta,* 597 So.2d 903 (Fla. 3d DCA 1992) (defense of illegality waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Kersey v. City of Rivera Beach,* 337 So.2d 995 (Fla. 4th DCA 1976) (defense of estoppel waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *St. Paul Fire & Marine Ins. Co. v. Walsh,* 501 So.2d 54 (Fla. 4th DCA 1987) (holding that settlement is an affirmative defense that ought to be pled or waived pursuant to R. 1.140(h)).

In addition to the foregoing, binding decisional precedent holds that waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right". *Raymond James Financial Services v. Steven W. Saldukas*, 896 So. 2d 707 (Fla. 2005) [30 Fla. L. Weekly S115a].

The record before this Court reflects that Defendant's knowledge and purported evidence pertaining to an alleged fraud *pre-dates* the filing of the instant lawsuit. Nevertheless, Defendant failed to raise a fraud defense at inception of this case as is otherwise required by the applicable rules of procedure noted above. Likewise, Defendant failed to timely seek an amendment to its pleading at any point over the past seven (7) years of litigation opting to travel under the issues of reasonableness, relatedness, and medical necessity of Plaintiff's treatment as framed by the pleadings.

Based on the foregoing, this Court finds that Defendant, by its own conduct, has waived its right to raise a fraud defense in this case.

Further, despite Florida's liberal policy allowing amendments under Florida Rule of Civil Procedure 1.190 (a)[2], Florida precedent provides that a denial of a motion is warranted where (1) the amendment would be futile, (2) the privilege to amend the pleading has been abused, or (3) the amendment would prejudice the opposing party. *Yun Enterprises, LTD. v. Graziani,* 840 So. 2d 420 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D781a].

The Court finds that the Defendant has abused the privilege to amend since "the amendment [was] sought extremely late in the proceedings, without justification for the delay, [and] the facts were long known" to the Defendant. *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 190.3[3][b]* (noting that there appears to be two kinds of circumstances that fall under the "abuse of privilege to amend" category: "one, where a party has already been given numerous, and arguably sufficient, opportunities to amend; *and another, where the amendment is sought extremely late in the proceeding, without justification for the delay, as where the facts were long known to the party belatedly seeking leave*"); *see also Wooten v. Wooten,* 213 So.2d 292 (Fla. 3d DCA 1968) (denied proposed amendment to complaint seeking to add cause of action at late stage of proceedings where plaintiff knew of underlying facts before the complaint was even filed); *Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prod., Inc.,* 553 So.2d 336 (Fla. 4th DCA 1989) (denied leave to add setoff defense three days before trial where previously known to defendant and prejudicial to plaintiff); *United States v. State,* 179 So.2d 890 (Fla. 3d DCA 1965) (denied impleader amendment where the movant knew for more than two years that the party sought to be impleaded had an interest); *Aydelott v. Greenheart (Demerara) Inc.,* 162 So.2d 286 (Fla. 2d DCA 1964) (proposed counterclaim "was not seasonably filed" since "the matters attempted to be raised by the tardy counterclaim were essentially within the knowledge of the defendant at the time he filed his answer"); *Mrmich v. Switzer,* 553 So.2d 1308, 1309 (Fla. 3d DCA 1989) (affirming denial of amendment and finding no abuse of discretion where "the action had been pending nearly five years" and that "no valid excuse was offered below for waiting this long period").

Finally, this Court finds that Plaintiff will be severely prejudiced by Defendant's belated proposed amendment given the facts of this case. "Under Rule 1.190, a test of prejudice to the [party opposing an amendment] is the primary consideration in determining whether a motion for leave to amend should be granted or denied". *Lasar Mfg. Co. v. Bachanov,* 436 So.2d 236, 237-38 (Fla. 3d DCA 1983); *Leavitt v. Garson,* 528 So.2d 108, 110 (Fla. 4th DCA 1988); *Newman v. State Farm Mut. Auto. Ins. Co.,* 858 So.2d 1205, 1206 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2590a]. In considering prejudice, the untimeliness of Defendant's motion is paramount since a motion to amend must be promptly made. *Griffin v. Societe Anonyme*, 53 Fla. 801, 830, 44 So. 342, 351 (1907).

Defendant obtained its alleged evidence in support of its purported defense no less than seven (7) years ago.

Nevertheless, Defendant did not timely raise any defenses and, accordingly, Plaintiff prosecuted this case with the sole issues being reasonableness, relatedness, and medical necessity of its treatment. As such, this Court finds that Plaintiff's ability to conduct any meaningful discovery to oppose the alleged defense has been significantly hampered as a result of the Defendant's conduct and severe delay in seeking leave to amend. This is so since the issues raised in Defendant's proposed defense are factual in nature. Due to the substantial passage of time, crucial witnesses may now be unavailable and their memories of events from some seven (7) years ago long faded and unreliable, not to mention that potential documentary evidence refuting the Defendant's allegations likely no longer exists. This extended lapse of time and delay caused by Defendant simply cannot be cured. Accordingly, the Court finds that to allow Defendant's proposed amendment at this late stage of the proceedings would irremediably prejudice the Plaintiff in its ability to conduct discovery and this prejudice outweighs any liberality interests in permitting an amendment. *See e.g., Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prods. Inc.,* 553 So.2d 336, 337 (Fla. 4th DCA 1989); *Saunders v. Goulard,* 569 So.2d 1305, 1306-07 (Fla. 5th DCA 1990). The Court also finds that Plaintiff will be prejudiced by Defendant's belated amendment as it has now expended substantial time and resources prosecuting this matter and rejected prior offers of judgment served by the Defendant premised on the issues as framed by the pleadings. *See e.g. Saunders v. Goulard,* 569 So.2d 1305, 1306-07 (Fla. 5th DCA 1990).

For the foregoing reasons, Defendant's unjustified delay in raising its purported defense clearly prejudices the Plaintiff and, accordingly, the proposed amendment must be denied.

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Defendant's Motion to File Amended Answer is DENIED.

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[1]At the hearing counsel for Plaintiff noted that this surveillance report is yet to be produced by the Defendant. A review of the court's docket also confirms that Defendant has neither served a response to Plaintiff Request for Production nor filed a privilege log disclosing the existence of this report.

[2]The rule provides that "[l]eave of court shall be given freely when justice so requires."

* * *

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Insurance—Personal injury protection—Answer—Amendment—Motion to amend answer to raise allegations of upcoding and deficient record-keeping is denied where proposed amendment is contrary to legislative intent to have those issues addressed and resolved prior to suit, medical provider will be severely prejudiced by amendment that would deprive it of opportunity to cure deficiencies in records and coding prior to suit, amendment would be futile, and insurer waived defenses and abused privilege to amend by failing to plead defenses known to it prior to suit during seven years of litigation

BISCAYNE REHAB CTR., INC., a/a/o Silvia Castro, Plaintiff. v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-004617-CC-25, Section CG01. June 27, 2020. Linda Diaz, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Ari Neimand, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO FILE AMENDED ANSWER

THIS CAUSE came before the Court on May 14, 2020 on Defendant's Motion to File Amended Answer.

The parties were represented by counsel at the hearing who presented arguments to this Court. Ari Neimand, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Defendant's motion, Plaintiff's Amended Memorandum of Law in Opposition to Defendant's Motion to File Amend Answer, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby enters this Order DENYING Defendant's Motion to File Amended Answer and makes the following factual findings and conclusions of law.

Plaintiff rendered treatment to the claimant from November 7, 2011 through February 29, 2012 in relation to an automobile accident and submitted a claim for payment of Personal Injury Protection ("PIP") benefits to Defendant.

On February 26, 2013, Plaintiff filed the instant lawsuit alleging breach of contract and seeking payment of unpaid PIP benefits. The recommended resolution standard for this action is eighteen (18) months. Fla. R. Jud. Adm. 2.250(a)(1)(B).

On October 7, 2013 Defendant served its Answer and Affirmative Defenses alleging payment as its sole defense to Plaintiff's Complaint.

Accordingly, since the inception of this case, the only issues framed by the pleadings have been the reasonableness, relatedness, and medical necessity of treatment rendered by the Plaintiff, as well as the payment allegations raised by Defendant.

On September 30, 2016 Defendant secured a peer review report from Don Morris, D.C. pursuant to Fla. Stat. 627.736(7)(a).

On January 15, 2020 Defendant served its Motion to File Amended Answer. This motion seeks to allege deficiencies within Plaintiff's medical records ("record keeping defense") based on the peer review opinion Defendant obtained from Don Morris, D.C. no less than four (4) years prior.[1]

At the hearing defense counsel could not provide an explanation for the substantial delay—nearly four (4) years—from the time Defendant obtained Dr. Morris' peer review report to the time it motioned this Court for leave to amend.

Defendant argues that its motion to amend ought to be granted due to Florida's liberal policy in favor of granting amendments. Defendant also argues that since this matter has not been set for trial and Plaintiff is free to depose Dr. Morris there is no prejudice to Plaintiff in allowing the amendment.

Plaintiff argues that given the nature of Defendant's proposed defenses, as applied to the PIP statute, Defendant's motion to amend ought to be denied. Plaintiff argues prejudice, futility, abuse of the privilege to amend, and waiver in support of its argument that Defendant's motion should be denied.

Florida Rule of Civil Procedure 1.190 (a) provides that "[l]eave of court shall be given freely when justice so requires." Interpreting this rule, Florida precedent provides that a denial of a motion is warranted where (1) the amendment would be futile, (2) the privilege to amend the pleading has been abused, or (3) the amendment would prejudice the opposing party. *Yun Enterprises, LTD. v. Graziani,* 840 So. 2d 420 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D781a].

Fla. Stat. 627.736(7)(a), under title "MENTAL AND PHYSICAL EXAMINATION OF INJURED PERSON; REPORTS", allows an insurance company to obtain reports from medical professionals opining on reasonableness, relatedness, and medical necessity of *treatment* rendered to its insured.

Fla. Stat. 627.736(6)(b),[2] under title "DISCOVERY OF FACTS ABOUT AN INJURED PERSON; DISPUTES", provides an insurer with an express statutory mechanism for obtaining *medical records* and/or information from a medical provider so as to authenticate a claim *prior* to making payment. Once such a request is made the claim of the medical provider is not "overdue" until it has complied with the request. This is commonly referred to as a (6)(b) request.

"As always, legislative intent is the polestar that guides a court's inquiry under the No-Fault Law, including the PIP Statute." *Geico General Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 154 (Fla. 2013) [38 Fla. L. Weekly S517a]. "Such intent is derived primarily from the language of the statute. Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Law." *Id.*

In the present case, in addition to its statutorily prescribed purpose, Defendant seeks to utilize the peer review report it obtained from Don Morris, D.C. pursuant to Fla. Stat. 627.736(7)(a) some four (4) years prior to raise affirmative defenses relating to Plaintiff's *medical records* and/or "record keeping".

Setting aside whether Defendant is permitted to utilize a report obtained under Fla. Stat. 627.736(7)(a) so as to attack the *medical records* of a provider post-suit, it is clear that the plain language of the PIP statute reflects a legislative intent and mechanism for medical records issues to be addressed and resolved by an insurer at the claims stage and prior to the institution of litigation. This is so since the statute provides that a claim is not "overdue" until a provider complies with a (6)(b) request.

In the present case, to allow Defendant's proposed amendment flies in the face of the legislative intent to have issues pertaining to medical records addressed and resolved prior to suit.

"Under Rule 1.190, a test of prejudice to the [party opposing an amendment] is the primary consideration in determining whether a motion for leave to amend should be granted or denied". *Lasar Mfg. Co. v. Bachanov,* 436 So.2d 236, 237-38 (Fla. 3d DCA 1983); *Leavitt v. Garson,* 528 So.2d 108, 110 (Fla. 4th DCA 1988); *Newman v. State Farm Mut. Auto. Ins. Co.,* 858 So.2d 1205, 1206 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2590a].

As more fully set forth below, this Court finds that Plaintiff will be severely prejudiced by Defendant's belated proposed amendment given the statutory scheme outlined above, as applied to the facts of this case.

Defendant did not make a (6)(b) request or raise any issues with Plaintiff's medical records prior to institution of this action. Accordingly, the facts of this case reflect that Defendant did not take advantage of the statutory mechanism established by the legislature for addressing any purported medical records issues prior to suit. Instead, Defendant sought to raise these issues only after obtaining a peer review report post-suit.

The statutory scheme reflects that the legislature has provided the insurer with a remedy to obtain and/or address any issues pertaining

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to medical records prior to suit. In doing so, it has also provided the medical provider with an equal opportunity to cure any alleged deficiencies pertaining to medical records issues prior to suit. These mechanisms were created by the legislature to facilitate "swift and automatic" payment of PIP benefits.

To allow Defendant to now raise its purported defense serves to circumvent the express statutory scheme put in place by the legislature. More importantly, allowing the Defendant to circumvent the statutory scheme is prejudicial to the Plaintiff since it has been deprived of a legislatively crafted opportunity to cure any purported deficiencies in its medical records prior to suit, thereby securing "swift and automatic" payment of PIP benefits.

The Court also finds that Plaintiff will be prejudiced by Defendant's belated amendment as it has now expended time and resources prosecuting this matter and rejected two prior offers of judgment served by the Defendant premised on the issues as framed by the pleadings. *See e.g. Saunders v. Goulard,* 569 So.2d 1305, 1306-07 (Fla. 5th DCA 1990).

Furthermore, this Court finds that there is merit to Plaintiff's argument that Defendant's belated proposed amendment should be denied as futile. "A proposed amendment is futile if it is insufficiently pled or is insufficient as a matter of law." *Armiger v. Associated Outdoor Clubs, Inc.,* 48 So.3d 864, 871 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2194a].

Defendant's proposed "record keeping" defense merely states a legal conclusion alleging a failure to comply with certain administrative requirements without setting forth any factual basis in support of same. "Certainty is required when pleading affirmative defenses and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient." *Cady v. Chevy Chase Sav. & Loan, Inc.,* 528 So. 2d 136, 138 (Fla. 4th DCA 1988); *see also Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach,* 318 So. 2d at 176 (stating that "the requirement of certainty will be insisted upon in the pleading of a defense").

Finally, "[a]ffirmative defenses required to be defensively pleaded under Rule 1.110(d) are waived if not timely raised by motion to dismiss or responsive pleading." *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 140.11[1][d*]; *Fla. R. Civ. Pro. 1.140(h)(1*) ("A party waives *all defenses* . . . that the party does not present either by motion . . . or, if the party has made no motion, in a responsive pleading . . .") (emphasis added); *See Mangum v. Susser,* 764 So.2d 653, 654-55 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1216a]; *see also Wolowitz v. Thoroughbred Motors, Inc.,* 765 So.2d 920, 923 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2033a] (defense of accord and satisfaction waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Fisher v. Fisher,* 613 So.2d 1370 (Fla. 2d DCA 1993) (defense of laches waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Miami Elec. Ctr., Inc. v. Saporta,* 597 So.2d 903 (Fla. 3d DCA 1992) (defense of illegality waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *Kersey v. City of Rivera Beach,* 337 So.2d 995 (Fla. 4th DCA 1976) (defense of estoppel waived pursuant to R. 1.140(h) since not pled as a defense as otherwise required under R. 1.110(d)); *St. Paul Fire & Marine Ins. Co. v. Walsh,* 501 So.2d 54 (Fla. 4th DCA 1987) (holding that settlement is an affirmative defense that ought to be pled or waived pursuant to R. 1.140(h)).

Binding decisional precedent holds that waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right". *Raymond James Financial Services v. Steven W. Saldukas*, 896 So. 2d 707 (Fla. 2005) [30 Fla. L. Weekly S115a].

Defendant has been in possession of Plaintiff's medical record and bills for the subject treatment since year 2012. Thus, Defendant had all the documents it needed to have previously asserted the defense prior to this action even being filed. Nevertheless, Defendant failed to raise its "record keeping" defense at the inception of this case as is otherwise required by the applicable rules of procedure. Defendant declined to utilize the mechanism provided in Fla. Stat. 627.736(6)(b) thereby preventing Plaintiff from having the opportunity to address and cure any issues with its "record keeping" prior to suit. Moreover, although Defendant obtained a peer review report in 2016, Defendant did not seek to raise a "record keeping" defense for the next four (4) years, instead continuing to travel under the issues as originally framed by the pleadings.

Based on the foregoing, this Court finds that Defendant, by its own conduct, has waived its right to raise its proposed defenses in this case.

For similar reasons, the Court finds that Defendant has abused the privilege to amend since "the amendment [was] sought extremely late in the proceedings, without justification for the delay, [and] the facts were long known" to the Defendant. *See Florida Civil Procedure, 2006 Edition, Bruce J. Berman, 190.3[3][b]* (noting that there appears to be two kinds of circumstances that fall under the "abuse of privilege to amend" category: "one, where a party has already been given numerous, and arguably sufficient, opportunities to amend; and another, *where the amendment is sought extremely late in the proceeding, without justification for the delay, as where the facts were long known to the party belatedly seeking leave*"); *see also Wooten v. Wooten,* 213 So.2d 292 (Fla. 3d DCA 1968) (denied proposed amendment to complaint seeking to add cause of action at late stage of proceedings where plaintiff knew of underlying facts before the complaint was even filed); *Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prod., Inc.,* 553 So.2d 336 (Fla. 4th DCA 1989) (denied leave to add setoff defense three days before trial where previously known to defendant and prejudicial to plaintiff); *United States v. State,* 179 So.2d 890 (Fla. 3d DCA 1965) (denied impleader amendment where the movant knew for more than two years that the party sought to be impleaded had an interest); *Aydelott v. Greenheart (Demerara) Inc.,* 162 So.2d 286 (Fla. 2d DCA 1964) (proposed counterclaim "was not seasonably filed" since "the matters attempted to be raised by the tardy counterclaim were essentially within the knowledge of the defendant at the time he filed his answer"); *Mrmich v. Switzer,* 553 So.2d 1308, 1309 (Fla. 3d DCA 1989) (affirming denial of amendment and finding no abuse of discretion where "the action had been pending nearly five years" and that "no valid excuse was offered below for waiting this long period"). The facts of this case reflect that although Defendant had knowledge of the defense as of September 30, 2016, if not sooner, Defendant nevertheless "sat on its hands" for nearly four (4) years and did not timely seek to raise the defense.

Therefore, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Defendant's Motion to File Amended Answer is DENIED.

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[1]Defendant's motion to amend also sought to raise a separate defense denying Plaintiff's treatment as medically necessary; however, at the hearing defense counsel conceded that such allegations were not a proper affirmative defense and advised that he was no longer seeking to raise these allegations as a defense.

[2]Fla. Stat. 627.736(6)(b) provides in pertinent part:

> Every. . .clinic. . .providing. . .services. . .*shall, if requested to do so* by the insurer. . .*furnish forthwith* a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment

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. . .

If an insurer makes a written request for documentation or information. . .the amount or the partial amount which is the subject of the insurer's inquiry *shall become overdue. . .within 10 days after the insurer's receipt of the requested documentation or information*. . .

* * *

Attorney's fees—Insurance—Property—Assignee of post-loss property insurance claim filed after enactment of section 627.7152(10) may recover attorney's fees only under section 57.105—Date that suit was filed, not date that assignment was signed, determines applicability of statute

FATHER & SON CARPET CLEANING & RESTORATION, LLC, Plaintiff, v. WESTERN WORLD INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-017327-CC-05, Section CC06. March 27, 2020. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES

THIS CAUSE came before the Court on February 25, 2020, upon Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees, and the Court having reviewed the Motion, heard arguments of counsel, reviewed the file, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees is hereby GRANTED. Plaintiff shall have 30 days from the date of this Order to file an Amended Complaint.

This suit was filed on July 22, 2019, after Governor DeSantis signed a bill enacting section 627.7152, Florida Statutes. Section 627.7152(10), Florida Statutes, controls claims for attorney fees in assignment of benefit suits. At the hearing, Plaintiff argued that section 627.428, Florida Statutes, controlled since the assignment of benefit form was signed on March 10, 2019, before the bill was enacted. Plaintiff's argument is not persuasive. Section 627.7152(10), Florida Statutes, states:

> Notwithstanding any other provision of law, in a ***suit*** related to an assignment agreement for post-loss claims arising under a residential or commercial property insurance policy, attorney fees and costs may be recovered by an assignee only under s. 57.105 and this subsection. (emphasis added).

Clearly, this subsection relates to the date a suit is filed rather than the date the assignment of benefits form is signed by the parties. *See State v. Burris,* 875 So. 2d 408, 410 (Fla. 2004) [29 Fla. L. Weekly S149a]. ("When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."). Since the suit was filed after the bill was signed into law, section 627.7152(10) controls.

Accordingly, Defendant's motion is GRANTED. Paragraphs fourteen and nineteen, along with the "Wherefore" clause within Plaintiff's Complaint is stricken to remove any reference to sections 627.428 and 57.041, Florida Statutes. Plaintiff shall have 30 days from the date of this Order to file an Amended Complaint to allege any claims for attorney's fees pursuant to sections 627.7152 and 57.105, Florida Statutes.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Inspection and maintenance of breath testing machine—Certification of inspectors, operators and instructors—No merit to contention that Alcohol Testing Program improperly delegated its responsibility for regulating breath test inspectors, operators, and instructors to Criminal Justice Standards and Training Commission—ATP acted within its authority in developing training curricula before forwarding it to CJSTC for adoption and implementation as rule—No merit to argument that notice and public hearing was required for ATP curricula to be properly adopted as rule where there was no need to adopt rule regarding curricula and testing that are procedures implicit to certification process provided for in rule 11-D8—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. AMBER GRACE BENCAZ, et al.,[1] Defendants. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2018 CT 17747 NC. April 17, 2020. Rehearing Denied June 1, 2020. David Denkin, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court on the Defendants' Motion to Suppress Breath Tests. The Court conducted a duly noticed *en banc* hearing on January 24, 2020, where the Court heard testimony from Dr. Brett Kirkland of the Florida Department of Law Enforcement's (hereinafter "FDLE") Alcohol Testing Program (hereinafter "ATP"), as well as the parties' arguments. Having considered the same and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) Each of the Defendants were arrested for Driving Under the Influence and requested by law enforcement to submit to a lawful breath test.

2) The Defendants submitted to the breath test either voluntarily or pursuant to Implied Consent.

3) The Court previously took judicial notice of the following:

a. Fla. Admin Code 11 D-8 governs the Implied Consent Program.

b. Chapters 11B-20, 11B-35, and 11D-8 of the Florida Administrative Code (hereinafter "FAC") and the rules promulgated by Florida's governmental agencies that are published in the FAC.

c. FDLE's Organizational Chart, admitted at the hearing for the limited purpose of establishing the organization of FDLE.

d. The Criminal Justice Professionalism Division's Organizational Chart, admitted at the hearing for the limited purpose of establishing the organization of the Professionalism Division.

4) The Court admitted the State's Exhibit la-g (CJSTC Forms 14, 17, 71, 81,82, and 271; and the Breath Test Permit Application), per stipulation of the parties.

5) The State called ATP's Dr. Brett Kirkland, who testified to the following:

a. ATP governs and oversees the reliability of testing of breath and blood samples in Florida, and its authority comes from Fla. Stat § 316.1932.

b. ATP creates the curriculums and approves the courses necessary to become a breath test operator, agency inspector and breath test instructor in Florida.

c. Florida requires breath test operators and agency inspectors to have a permit in order to operate in that capacity. ATP issues the permits for those positions.

d. Fla. Stat. §316.1932(1)(a)(2)(m) allows ATP to consult and cooperate with other entities in the administration of its duties.

e. The Criminal Justice Standards and Training Commission (hereinafter "CJSTC") oversees standards and training and makes the rules pertaining to such for law enforcement officers and instructors.

f. CJSTC is composed of administrative staff and a Commission. The administrative arm is comprised of FDLE employees, while nineteen gubernatorial appointees collectively serve as the Commission.

g. Fla. Stat. § 943.12(6) allows CJSTC to consult and cooperate with other entities in the administration of its duties.

h. ATP and CJSTC are sections under FDLE's Criminal Justice Professionalism Division [see FDLE Organizational Chart].

i. No authority has been delegated from ATP to CJSTC.

j. ATP's procedure for approving breath test operator and agency inspector courses is to submit them to CJSTC for discussion and then

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approval for implementation.

k. ATP has a procedure in place to issue a permit to a breath test instructor only after CJSTC certifies the instructor based on the criteria ATP established.

1. CJSTC adopts the rules for breath testing as submitted by ATP.

m. CJSTC has never changed or denied the breath testing rules as submitted by ATP; CJSTC recognizes that ATP is the subject matter expert and no one in Florida can receive a permit unless they complete ATP's curriculum, which is implemented by ATP without CJSTC' s input.

n. The methodology of how to conduct a breath test is rule based but the curriculum for such is not. Therefore, ATP is permitted to make changes to the curriculum as needed to keep up with methodology without having to go before the public for approval.

ANALYSIS

The Defendants seek to suppress the results of their breath tests alleging that the sections of FDLE violated legislative mandates in the following two ways and these violations render the testing invalid: (1) ATP improperly delegated its responsibility for establishing a curriculum and regulating breath test operators, inspectors and instructors to CJSTC in violation of Florida's Implied Consent statute [post 2000], and (2) CJSTC adopted rules that set forth the criteria to become a breath test operator, instructor and inspector contrary to the Administrative Procedure Act (hereinafter "APA"), section 120.54(1)(i)(3) of the Florida Statutes. The Defendants argue that each of these violations, in and of itself, renders their breath test results inadmissible under *State v. Bender,* 382 So. 2d 697 (Fla. 1980) (holding that breath tests are admissible when performed in compliance with Florida's Implied Consent statute and the administrative provisions enacted therefrom).

The State, on the other hand, argues there was no improper delegation of authority between ATP and CJSTC and, furthermore, the procedures and course curricula for breath test operators, instructors and inspectors are not required to be promulgated rules, so there could be no APA violation. The Court agrees.

a. **Delegation of Authority**

Under the Implied Consent Statute, ATP is responsible for the regulation, inspection and operation of breath test instruments, in addition to the regulation of the individuals who operate and inspect the instruments. § 316.1932(1)(a)(2), *Fla. Stat.* The statute charges ATP with establishing a uniform curricula for the operation and inspection of the instruments and approving operator and inspector classes, as well as establishing uniform procedures for issuing permits for individuals to serve as operators, inspectors and instructors in Florida. *Id.* Although ATP develops the curricula and procedures to obtain the permit, CJSTC is taxed with training and certifying instructors in the law enforcement related fields. §§ 943.085 - 943.255, *Fla. Stat.* As such, the duties of ATP and CJSTC appear to overlap and it is only fitting that the legislature allows for ATP and CJSTC to consult and cooperate with each other to implement their assigned duties. *See* § 316.1932(1)(a)(2)(m) and § 943.12(6), *Fla. Stat.*

The Court finds based on the above described legislative authority bestowed on ATP and CJSTC, in conjunction with Dr. Kirkland's testimony, that ATP did not delegate its authority to CJSTC. ATP acted within its authority under 316.1932(1)(a)(2) in developing the curricula and the authority of § 316.1932(1)(a)(2)(m) in forwarding it to CJSTC for implementation. Per Dr. Kirkland's testimony, ATP created and approved the breath test operator, agency inspector, and breath test instructor courses prior to CJSTC approving and adopting them as their procedures for training and certifying individuals in these areas. The Court finds this to be a proper use of the authority that permits division sections to consult and cooperate with each other to effectuate their statutory duties.

b. **Administrative Procedure Act**

The defense argues that notice and a public hearing was required under the APA in order for ATP's curricula to be properly adopted and implemented as a rule. *State v. Bodden,* 877 So. 2d 680 (Fla. 2004) [29 Fla. L. Weekly S153a]. The Court finds no such requirement.

The legislature made clear in section 316.1932(1)(a)(2)(f) that ATP shall "[e]stablish *procedure* for the approval of breath test operator and agency inspector classes" [italics added]. There is no requirement that a rule be promulgated; rather, the legislature expressly called for a procedure to be established. ATP's development of curricula is an implicit part of its procedures, and the procedures are ancillary to the promulgated rules. The Second District Court of Appeal, in *Wissel v. State,* 691 So. 2d 507 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D619a], provides a good discussion as to what is a "rule" that must be promulgated. The *Wissel* Court explained, "procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation." Likewise, curricula and testing are procedures implicit to the certification process with which CJSTC is tasked and, again, there would be no need to adopt a promulgated rule. The Court recognizes that ATP's curriculum is substantively based on rule 11-D8, which covers the approved instrument, procedures for administering breath tests and the maintenance of the lntoxilyzer 8000. Even so, it is not necessary to put that curriculum into rule and require a public hearing each time the curricula needs to be updated based on technological advancements.

CONCLUSION

The Court, taking into consideration the testimony received and in adherence to its prior order issued in case 2017-CT-3186 SC on 02/02/2018, concludes there was no improper delegation of authority from ATP to CJSTC. Furthermore, the Court concludes a notice and public hearing, under the APA, was not required prior to CJSTC adopting and implementing ATP's curricula. It is hereby,

ORDERED AND ADJUDGED that the Defendants' Motion to Suppress is denied.

---

[1]See attached Exhibit for complete list of Defendants

EXHIBIT—DIVISION CASE LIST FOR INTOXILYZER MOTION

Defendant	Case Number	Judge
Anne Barnett	2019 CT 012550 NC	David Denkin
Amber Grace Bencaz	2018 CT 017747 NC	David Denkin
Khalid Bouhamid	2018 CT 018814 SC	Dana Moss
Jacob Louis Duvall	2016 CT 000064 NC	Erika Quartermaine
Javier Hernandez Guzman	2015 CT 012257 NC	Phyllis Galen
Maverick Earl Hilton	2018 CT 016442 NC	Erika Quartermaine
Misti Danielle Jensen	2019 CT 003164 SC	Dana Moss
Michael Steven Kniceley	2018 CT 013134 SC	Dana Moss

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Jesus Lechuga Lara	2019 CT 015496 NC	Maryann Boehm
Kerri Elizabeth Long	2019 CT 016347 SC	Dana Moss
Robert S. Magaris	2018 CT 018778 NC	Erika Quartermaine
Wanda Flowe Mingo	2019 CT 001193 SC	Dana Moss
Mark E. Mlynski	2019 CT 012530 NC	Erika Quartermaine
Capron Edward Smith	2019 CT 002808 NC	Phyllis Galen
Sarah C. Todd	2019 CT 012014 SC	Dana Moss
Joseph Aaron Valderrama	2018 CT 015788 NC	Phyllis Galen

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

This matter came before the Court on the Defendant's motion requesting the Court to conduct a rehearing on the Defendant's Motion to Suppress the Breath Test. After careful consideration of the issues raised in the Defendant's motion, the Court declines to conduct an additional hearing.

ORDERED that Defendant's Motion for Rehearing is Denied.

* * *

Criminal law—Evidence—Breath test—Motion to suppress breath test based on failure to comply with implied consent law and/or administrative rules—Burden of proof

STATE OF FLORIDA, Petitioner, v. AMBER BENCAZ, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Criminal Division. Case No. 2018-CT-17747-NC. March 22, 2019. David Denkin, Judge. Counsel: Monica Kelly, for Petitioner. Robert Harrison, for Defendant.

ORDER ON STATE'S MOTION TO DECLARE DEFENDANT'S MOTION TO SUPPRESS A MOTION IN LIMINE

THIS MATTER was brought before this Court pursuant to the State's Motion to rename[1] Defendant's Motion to Suppress, Defendant's Motion in Limine so as to place the burden of proof on the Defendant.

The Defendant filed a motion labeling it 'Motion to Suppress Breath Test (Invalid Instructor Permit)' alleging that:

- There was a warrantless breath test.
- The State failed to comply with the statutory provisions of implied consent.
- The Alcohol Testing Program (ATP) has not established criteria for Breath Test Instructors, instead delegated the authority to the Criminal Justice Professionalism Program.
- The Criminal Justice Professionalism Program (CJSTC) exceeded its' rulemaking authority by enacting rules which were legislatively granted to ATP.
- Neither the breath test operator, agency inspector and/or instructor obtained their respective permits pursuant to ATP's exercise of their statutory authority. Instead, they were obtained by the acts of CJSTC, which did not have the authority to do.
- The Defendant did not voluntarily consent to the breath test.
- The breath test results should not be admitted into evidence at trial.

The Defendant as the moving party in this matter has the burden of proof *See* Fla.R.Crim.P. 3.190(g); *Birchfield v. North Dakota*, 136 S.C. 2160 (2016) [26 Fla. L. Weekly Fed. S300a]; *State v. Mobley,* 98 So.3d 124, 125 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1726a].

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant has the initial burden of proof to show that the State failed to substantially comply with the implied consent statute and/or the administrative provisions enacted by its authority. Upon a sufficient showing (preponderance of the evidence) the State must then present evidence showing substantial compliance, that any non-compliance is inconsequential or admissibility upon some other legal basis.

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[1]Romeo and Juliet, Act II, Scene II "What's in a name? That which we call a rose by any other word would smell as sweet.", William Shakespeare

* * *

Insurance—Personal injury protection— Default— Vacation—Excusable neglect—Motion to vacate default is denied—Insurer offered no explanation for its failure to respond to six items of correspondence regarding suit mailed to it by medical provider after complaint was served and its failure to appear for properly noticed hearing

PHYSICIANS GROUP, L.L.C., a/a/o Fredrick Wilson, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 CC 003453 NC. May 29, 2020. Erika Quartermaine, Judge. Counsel: Nicholas A. Chaipetta, Marten | Chiapetta, Lake Worth, for Plaintiff. Cameron J. Ringo, McFarlane Dolan & Prince, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT AND DEFAULT FINAL JUDGMENT

THIS CAUSE having come before the Court for hearing on May 13, 2020 upon Defendant's Motion to Vacate Default and Default Final Judgment(s) and the Court, having reviewed the motions, the Court file, the case law presented, and having heard argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

BACKGROUND

1. The Plaintiff filed a one count breach of contract action against the Defendant seeking unpaid Personal Injury Protection benefits on June 14, 2019. [D.E. 1].

2. The Defendant was served a copy of the Summons and Complaint on August 19, 2019. [D.E. 4].

3. On October 17, 2019, the Plaintiff filed and served the Defendant its Motion for Default, via U.S. mail. [D.E. 24].

4. A clerk's default was entered against the Defendant on October 18, 2019. [D.E. 8].

5. On October 22, 2019, the Plaintiff filed and served the Defendant its Motion to Tax Attorney's Fees and Costs, via U.S. mail. [D.E. 9].

6. The Plaintiff filed and mailed to the Defendant, its Motion for Entry of Final Judgment along with an affidavit of indebtedness on October 31, 2019. [D.E. 10, 24].

7. On November 04, 2019 this Court entered final judgment in favor of Plaintiff. The Judgment was recorded on November 05, 2019. [D.E. 12]. The Plaintiff mailed a copy of the Judgment to the Defendant [D.E. 24].

8. On November 12, 2019, the Plaintiff file and served the Defendant, via U.S. Mail, with a Notice of Hearing on Plaintiff's Motion to Tax. [D.E. 24]

9. This Court held a properly noticed hearing Plaintiff's Motion to Tax Attorney's Fees and Costs on December 02, 2019. [D.E. 17]. On that same day, the Court entered final judgment as to fees and costs in Plaintiff's favor. [D.E. 18].

10. On December 20, 2019, Plaintiff's counsel's office sent the Defendant, via certified mail, a letter requesting satisfaction of the

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judgments. [D.E 24].

11. On January 07, 2020, sixty-four (64) days after the November Final Judgment was entered, the Defendant filed its Motion to Vacate Default. [D.E 20]. The Defendant filed its Affidavit of Michael Anderson in support of its Motion to Vacate Default on January 14, 2020.

12. The Defendant filed its Answer and Affirmative Defenses on March 02, 2020.[D.E. 28]. Shortly thereafter, on March 24, 2020 the Defendant filed an Amended Affidavit of Michael Anderson. [D.E. 32].

13. On May 13, 2020, this Court heard arguments on the Defendant's Motion to Vacate Default.

14. The Defendant argued that its affiant, Michael Anderson, first discovered the default on January 02, 2020, and that he misfiled or inadvertently failed to calendar the appropriate deadlines. The Defendant also argued that the file was assigned to a litigation adjuster who failed to follow instructions and refer to the case to outside counsel, and as result of that failure has been terminated by the Defendant.

15. The Plaintiff argued that in addition to service of summons and complaint, the Defendant was served with documents on at least six (6) different occasions. In support of its contention, the Plaintiff filed an affidavit of Katrin Saxenmeyer. [D.E. 24]. The Plaintiff further argued that the Defendant's Amended Affidavit of Michael Anderson is conclusory and it fails to address what happened to the substantial correspondence sent to the Defendant between October 17, 2019 and December 20, 2019. The Plaintiff also alleged that the Defendant failed to appear for a properly noticed hearing, which was not explained in the Defendant's Amended Affidavit.

CONCLUSIONS OF LAW

In Florida, there is a strong preference for lawsuits to be determined on the merits and courts should liberally set aside defaults under appropriate circumstances. *Geer v. Jacobsen,* 880 So. 2d 717, 720 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a]. However, it was incumbent upon the Defendant to demonstrate excusable neglect, a meritorious defense, and due diligence. *See id.*

Under the circumstances of this case, vacating the default would not be appropriate. Although the Defendant brought forth sworn testimony, that testimony fell woefully short of short of establishing excusable neglect. *See, e.g., Hurley v. Gov't Employees Ins. Co.,* 619 So. 2d 477, 479 (Fla. 2d DCA 1993).

In *Hurley,* Geico sought to set aside a default and default judgment. In analyzing the case, the Second District Court of Appeals found that Geico was grossly negligent for not responding to a "continuing shower of legal pleadings." The court went on to state that "neither [affidavit filed by Geico] could explain what happened to the complaint or suit papers other than admitting that the complaint was received by GEICO . . . and then was lost or misfiled." The court held that Geico was grossly negligent, and therefore, unable to prove excusable neglect.

In *Bequer v. Nat'l City Bank,* 46 So. 3d 1199, 1202 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D485a], the Fourth District Court of Appeals relying on *Hurley,* found that the appellee failed to explain what happened to correspondence advising of default. The court then stated:

> While appellee's inaction to respond to the complaint alone might have constituted excusable neglect given the system appellees had in place, the failure to respond to the complaint, when coupled with the correspondence sent on three different occasions, constitutes gross negligence. Missing the complaint and the correspondence is not evidence of a "system gone awry" but rather a defective system altogether.
>
> Here, the Defendant offered no explanation as to what happened to each document mailed to it between October 17, 2019 through December 20, 2019. The Defendant also failed explain why it did not attend a properly noticed hearing on December 02, 2019. On the other hand, in addition to the certificates of services on the documents, the Plaintiff provided sufficient evidence to establish a presumption that the documents were received. *See Brown v. Giffen Industry.,* Inc., 281 So. 2d 897, 900 (Fla. 1973)(on rehearing)(there is a rebuttable presumption "that mail properly addressed, stamped and mailed was received by the addressee."); *Brake v. State, Unemployment Appeals Comm'n,* 473 So.2d 774 (Fla. 3d DCA 1985)(testimony regarding customary office practice is sufficient to trigger the presumption in favor of mailing).
>
> The Court finds the Amended Affidavit of Michael Anderson fails to adequately explain the failure to respond to six (6) correspondences sent after the service of the Complaint. *See Hurley,* 619 So. 2d at 479. However, even if the six (6) subsequent pieces of correspondence were the continuing error of one now-terminated employee, then the Defendant's motion must still be denied because a system with no check or balance is defective. *See Bequer,* 46 So. 3d at 1202.
>
> Accordingly, it is hereupon ORDERED and ADJUDGED, as follows:
>
> 1. The Defendant's Motion to Vacate Default is **DENIED**;
>
> 2. The Court reserves with respect to entitlement to costs and fees related to this motion.

* * *

Criminal law—Driving under influence—Evidence—Hearsay—Intoxilyzer inspection reports—Confrontation clause of Sixth Amendment does not bar admission of monthly Intoxilyzer inspection report into evidence without testimony from person who performed inspection—Motion in limine is denied

STATE OF FLORIDA, v. RYAN DEVARS, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Traffic Division. Case No. 5167-XEP, Division C. February 27, 2014. John N. Conrad, Judge.

ORDER DENYING DEFENDANT'S SECOND MOTION IN LIMINE TO PROHIBIT THE STATE FROM MENTIONING THE DEFENDANT'S BREATH TEST AND BREATH TEST RESULTS IN TRIAL

THIS CAUSE having come before the Court for hearing on January 28, 2014, pursuant to the Second Motion in Limine to Prohibit the State from Mentioning the Defendant's Breath Test and Breath Test Results in Trial filed by Defendant, Ryan Devars, and the Court having considered the evidence and argument of the parties presented at the hearing, reviewed the case law and Memorandum of Law submitted by the parties following the hearing, and being otherwise fully advised in this matter, does hereby make the following ruling:

Defendant argues that his breath test results in this case should not be admitted during trial because the person who performed the most recent required monthly inspection on the breath test instrument, prior to the breath test being administered, is no longer available as a witness and was not previously subject to cross-examination by the defense.[1] Additionally, the witness listed by the State who allegedly observed this monthly inspection, Melanie Snyder, has no recollection of being present during the actual inspection. Defendant argues that the admission of this monthly inspection report during trial would violate his Sixth Amendment right to confrontation as delineated in *Crawford v. Washington,* 541 U.S. 36 (2004) [17 Fla. L. Weekly Fed. S181a].

The State has conceded in its Memorandum of Law that the monthly inspection report would not be admissible as a recorded recollection under § 90.803(5), Fla. Stat. However, the State argues that the monthly inspection report should be admitted as a public

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record under § 90.803(8), Fla. Stat. The State argues that the monthly inspection report is not testimonial in nature, and therefore, its admissibility would not violate Defendant's right to confrontation, citing *Pflieger v. State,* 952 So.2d 1251 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D931b].

After reviewing all of the relevant case law, this Court concludes that the monthly inspection report is non-testimonial in nature, and therefore, its admissibility during trial, without the testimony of the person who conducted the actual inspection, would not violate Defendant's constitutional right to confrontation. In reaching this conclusion, the Court finds that the monthly inspection report does not contain information that bears direct witness against Defendant. Specifically, the monthly inspection occurred prior to the date of the alleged offense and does not contain specific facts regarding the alleged impairment or breath alcohol level of Defendant at the time of driving.

In *Crawford,* the Court discussed testimonial evidence as follows:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."

Crawford, 541 U.S. at 51.

In *Bullcoming v. New Mexico,* 131 S.C. 2705 (2011) [22 Fla. L. Weekly Fed. S1213a], the Court further expounded on the nature of testimonial evidence by noting:

> To rank as "testimonial," a statement must have a "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Davis v. Washington,* 547 U.S. 813, 822, 126 S.C. 2266, 165 L.Ed.2d 224 (2006) [19 Fla. L. Weekly Fed. S299a]. See also *Bryant,* 562 U.S., at ___, 131 S.C., at 1155. Elaborating on the purpose for which a "testimonial report" is created, we observed in *Melendez-Diaz* that business and public records "are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." 557 U.S., at ___, 129 S.C., at 2539-2540.

Bullcoming, 131 S.C. at 2714.

Lastly, in *State v. Belvin,* 986 So.2d 516 (Fla. 2008) [33 Fla. L. Weekly S279a], the Florida Supreme Court considered the issue of whether a breath test affidavit was testimonial in nature. In concluding that the affidavit was testimonial, the Court looked at the specific purpose of the affidavit and stated the following:

> Applying the rationales of *Davis* and *Crawford* to the instant case, we conclude that the breath test affidavit is testimonial. First, the affidavit was "acting as a witness" against the accused. *Davis,* 547 U.S. at 828, 126 S.C. 2266; *see Crawford,* 541 U.S. at 51, 124 S.C. 1354. The technician who created the breath test affidavit did so to prove a critical element in Belvin's DUI criminal prosecution. In other words, the breath test affidavit was created "to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822, 126 S.C. 2266; *see Thomas v. United States,* 914 A.2d 1, 1243 (D.C.2006), *cert. denied,* __ U.S. __, 128 S.C. 241, 169 L.Ed.2d 160 (2007). Second, the affidavit was not created during an ongoing emergency or contemporaneously with the crime. Instead, it was created "well after the criminal events had transpired." *Magruder v. Commonwealth,* 275 Va. 283, 657 S.E.2d 113, 129 (2008) (Keenan, J., dissenting); *see Davis,* 547 U.S. at 830, 832, 126 S.C. 2266. Third, the affidavit was created at the request of the police for Belvin's DUI prosecution. *See State v. Caulfield,* 722 N.W.2d 304, 309 (Minn.2006); *State v. March,* 216 S.W.3d 663, 666(Mo.), *cert. dismissed*, __ U.S. __, 128 S.C. 1441, 169 L.Ed.2d 256 (2007). Finally, the affidavit falls squarely into the category of "formalized testimonial materials, *such as affidavits*," which the Supreme Court listed in the various formulations of the core class of "testimonial" statements. *Crawford,* 541 U.S. at 52, 124 S.C. 1354 (emphasis added). A breath test affidavit is created under circumstances where the technician is expecting it will be used at a later trial. More precisely, the sole purpose of a breath test affidavit is to authenticate the results of the test for use at trial. *See* § 316.1934(5), Fla. Stat. (2007).

Belvin, 986 So.2d at 521.

In applying a *Belvin* analysis to the monthly inspection report in this case, this Court finds that: 1) the monthly inspection report does not act as a witness against Defendant and was not created to prove a critical element in this DUI prosecution. In other words, the inspection report was not created to "establish or prove past events potentially relevant to later criminal prosecution"; 2) the inspection report was not created "well after the criminal events had transpired"; 3) the inspection report was not created at the request of the police for Defendant's DUI prosecution; and 4) the sole purpose of the monthly inspection report is not to authenticate the results of Defendant's breath test for use at trial.

In *Pflieger v. State,* 952 So.2d 1251 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D931b], the court specifically addressed the issue of whether the introduction of an annual inspection report for a breath testing instrument or intoxilyzer, as a business or public record, violated the confrontation clause as interpreted by the *Crawford* decision. The court held that:

> Taking the above cases and the purpose behind annual inspection reports into consideration, we hold that those reports are non-testimonial. An inspection report, like the hospital record of a blood test, is intended for the non-testimonial purpose of making sure the machine is working properly or for accurate medical treatment, respectively. Using these reports for a litigation purpose is a secondary purpose and therefore, does not raise the concerns expressed in *Crawford* of unreliability.

Id. at 1254. The court further commented that "the actual maintenance report is not compiled during the investigation of a particular crime, as *Crawford* contemplates." *Id.* at 1253. One of the cases cited by the *Pflieger* court was *Commonwealth v. Walther,* 189 S.W.3d 570 (Ky. 2006), which stated that "[e]very jurisdiction but one that has considered this issue since *Crawford* has concluded that maintenance and performance test records of breath-analysis instruments are not testimonial, thus their admissibility is not governed by *Crawford*."[2] In these other jurisdictions, "certified copies of a breathalyzer's maintenance and test records have been admitted into evidence without in-court testimony by the breath-alcohol technician who performed the maintenance and tests." *Pflieger,* 952 So.2d at 1253.[3]

The *Pflieger* decision was recently discussed by Judge Sleet in *Peterson v. State,* 129 So.3d 451 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D75a], which addressed the issue of whether the air bag control system report from a vehicle was admissible during trial. Judge Sleet stated that the *Pflieger* decision provided guidance to the court and noted: "Mike the driving record in *Card* and the annual inspection report in *Pflieger,* the air bag control system report is not accusatory and does not describe any specific wrongdoing of Peterson. Instead, the report merely establishes the existence or absence of some objective fact, i.e., if and when the brakes were applied in Peterson's car before the accident and the speed the car was traveling." *Id.* at 453.

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Defendant cites to *Yankey v. DHSMV,* 6 So.3d 633 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D418a] and *Lee v. DHSMV,* 4 So.3d 754 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D520a], for the proposition that Defendant has a constitutional right to confrontation when the evidence relates to inspection reports for breath testing instruments. This Court believes these cases are distinguishable because they involve administrative proceedings that are expressly controlled by § 322.2615, Fla. Stat. At best, these cases hold that a defendant in an administrative suspension proceeding has a right to subpoena witnesses whose names are identified in the documents filed by the Department.[4] They did not conclude that the Department has a legal obligation to produce those witnesses at the hearing. In the present case, Defendant would not be denied the right to subpoena any relevant witnesses should he desire and to question those witnesses at trial.

In summary, the narrow issue in this case can be stated as follows: Is the monthly inspection report for a breath test instrument testimonial in nature? In reliance on *Pflieger* and *Peterson,* this Court holds that the monthly inspection report is non-testimonial, and therefore, its admission at trial without testimony from the person who performed the inspection, assuming a proper predicate is established by the State, would not violate Defendant's Sixth Amendment right to confrontation.[5] Accordingly, Defendant's Second Motion in Limine is hereby **denied**.

---

[1]Under § 316.1934, Fla. Stat., a breath test affidavit is admissible, without further authentication, if the affidavit discloses, among other things, "the date of performance of the most recent required maintenance on such instrument."

[2]To the extent that *Shiver v. State,* 900 So.2d 615 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D653a] suggests that cross-examination of the witness who performed the monthly maintenance would be constitutionally mandated, this Court finds that *Shiver* would be in conflict with the *Pflieger* decision.

[3]In reaching its decision, this Court finds there is no meaningful distinction, for purposes of constitutional analysis, between an annual inspection report and a monthly inspection report. See *State v. Buttolph,* 969 So.2d 1209 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2919a].

[4]In *Yankee,* the court stated that they were not addressing "what specific documentation is required to constitute 'breath test results' that would support an administrative license suspension." *Yankee,* 6 So.3d at 638.

[5]As pointed out in *Pflieger,* the litigation use of an inspection report is a secondary purpose.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint to correct amount in controversy following confession of judgment for amount alleged in original complaint is granted—Amount in controversy is merely allegation and is not dispositive of issue of damages, request to amend complaint is the first request by medical provider and comes early in litigation, and insurer did not tender payment until immediately before hearing on motion to amend that was held 90 days after it confessed judgment

MRI ASSOCIATES OF TAMPA, INC., d/b/a PARK PLACE MRI, a/a/o Jorge Hernandez, Plaintiff, v. AUTO CLUB INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 18-CC-042340, Division M. March 31, 2020. Miriam Valkenburg, Judge.

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

THIS CAUSE having come before the Court on February 27, 2020 on Plaintiff's Motion for Leave to Amend Complaint, with counsel for both parties being present in court, and having full opportunity to be heard, and the Court having reviewed the entire court file, and having been fully advised in the premises, hereby finds as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. This is an action for unpaid and/or underpaid Personal Injury Protection benefits. On August 3, 2018 Plaintiff filed its Complaint seeking personal injury protection benefits, which included a jurisdictional statement that damages did not exceed $99.99.

2. On November 7, 2019, approximately fifteen (15) months after this lawsuit was filed, Defendant filed a "Notice of Filing Confession of Judgment" wherein it confessed judgment in the amount of $100.00, plus applicable interest. Within its Notice, Defendant stipulated to Plaintiff's entitlement to reasonable attorney's fees and costs, with jurisdiction reserved only as to the amount.

3. On that same date, upon receipt of Defendant's Notice of Confession of Judgment, Plaintiff filed its Motion for Leave to Amend its Complaint amending the jurisdictional amount pled to "damages which exceed $99.99, but which does not exceed $500, exclusive of costs, interest and attorney fees." Prior to the filing of its Motion for Leave, Plaintiff had not filed an amended pleading.

4. On or about February 19, 2020, and more than three (3) months after filing its "Notice of Confession of Judgment," Defendant issued payment in the form of two separate drafts: one in the amount of $100.00, and a second in the amount of $17.55. Both drafts were made payable to Park Place MRI and mailed to Plaintiff's counsel.

LEGAL ANALYSIS AND DISCUSSION

Hillsborough County Administrative Order S-2019-044(4) provides that "[e]very complaint or statement of claim will state either the exact total amount claimed or the value of the property involved, exclusive of costs, interest and attorney's fees **OR** one of the six following statements: . . . (1) this claim does not exceed $99.99, exclusive of costs, interest and attorney's fees . . ." (emphasis in original).

Jurisdictional allegations contained within the pleadings establish which court maintains jurisdiction over the subject matter and are not dispositive of the issue of damages. The plaintiff's actual damages are to be decided by the pleadings and the proof at trial. *See Chasin v. Richey,* 91 So.2d 811, 812 (Fla. 1957) (noting "in the ordinary case it is the facts alleged, *the issues and proof,* and not the form of the prayer for relief, which determine the nature of the relief to be granted") (emphasis added); *see also Shirley v. Lake Butler Corp.,* 123 So.2d 267, 272 (Fla. 2d DCA 1960) (stating "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in his pleadings**. . .An amendment of the prayer for relief is not necessary to obtain the substantive relief to which the claimant is entitled to under the pleadings *and proof.*") (emphasis added).

Plaintiff further argues that "confessions of judgment" only arise when an insurer agrees to pay benefits **in accordance with its insurance policy**, *see Fortune Ins. Co. v. Brito*, 522 So. 2d 1028 (Fla. 3d DCA 1988) (emphasis added), and "decline[s] to defend its position in the pending suit." *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217, 218, (Fla. 1983). Tendering a sum that is less than the full amount of the plaintiff's claim does not amount to a confession of judgment. *See e.g. Medical Specialists of Tampa Bay, LLC v. USAA Casualty Ins. Co.*, 18 Fla. L. Weekly Supp. 695b (Fla. Pasco Cty. Ct. May 18, 2011).

Here, while the Defendant confessed judgment payment was not tendered until over ninety (90) days and immediately before this hearing. By filing its "Notice of Confession of Judgment" without actually issuing the payment that is being "confessed," Defendant is engaging in a game of "gotcha," thereby attempting to capitalize on a procedural technicality in order to resolve a lawsuit for less than what is owed under subject policy of insurance. *See e.g., Salcedo v. Ass'n Cubana, Inc.*, 368 So. 2d 1337 (Fla. 3d DCA 1979) ("courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed"); *see also Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970) (finding that causes of action should be

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decided on their merits and not as the result of " 'surprise, trickery, bluff, and legal gymnastics' ").

Defendant, argues that by virtue of filing its "Notice of Confession of Judgment," this Court is divested of jurisdiction, except to determine the amount of attorney's fees and costs to be awarded to Park Place MRI, as the prevailing party. In support of this position, Defendant primarily relies on *Wollard, supra,* and its progeny. In *Wollard*, it was held that when an "insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit." *Id.* at 218. Thus, as stated in *Wollard*, "**the payment of the claim** is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Id.* (emphasis added); s*ee also Fortune Insurance Company v. Brito*, 522 So. 2d 1028 (Fla. 2d DCA 1988).

This Court must consider Florida Rule of Civil Procedure 1.190(e) as well as the liberal standard with regard to granting leave to amend pleading. In that regard, this Court is persuaded by the opinion of Judge A. Christian Miller in the matter of *Mentor Chiropractic Rehab Center, Inc.*, *a/a/o Nadia Rosin v. Progressive American Insurance Company*, 27 Fla. L. Weekly Supp. 730a (Fla. Volusia Cty. July 16, 2019).

Although this Court notes that the *Mentor* case was governed by Florida's Small Claims Rules at the time judgment was confessed and that the Florida Rules of Civil Procedure are fully invoked in this matter, the rationale holds true. In *Mentor*, much like the instant matter, a medical provider filed a lawsuit to recover unpaid PIP benefits and the insurance carrier opted to confess judgment. Shortly thereafter, the insurer filed a "Notice of Confession of Judgment" and the medical provider sought leave to amend the Complaint. The *Mentor* court granted the medical provider's motion on the basis that "Florida Courts have long recognized strong public policy interests in favor of liberally allowing amendments to pleadings to allow cases to be addressed on their merits, absent abuse of the amendment process." The *Mentor* court found no abuse of process as the motion for leave to amend was the medical providers "first request to amend, it was filed very early in the litigation, and the only requested change is to increase the damages allegation. It would almost certainly be an abuse of discretion to disallow an amendment of this type under this set of circumstances in any other case."

Similar to the medical provider in *Mentor*, the instant Motion for Leave to Amend Complaint is Park Place MRI's first attempt at amending its Complaint, and merely seeks to increase the jurisdictional amount. This Court does not find that Park Place MRI has abused the amendment process, nor that the filing of an amended pleading at this early stage in litigation would prejudice Defendant in any manner. Further, Auto Club Insurance Company of Florida has not presented any binding authority standing for the proposition that the jurisdictional amount plead serves as a cap on damages, nor that the mere filing of a "Notice of Confession of Judgment" without payment prevents the granting of the relief sought by Plaintiff. Accordingly, it is hereby:

ORDERED AND ADJUDGED that:

(1) Plaintiff's Motion for Leave to Amend Complaint is **GRANTED** conditioned upon the payment of any increase in the applicable filing fee due to the Clerk of Court.

(2) The Amended Complaint attached to Plaintiff's Motion for Leave to Amend is deemed filed as of the date of this Order.

(3) Defendant shall have twenty (20) days from the date of this Order to file its responsive pleading.

* * *

Insurance—Automobile—Application—Misrepresentations—Action for declaratory relief challenging rescission of policy for failure to disclose household member on application and seeking declaration that insured is entitled to PIP and property damage coverage—Materiality—Insurer was entitled to rescind policy based on insured's failure to disclose that she lived with her brother where insured failed to contradict insurer's claim that this disclosure would have caused insurer to issue policy at higher premium rate, misrepresentation—Insurer was not required to provide an affidavit in addition to deposition testimony to establish the materiality of misrepresentation—Instruction to provide information for "all persons age 14 or older residing with Applicant (licensed or not)" unambiguously required insured to disclose brother

SUNITA ROBERTS, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 18-CC-042484. May 19, 2020. Michael C. Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. John Mollaghan, McFarlane Dolan & Prince, Coral Springs, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S COMPETING MOTION FOR SUMMARY JUDGMENT ON WHETHER DEFENDANT PROPERLY RESCINDED THE PLICY OF INSURANCE

THIS CAUSE having come before the Court on April 23rd, 2020, upon Defendant's Motion for Summary Judgment, and Plaintiff's Motion for Summary Judgment and the Court having reviewed the motions, the entire Court file, the case law presented, having heard argument of counsel, having made a thorough review of the matters filed of record, and being otherwise advised in the premises, the Court finds as follows:

Factual Background

SUNITA ROBERTS, (Plaintiff) brought the instant Declaratory Action against DIRECT GENERAL INSURANCE COMPANY (Defendant) to challenge Defendant's rescission of a policy of automobile insurance and ask this Court declare that Plaintiff is entitled to Personal Injury Protection and Property damage coverage for a reported automobile accident that occurred on June 22, 2018. Defendant rescinded the policy of insurance on the basis that Plaintiff failed to disclose that she resided with her brother, Michael Lawrence, at the time of policy inception and had she disclosed this information the Defendant would not have issued the policy on the same terms, namely Defendant would have charged a higher premium to issue the policy.

Ms. Roberts initially completed an online application for a policy of automobile insurance on April 10, 2017. Plaintiff failed to list her brother, Michael Lawrence, as a household member when completing the following sections of the application:

> DRIVER INFORMATION: Complete for Applicant, spouse, all persons age 14 and older residing with Applicant (licensed or not). Also list any other regular operators of the vehicles on this application, including children away from home or in college (licensed or not).

Moreover, on the application for insurance, the Plaintiff electronically signed the pertinent page of the Applicant's Statement, which provides in part:

> "I acknowledge that all regular operators of my vehicle(s) have been reported to the Company. I ALSO ACKNOWLEDGE THAT ALL PERSONS AGES 14 AND OLDER WHO LIVE WITH ME HAVE BEEN REPORTED TO THE COMPANY. . . ."

On April 10, 2018, Plaintiff completed an identical application to renew coverage on said policy of insurance, in which Plaintiff similarly failed to list her brother as a resident of the household over 14 years of age.

Following the June 22, 2018 motor vehicle accident, a recorded statement was taken of Plaintiff wherein Plaintiff disclosed to

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Defendant that she lived with her brother prior to the initial application, and all times since. Defendant determined that had Plaintiff provided the proper information at the time of the insurance application then Plaintiff would have been charged a higher premium rate. Therefore, the Defendant declared the policy void *ab initio* due to material misrepresentations and returned the paid premiums to Plaintiff. Due to the policy being declared void *ab initio* the Defendant denied coverage for the subject motor vehicle accident.

At the April 23, 2020 Hearing on competing Motions for Summary Judgment, Plaintiff argued that the presence of the brother in the household was not material as the brother never drove the vehicle and thus the misrepresentation by not listing the brother on the application was not a material misrepresentation. Plaintiff further argued that the application language was ambiguous as it failed to define the terms *Driver*, *Excluded Driver, Household Resident*, *Household Member* and *Regular Operator*. Plaintiff's position was that Defendant could not rescind the policy at issue based on an unlisted household member as the terms were ambiguous within the application. Plaintiff relied upon a number of circuit and county court decisions to support this position. Plaintiff also claimed that bolding the headings on the application meant that the accompanying definitions became overlooked or ambiguous.

Plaintiff further argued that Defendant's underwriting deponent lacked the personal knowledge necessary to be a record custodian or testify with personal knowledge that the undisclosed resident would have caused the policy to be issued at a higher premium because: Ms. Robison did not enter the information into the computer system; did not initially underwrite the application; did not create the Underwriting guidelines; and could not testify to the workings or accuracy of the AS/400 system that created the quote upon which Defendant relied for determining that the policy would have been issued at a higher premium. Additionally, Plaintiff argued that Defendant was burdened to provide an affidavit in support of the rescission in addition to the deposition testimony.

Defendant argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured, and thus Plaintiff's contention that the undisclosed resident could not be material was irrelevant. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (Fla. 5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Defendant is entitled to all information that Defendant deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1578a].

Defendant further argued that Defendant's deponent satisfied the requirements of the business records exception to testify that the misrepresentation was material. "(P)roper authentication by a witness for the purposes of the business records exception requires that the witness demonstrate familiarity with the record-keeping system of [the] business that prepared the document and knowledge of how the data was uploaded into the system." *Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1502a]. "However, "[t]he law does not require an affiant who relies on computerized bank records to be the records custodian who entered or created the data, nor must the affiant identify who entered the data into the computer." *Id.* Defendant argued that as Ms. Robison testified at the deposition that she managed the department that determined the relevant quote, explained how the quote was created, was familiar with the underwriting guidelines, and acquired personal knowledge from review of the file, then she met the requirements to authenticate the quote. Defendant maintained that Ms. Robison was not required to testify to the underlying programming of the computer system, did not have to be the person who entered the information into the system, and that an additional affidavit was not required. "Uncontradicted deposition testimony or affidavit of an underwriter that he or she would not have offered the subject policy if the true facts had been known may satisfy the requirements of section 627.409(1)(c). *National Union v. Sahlen*, 999 F.2d at 1536; *Jackson National Life Insurance Co. v. Proper,* 760 F.Supp. at 905." *Carter v. United of Omaha Life Ins.*, 685 So. 2d 2, 6 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2259d]. As Plaintiff provided no relevant testimony in opposition, then Defendant was entitled to summary judgment on this issue.

Finally, Defendant contended that Plaintiff cannot simply claim a term is ambiguous but must also prove that the Plaintiff believed the provision had a different meaning with which the applicant complied. *See Mercury Ins. Co. v. Markham,* 36 So. 3d 730, 733, (Fla. 1st DCA 2010) [35 Fla. L. Weekly D870a] Fla. App. Plaintiff's simple claim that it was ambiguous, was insufficient. Additionally, Defendant specifically defined Driver in the application as including "*all persons age 14 and older residing with Applicant (licensed or not)*." As Plaintiff's brother was over 14 at the time of application he clearly met this definition. Defendant further argued that "a provision is not ambiguous, however, simply because it is complex or requires analysis." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, (Fla. 2011) [36 Fla. L. Weekly S469a]. Defendant claimed that when read in combination with the Applicant Statement, "*I ALSO ACKNOWLEDGE THAT ALL PERSONS AGES 14 AND OLDER WHO LIVE WITH ME HAVE BEEN REPORTED TO THE COMPANY*" it is clear that the applicant is required to state with whom they live. Defendant argued that no reasonable interpretation of the question could lead to the conclusion that Plaintiff was not required to list her brother with whom she lived for a number of years.

Analysis Regarding Whether the Undisclosed Resident was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer and therefore Plaintiff's claims that the failure to list a resident relative who did not drive on the insurance application could not be material lacked support. Rather, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court also found instructive a Federal ruling that similarly found such a misrepresentation is sufficient to rescind the policy. "Where a misrepresentation in an application meets these requirements, "the insurer, as a matter of right, may unilaterally rescind." *Braddy v. Infinity Assur. Ins. Co.,* 2015 U.S. Dist. LEXIS 29372, *6, 2015 WL 1056068. The

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Court ruled that despite Plaintiff's claim that regardless of the persuasive decisions provided, the Court is bound to find that the failure to disclose a household member that would have cause the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Plaintiff failed to provide testimony to contradict Defendant's claim that the disclosure would have caused Defendant to issue the policy at a higher premium rate, then Defendant was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

Analysis Regarding Whether Defendant's Corporate Representative Testimony Satisfied the Business Records Exception.

The Court reviewed the provided authority and rejected Plaintiff's argument that Defendant required an affidavit in addition to the deposition testimony to establish the materiality of the misrepresentation. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993). Additionally, the Court found that the deponent testified to knowledge of the system used to generate the quote, how the information was entered into the system, and could claim personal knowledge from a review of the records, therefore, Defendant's deponent satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Defendant established without contrary evidence that the misrepresentation was material.

Analysis Regarding Whether the Term "Driver" and "Residing" are Ambiguous

The Court found that the definition of driver provided by Defendant could only be construed as to require disclosure of Plaintiff's brother. The Court reviewed the county and circuit opinions provided by Plaintiff concerning ambiguity. However, Plaintiff failed to persuade the Court that such decisions were binding. Additionally, such decisions did not deal with the specific clause at issue in this matter. The Court agreed that ambiguity is not created "simply because it is complex or requires analysis." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566 (Fla. 2011) [36 Fla. L. Weekly S469a]. The Court found that simply claiming a word or phrase is ambiguous does not strike the phrase or word. Rather Plaintiff required to persuade the Court that Plaintiff that the claimed ambiguous word caused the Plaintiff to understand the requirement in another manner, with which she complied. *See Mercury Ins. Co. v. Markham,* 36 So. 3d 730, 733, (Fla. 1st DCA 2010) [35 Fla. L. Weekly D870a]. Plaintiff not only failed to provide another understanding of the provision that did not require disclosure of her brother, Plaintiff failed to provide any other possible understanding of the requirement. The Court was not persuaded that the bolding of the word Driver caused the application to be ambiguous because the definition was provided as a continuation. The Court also ruled that the provision requiring disclosure of "all persons age 14 and older residing with Applicant (licensed or not)" in the Driver section was not ambiguous. The Court found that the application unambiguously required Plaintiff to disclose her brother, with whom, as both parties agreed, she lived at the time of the application.

Conclusion

This Court finds that the Defendant's application unambiguously required Plaintiff to disclose her brother as a household member, that Defendant provided the required testimony to establish said that Plaintiff's failure to disclose was a material misrepresentation because Defendant would not have issued the policy on the same terms, and thus Defendant properly rescinded the subject policy of insurance. Consequently, Defendant properly denied coverage for the loss at issue.

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

- Plaintiff's Motion for Summary Judgment is hereby **DENIED**.
- Defendant's Motion for Summary Judgment is hereby **GRANTED.**
- That the Parties go henceforth without day.

* * *

Insurance—Personal injury protection—Dismissal—Confession of judgment—Motions to dismiss, enforce confession of judgment, and enter final judgment are denied where insurer confessed judgment in amount less than upper limit of damages pled or unreduced policy limits, confession of judgment in response to original complaint was rendered nullity by fact that medical provider filed amended complaint as was its automatic right before insurer filed any responsive pleading to original complaint, and declaratory relief sought in amended complaint was not specifically related to damages sought in breach of contract count

MRI ASSOCIATES OF ST. PETE. d/b/a SAINT PETE MRI, as assignee of Maria Puente, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-002590, Division M. March 31, 2020. Miriam Valkenburg, Judge. Counsel: Lorca Divale, The Physician Collection Group, P.A., Tampa, for Plaintiff. Eric A. Hogrefe, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, MOTION TO ENFORCE CONFESSION OF JUDGMENT, AND MOTION FOR ENTRY OF FINAL JUDGMENT

THIS MATTER having come before the Court on February 25, 2020, on Defendant's Motion to Dismiss, Motion to Enforce Confession of Judgment, and Motion for Entry of Final Judgment filed March 11, 2019, and having considered the motions and replies, the arguments presented by counsel, the court file and applicable law, and being otherwise fully advised in the premises, the Court finds as follows:

1. This is an action for breach of contract seeking damages that do not exceed $499.00. Plaintiff's initial Complaint was filed on January 10, 2019. Plaintiff's First Amended Complaint was filed on February 27, 2019. The Court notes that no responsive pleading had been filed at the time.

2. The Defendant was properly served on January 18, 2019.

3. On February 1, 2019, instead of filing an Answer to the Complaint, the Defendant filed a "Notice of Confession of Judgment" which claimed to be "for the amount of benefits demanded in the complaint for Plaintiff's services provided to its aforementioned assignor, plus applicable interest for a total amount of $1.84."

4. Although this case was filed in Small Claims Court, the full rules of civil procedure have been invoked pursuant to ADMINISTRATIVE ORDER S-2019-044(10)(a), Thirteenth Judicial Circuit, Hillsborough County, Florida.

5. Pursuant to Florida Rules of Civil Procedure 1.110(d) and 1.140(b) the Defendant shall file an answer and must raise every defense in law or fact in that responsive pleading. At the time Plaintiff filed its amended complaint, Defendant's affirmative defense as to payment of the actual amount sued for, exhaustion of benefits, was not properly raised in an answer. Rather it was first raised on March 11, 2019 in Defendant's Motion to Dismiss [Plaintiff's First Amended Complaint], Motion to Enforce Confession of Judgment and Motion for Entry of Final Judgment.

6. Defendant's Motion to Dismiss argues this Court lacks jurisdiction to grant Plaintiff leave to amend its complaint due to the "confession of judgment" in the amount of $1.79 plus $0.05 interest filed by the Defendant on February 1, 2019.

7. In support of its Motion, the Defendant's relies upon *Geico Cas.*

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Co. v. Barber, 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] and *Bretz Chiropractic Clinic v. Geico General Ins. Co.*, 26 Fla. L. Weekly Supp. 620a (Fla. 12th Circuit (appellate) Oct. 8, 2018). Those cases however are distinguishable from the instant case. The cases relied upon by the Defendant involve either payment in the full amount of the pled damages in the complaint's jurisdictional statement, or the entire, unreduced, policy limits at issue in the litigation. Here, Defendant paid $1.79 plus interest. This amount is not the upper limit of the damages pled by Plaintiff in the Complaint's jurisdictional statement, nor is it the entirety of policy limits. Rather, as indicated by Defendant's Motion, despite the alleged exhaustion of benefits in this matter, Defendant unilaterally calculated that $1.79 is the amount due Plaintiff in this action. *See* Defendant's Motion ¶ 3. The Court has made no determinations relative to the amount of damages due in this matter. There have been no motions for summary judgment with evidence heard by this Court to make needed determinations regarding damages and relevant defenses in this matter. As such, there remains a controversy as to whether Plaintiff did in fact obtained full and adequate relief.

8. Next, the declaratory relief sought in Plaintiff's First Amended Complaint is not specifically related to the damages sought in the breach of contract count. Plaintiff's breach of contract count alleges that Defendant applied the PIP Schedule of Maximum Charges to Plaintiff's bills for services provided to Maria Puente before applying the deductible to Plaintiff's bills. This improper application of the PIP fee schedules by the Defendant to the insured's deductible was addressed by the Florida Supreme Court in *Progressive Select Ins. Co. v. Florida Hospital Medical Center,* 44 Fla. L. Weekly S59a (Fla. December 28, 2018). In contrast, Plaintiff's declaratory judgment action is specific to bills for which the deductible was not applied and the question remains whether the Defendant's policy language is sufficient to incorporate the PIP fee schedules in Section 627.736(5)(a)1-5, Florida Statutes (2019) and if so, whether the proper fee schedule to apply is Medicare's Limiting Charge or Participating Charge.

9. Third, Plaintiff's First Amended Complaint was not filed by leave of Court because none was required at the time it was filed as no responsive pleading had been filed by the Defendant. Florida Rule of Civil Procedure 1.190(a) states that "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. . . ." Several courts have recognized that Rule 1.190(a) "grants plaintiffs an automatic right to amend the complaint once before a responsive pleading is served." *See, e.g., Boca Burger, Inc. v. Forum*, 912 So.2d 561, 567 (Fla. 2005) [30 Fla. L. Weekly S539a], *citing Vanderberg v. Rios*, 798 So.2d 806, 807 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2548b]; *Fusilier v. Markov*, 676 So.2d 1053, 1054 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1597c]; *Posey v. Magill*, 530 So.2d 985, 986 (Fla. 1st DCA 1988); *Abston v. Bryan*, 519 So.2d 1125, 1127 (Fla. 5th DCA 1988); *Fla. Power & Light Co. v. Int'l Bhd. of Elec. Workers Sys. Council U-4*, 307 So.2d 189, 191 (Fla. 4th DCA 1975); *Bryant v. Small*, 271 So.2d 808, 809 (Fla. 3d DCA 1973).

10. As such, this Court agrees with the reasoning of its sister Hillsborough County Courts. *See, e.g., Siegfried K. Holtz, M.D., P.A., aao John Antoine v. Geico Indemnity Company*, Case # 11-CC-025759 (Fla. Hillsborough Cty. Ct. Feb. 6, 2012, Judge H. Berkowitz) (Notice of Confession of Judgment filed in response to original complaint rendered a nullity in light of complaint having been amended before a responsive pleading was served); *Siegfried K. Holtz, M.D., P.A., aao Angela Franks v. Geico Indemnity Company*, Order Case # 11-CC-025517 (Fla. Hillsborough Cty. Ct. Feb. 6, 2012, Judge G. Fernandez) (Motion to Strike Amended Complaint denied because Plaintiff's amended complaint was filed after Defendant's Notice of Confession of Judgment, but before any "responsive pleading" was filed by Defendant); *Brandon Community Health and Rehabilitation, L.L.C., aao Carolyn Kelley v. Geico General Insurance Company*, Case # 11-CC-026572 (Fla. Hillsborough Cty. Ct. Feb. 15, 2012, Judge M. Lucas) (Confession of Judgment is neither a responsive pleading, nor a judgment, therefore, filing of "Notice of Confession of Judgment" did not divest court of jurisdiction. Plaintiff had an "automatic right" to file amended complaint before Defendant filed a responsive pleading).

11. Finally, the current posture of this case and the record before the Court makes entry of final judgment premature at this time. As noted in paragraph 7, the $1.79 paid by Defendant was not the upper limit of damages pled by Plaintiff or the unreduced policy limits, but rather a unilateral damages determination. The matters at issue in this case are not ripe at this stage for the Court's determination.

Based upon the foregoing, it is therefore **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss, Motion to Enforce Confession of Judgment, and Motion for Entry of Final Judgment filed March 11, 2019 is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Discovery—Medical provider lacks standing to compel production of insured's application for insurance and deductible election form

MD NOW MEDICAL CENTERS, INC. d/b/a MD NOW, (Patient: Joyce Shuster), Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019SC008782XXXXSB. May 19, 2020. Marni A. Bryson, Judge. Counsel: Manshi Shah, Law Office of Jeffrey R. Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER, PLAINTIFF'S MOTION TO COMPEL APPEARANCE OF REPRESENTATIVE FOR DEPOSITION, AND PLAINTIFF'S MOTION TO CONTINUE HEARING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on May 6, 2020, on Defendant's Motion for Protective Order, Plaintiff's Motion to Compel Appearance of Representative for Deposition, and Plaintiff's Motion to Continue Hearing of Defendant's Motion for Summary Judgment, the Court having reviewed the aforementioned motions, the relevant legal authority, heard argument of counsel, and been sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion for Protective Order is GRANTED.

2. Plaintiff's Motion to Compel Appearance of Representative for Deposition is DENIED.

3. Plaintiff's Motion to Continue Hearing of Defendant's Motion for Summary Judgment is DENIED

4. Plaintiff's Motion to Compel Better Responses to Request for Production filed May 5, 2020 is GRANTED IN PART and DENIED IN PART. Plaintiff's Motion to Compel Better Responses to Request for Production is granted as to the Explanation of Benefits for all providers and is denied as to the Insured's application of insurance and deductible election form as Plaintiff lacks standing.

* * *

Real property—Homeowners associations—Mediation—Whether homeowner can record meetings of homeowners association board is "dispute regarding a board meeting" triggering requirement of presuit mediation under section 720.311(2)(a)—Proper remedy for failure to comply with condition precedent of mediation is dismissal of action, not abatement

JEFFREY DYER, et al., Plaintiffs, v. CRYSTAL LAKE VILLAGE HOMEOWNERS ASSOCIATION, INC., et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-17123 COCE (53). June 19, 2020. Robert W. Lee, Judge. Counsel: James M. Potts, Sr., Fort Lauderdale, for Plaintiff. Jessica M. Turner,

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Fort Lauderdale, for Defendant.

FINAL ORDER OF DISMISSAL

This cause came before the Court for hearing on June 18, 2020 of the Defendant's Motion to Dismiss Amended Complaint, and the Court's having reviewed the Motion and Court record, heard argument, reviewed the relevant legal authorities, and been sufficiently advised in the premises, rules as follows:

The Plaintiffs have filed their action for declaratory and injunctive relief seeking a decision that a parcel owner in the Crystal Lake Village community has the right to audio-record board meetings of the homeowners' association. The Defendant association has responded with a Motion to Dismiss, asserting that the Plaintiffs were first required to pursue mandatory presuit mediation before filing this lawsuit.

The parties do not dispute that the Defendant is a homeowners' association governed by chapter 720 of the Florida Statutes. Within this chapter is subsection 720.311(2)(a): "Disputes between an association and a parcel owner regarding [. . .] disputes regarding meetings of the board [. . .], shall be the subject of a demand for presuit mediation served by an aggrieved party before the dispute is filed in court" (emphasis added). The statute continues that an opposing party must be provided a written warning that "[i]f you fail to participate in the mediation process, suit may be brought against you without further warning." *Id*. Finally, the next subsection reiterates that "[i]f presuit mediation [. . .] is not successful, the parties may file the unresolved dispute in a court of competent jurisdiction." *Id*. s720.311(2)(c).

The Plaintiffs concede they did not seek presuit mediation, but argue that the relief they are seeking—the determination of a right to audio-record board meetings—is not a "dispute" within the meaning of the statute. Second, the Plaintiffs urge that if this Court finds that it is a "dispute," then the remedy would be to abate this case for the period required to pursue the mandatory mediation.

First, the Court concludes that the issue of whether a homeowner can record a board meeting is in fact a "dispute regarding a board meeting." The Plaintiffs argue that the types of disputes addressed by the statute are those dealing with such issues as how a board meeting is noticed, etc. The statute contains no such limitation. The issue of recording is only relevant here because it pertains to the board meeting—as a result, the Court concludes it is a "dispute regarding a board meeting," thus triggering the mediation process.

Having determined that presuit mediation should have been sought, the question results, what is the remedy when the statute was avoided? To be sure, there are instances when the appellate courts have approved a stay of a proceeding to allow a party to comply with a condition precedent, with the case being dismissed only if the aggrieved party does not take advantage of the abatement period. *Progressive Express Ins. Co. v. Menendez*, 979 So.2d 324 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D811a]; *Willis v. Huff*, 732 So.2d 1272, 1273 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1723a].

However, concerning the facts of the instant case, the Fourth DCA has issued an en banc decision in a strongly analogous case. *Neate v. Cypress Club Condominium, Inc.*, 718 So.2d 390 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2317a]. In *Neate*, the appellate court analyzed a similar provision in the Florida Condominium Act which requires an owner who has a dispute with a condominium association to file for mandatory non-binding arbitration "prior to the institution of court litigation." Fla. Stat. s718.1255(4)(a). The owner failed to do so, and the association filed a motion to dismiss the case, rather than seeking a stay. The appellate court held that when a condition precedent pertains to the "filing" of the lawsuit, the proper remedy is dismissal, and not a stay. 718 So.2d at 392. More than a decade later, the Third DCA echoed this decision in a ruling that when condominium unit owners failed to file for mandatory nonbinding arbitration of a dispute involving notices of a special meeting, the proper remedy was dismissal. *Intracoastal Point Condominium Ass'n v. Horowitz*, 54 So.3d 528, 529 (Fla. 3d DCA 2008) [36 Fla. L. Weekly D73b].

In the Court's view, the similarities between the homeowners' association statute and the condominium statute are too strong to urge that a different result should obtain in one but not the other. The bottom line is that a dispute about whether a homeowners' association board meeting can be recorded by an owner is a "dispute regarding a board meeting" triggering the requirement of presuit mediation. When the Plaintiffs did not avail themselves of this procedure, the case was subject to dismissal at the Defendant's urging. The Plaintiffs are free to refile their case if the presuit mediation process does not resolve the dispute. *See Intracoastal Point*, 54 So.3d at 529 (Ramirez, C.J., concurring) (a dismissal for this reason should be without prejudice to comply with the statute). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss is GRANTED. This case is DISMISSED without prejudice.

* * *

Insurance—Personal injury protection—Coverage—Additional driver—Nonresident relative who is named additional driver in parents' PIP policy and who was injured while driving modified golf cart/low speed vehicle owned by his employer while fulfilling his employment functions is not entitled to coverage under parents' policy—While policy does not expressly define term "additional driver," it is clear from policy read in total that term refers to those that live in same residence as named insured and/or drive insured vehicle—Claimant's employer is required to maintain policy providing PIP coverage to persons injured while occupying golf cart

MELI ORTHOPEDIC CENTERS OF EXCELLENCE, LLC., a/a/o John Colonel, Plaintiff v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE18015180. Division 54. May 11, 2020. Florence Barner, Judge. Counsel: Ryan M. Sanders, for Plaintiff. Christopher E. Marshall, Law Office of George L. Cimballa, III, Fort Lauderdale, for Defendant.

FINAL SUMMARY JUDGMENT

ORDER ON PLAINTIFF AND DEFENDANT'S CROSS MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER, having come before the Court for hearing on May 4, 2020, on Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment, and the Court having reviewed the Court file, and having heard argument of counsel for both parties at a coordinated video conference hearing conducted by agreement of both parties, and being otherwise fully advised in the premises, the Court finds as follows:

FACTS AND STIPULATIONS

First, per stipulation of the parties through their joint pre-trial stipulation and by argument heard, the named insureds are John Colonel's parents. On May 21, 2017, John Colonel was injured in a motor vehicle accident while driving a modified golf cart, owned by his employer. The modified golf cart met the standard as a low speed vehicle under Florida Statute §320.01(41) and it was permitted to be operated on the streets under Florida Statute §316.2122. John Colonel is listed on his parents' policy of insurance as an "additional driver". However, John Colonel does not reside with his parents and was not a resident relative of the named insureds (his parents) at the time of this accident. Additionally, the parties stipulate, the only issue of law to be determined is whether John Colonel, as an additional driver on the subject policy, is entitled to PIP coverage while injured occupying employer's low speed vehicle not listed on the subject policy or insured by Defendant Geico. Therefore, the question before the Court is whether GEICO's failure to define the terms "driver" and/or "additional driver" render its usage in the policy ambiguous, such that

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the assignor, Plaintiff, would receive coverage under the subject GEICO policy for an accident which occurred while the assignor was operating a low speed motor vehicle.

THE LANGUAGE OF THE INSTANT PIP POLICY

The PIP portion of the insurance policy issued by Defendant limits the coverage an additional insured may receive through the following definitions, benefit payment rights, and exclusions (Emphasis added):

You and your means the named insured shown in the declarations or his or her spouse if a resident of the same household. See Section I (Liability), A-30FL (03-11) Page 3 of 19, incorporated in Section 11 (PIP), A-30FL (03-11) Page 6 of 19;

Relative means a person related to you by blood, marriage or adoption (including a ward or foster child) **who is a resident of the same household as you**. See Section I (Liability), A30FL (03-11) Page 3 of 19, incorporated in Section Il (PIP), A-30FL (03-11) Page 6 of 19;

Insured motor vehicle means a motor vehicle:

a. Of which you are the owner, and
b. With respect to which security is required to be maintained under the Florida Motor Vehicle No-Fault Law, and
c. For which a premium is charged, or which a trailer, other than a mobile home, designed for use with a motor vehicle. See Section 11 (PIP), A-30FL (03-11) Page 6 of 19;

Motor vehicle means any self-propelled vehicle of four or more wheels which is of a type both designed and required to be licensed for use on the highways of Florida and any trailer or semitrailer designed for use with such vehicle.

A motor vehicle does not include:

a. Any motor vehicle which is used in mass transit other than public school transportation and designed to transport more than five passengers exclusive of the operator of the motor vehicle and which is owned by a municipality, a transit authority, or a political subdivision of the state; or
b. A mobile home. See Section Il (PIP), A-30FL (03-11) Page 7 of 19;

PAYMENTS WE WILL MAKE

The Company will pay in accordance with the Florida Motor Vehicle No Fault Law (as enacted, amended, or newly enacted), and where applicable in accordance with all fee schedules contained in the Florida Motor Vehicle No Fault Law, to or for the benefit of the injured person:

a. 80% of medical expenses which are medically necessary, pursuant to the following schedule of maximum charges contained in the Florida Statute 627.736(5) (a) 2:

I. For emergency transport and treatment by providers licensed under Florida Statutes, Title 29, Chapter 401, 200 percent of Medicare.

a. For emergency services and care provided by a hospital licensed under Florida Statutes, Title 29, chapter 395, 75 percent of the hospital's usual and customary charges. For emergency services and care as defined by Florida Statutes Title 29, chapter 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, we may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under Florida Statutes Title 31, chapter 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by us.
b. 60% of work loss; and
c. Replacement services expenses; and
d. Death benefits.

The above benefits will be provided for injuries incurred as a result of bodily injury, caused by an accident arising out of the ownership, maintenance or use of a motor vehicle and sustained by:

1. You or any relative while occupying a motor vehicle or, while a pedestrian through being struck by a motor vehicle; or
2. Any other person while occupying the insured motor vehicle or, while a pedestrian, through being struck by the insured motor vehicle.

EXCLUSIONS

Section II - Part I does not apply:

I. To you or any relative injured while occupying any motor vehicle owned by you and which is not an insured motor vehicle under this insurance;

2. To any person while operating the insured motor vehicle without your express or implied consent;
3. To any person, if such person's conduct contributed to his bodily injury under any of the following circumstances:

i. Causing bodily injury to himself intentionally; ii. While committing a felony;

4. To you or any dependent relative for work loss if an entry in the schedule or declarations indicates such coverage does not apply;
5. To any pedestrian, other than you or any relative, not a legal resident of the State of Florida;
6. To any person, other than you, if such person is the owner of a motor vehicle with respect to which security is required under the Florida Motor Vehicle No-Fault law, as amended;
7. To any person, other than you or any relative, who is entitled to personal injury protection benefits from the owner or owners of a motor vehicle which is not an insured motor vehicle under this insurance or from the owner's Insurer; or
8. To any person who sustains bodily injury while occupying a motor vehicle located for use as a residence or premises

See Section 11 (PIP), A-30FL (03-11) Pages 7-8 of 19.

SUMMARY OF THE ARGUMENTS

First, Plaintiff notes that under Florida Statute §320.02(1), "every owner or person in charge of a motor vehicle that is operated or driven on the roads of this state shall register the vehicle in this state"[1] and "proof that personal injury protection benefits have been purchased if required under s. 627.733. . ."[2]. Thus, low-speed vehicles must be registered and insured under a policy of insurance providing personal injury protection benefits if the vehicle is to be operated or driven on the roads of the state. Therefore, as to the modified golf cart, the Court must find that pursuant to Florida Statute §316.2122(3), "[a] low-speed vehicle or mini truck must be insured in accordance with s. 320.02 and titled pursuant to chapter 319" (2015).

Next, Plaintiff argues that Defendant's failure to define the term "additional driver" or "driver" renders its usage ambiguous.[3] Plaintiff further argues that John Colonel should receive PIP benefits because he is listed on the Declarations Page of the subject policy as an "additional driver" and since Defendant did not define the term "driver" in its policy, there is ambiguity that must be construed in favor of the insured and coverage afforded.[4]

Additionally, Plaintiff argues that the present factual scenario is analogous to *Huff v. State Farm Mut Auto Ins. Co.,* wherein the Honorable Judge Andrew L. Cameron found that, "State Farm has failed to define the term "driver" in its policy. The fact that the policy

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fails to define the term "driver" would make the term ambiguous. This would reasonably lead a person to believe that he or she was covered as a listed driver under the insurance policy."[5] Defendant counters this argument by reasoning that all of the cases relied upon by Plaintiff only discuss the ambiguity of the term "driver" in liability cases where material misrepresentations were alleged in the applications for insurance. Defendant reasons that the Courts found the term "driver" was used to describe different sets of persons to be included in the application, therefore coverage for liability was found. *Huff* is the only case where the term driver was added into the area of entitlement to PIP. Plaintiff argues the *Huff* facts are very different from the instant case. In *Huff*, the claimant was a "named driver" on his ex-wife's policy of insurance and was injured while driving the vehicle in his possession, based upon a marital settlement agreement and which remained insured under the ex-wife's policy, but titled only in the ex-wife's name. The insurer denied the claim for PIP benefits because the claimant did not live with the policyholder to qualify as a resident and as a beneficial owner of the vehicle, the claimant was required to have his own PIP policy. The Court concluded that as claimant was already a named driver on the policy and due to the lack of definitions for the term "driver" and "named driver" ambiguity could be found to provide coverage to the claimant.

In the instant case, Defendant argues that its policy's lack of definition for the term "driver" does not render the policy ambiguous,[6] and it should be construed in accordance with its plain language,[7] and the policy's clear language addresses the entitlement to PIP benefits.[8] Defendant also notes that the policy definitions used by the *Vreeman* court mirrors the language in its own policy. Defendant reasons that, *in dicta*, *Hollywood Injury* considers the potential for allocating a duplication in coverage, however, each of its supporting cases hold that PIP benefits are limited to the policy holder, a resident relative of the policy holder, one injured while occupying the insured vehicle, or a non-occupant injured by the insured vehicle. Thus, entitlement is clearly listed in its policy when referencing the payment limitations for PIP benefits.[9]

SUBSTANTIVE ANALYSIS

In this matter of first impression, the legal issue before this Honorable Court is whether a named additional driver on the policy would be covered for Personal Injury Protection ("PIP") benefits if the additional driver is injured while occupying a low speed vehicle golf cart owned by an employer while fulfilling his employment functions. Florida law is clear that "an insurer that issues a personal injury protection policy is required to provide coverage for its named insured, relatives residing in the same household, drivers and passengers of the insured of the insured motor vehicle, and those non-occupants who are struck by the vehicle. [. . .] the insurer of an automobile in which a passenger is riding is required to provide the passenger with coverage unless he or she is the owner of a motor vehicle with respect to which security is required under."[10]

Further, Florida Statute §320.02(1), is clear that "every owner or person in charge of a motor vehicle that is operated or driven on the roads of this state shall register the vehicle in this state"[11] and "proof that personal injury protection benefits have been purchased if required under s. 627.733. . ."[12]. Thus, low-speed vehicles must be registered and insured under a policy of insurance providing personal injury protection benefits if the vehicle is to be operated or driven on the roads of the state. Therefore, as to the modified golf cart, the Court finds that pursuant to Florida Statute §316.2122(3), "[a] low-speed vehicle or mini truck must be insured in accordance with s. 320.02 and titled pursuant to chapter 319."

The subject policy states that "[t]he Company will pay, in accordance with the Florida Motor Vehicle No Fault Law. . . for [specified damages] caused by accident arising out of the ownership, maintenance or use of a motor vehicle and sustained by . . . *you* or a relative while occupying a motor vehicle . . . or . . . any other person while occupying *the insured motor vehicle* . . . .". *id*. The PIP portion of Defendant's insurance policy provides the following definitions: "You" is defined as "the Policyholder named on the Declarations Page and spouse, if living in the same household." "Insured motor vehicle" is defined as "a motor vehicle of which you are the owner and with respect to which security is required to be maintained under the Florida Motor Vehicle No Fault Law, and for which a premium is charged." "Named insured" is defined as "the person or persons named on the Declarations Page of the policy and, if an individual, shall include the spouse if a resident of the same household." This Court finds that while the terms "driver" and "additional driver" are not expressly defined in Defendant's policy however, their plain meaning is clear as is written in the policy when read in total. Here, it is clear that additional drivers are those that live in the same residence as the named insured and/or drive the vehicle on the policy, but who do not receive the same coverage as the named insured. An additional driver is only covered when driving the vehicle listed in the policy. Just as the Fist District Court of Appeals reasoned in *Vreeman supra* Defendant:

> "must provide **PIP** coverage to the [additional drivers] only if they come within the terms of the policy. The policy obligates [insurer] to provide **PIP** coverage in either of two situations. In the first situation, **PIP** coverage is provided to the "named insured" or a relative of a "named insured" when these individuals are occupying *any* motor vehicle. The [additional drivers] are not named insureds nor relatives of a named insured on the policy . . . issued to Vreeman. Since the [additional drivers] are not named insureds, they are not entitled to coverage merely because they suffered damages while "occupying a motor vehicle." Consequently, [the insurer] incurs no obligation to provide **PIP** benefits to the [additional drivers] under the first provision. In the second situation, the policy provides **PIP** coverage to any person who occupies "the insured motor vehicle." Under the policy, only a vehicle owned by "you," meaning Vreeman, for which a premium was collected, could qualify as an "insured motor vehicle." Since Enterprise owned the vehicle the [additional drivers] were driving, and the rental car was not listed on the policy [the insurer] issued to Vreeman, the rental car could not qualify as an "insured motor vehicle" as that term is defined by [the insurer's] policy. Thus, [the insurer] incurs no obligation to provide **PIP** coverage to the [additional drivers] under the second provision.

In the instant case, GEICO's policy limits PIP benefits to only the named insured, policyholder, ***resident*** **relative**, a person injured while occupying the insured vehicle, or a non-occupant injured by the insured vehicle. Here, Mr. Colonel was neither the named insured, policyholder, ***resident*** relative, injured while occupying the insured vehicle, or a non-occupant injured by the insured vehicle.

CONCLUSION

Therefore, Defendant GEICO does not have an obligation to provide PIP coverage. Mr. Colonel is an additional driver, which only provides PIP coverage while occupying the insured vehicle. As the owner of a modified golf cart, under Florida Statute §320.02, Mr. Colonel's employer is required to maintain a policy of insurance providing PIP to persons, like Mr. Colonel, who are injured while occupying the modified vehicle. Therefore, the Plaintiff's Motion for Summary Judgment is **DENIED and shall go henceforth without day** and Defendant's Motion for Summary Judgment is **GRANTED**.

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[1]See, Florida Statute §320.02(1), 2015.

[2]*See*, Florida Statute §320.02(5)(a), 2015.

[3]See *Great Oaks Casualty Ins. Co. v. State Farm Mut. Auto Ins. Co.* (Fla. 4th DCA 1988) ("While we consider this to be a close case on liability, the existing weight of authority supports the trial judge's holding that the application involved here vis-a-vis

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the term "Drivers," without further explanatory language, is ambiguous making it difficult for the average person to understand the broad meaning of the term."). See also, *Redland Ins. Co. v. CEM Site Constructors, Inc.*, 86 So. 3d 1259 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1115a].

[4]See *Lenhart v. Federated National Insurance Company*, 950 So. 2d 454, 457 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D460b].

[5]*Huff v. State Farm Fire & Casualty Company*, 2011-CC-12284-O (Orange Cty. Ct. Jun. 27, 2014) [22 Fla. L. Weekly Supp. 117b].

[6]*Koikos v. Travelers Insurance Company,* 849 So. 2d 263 (Fla. 2003) [28 Fla. L. Weekly S194a].

[7]*Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003) [28 Fla. L. Weekly S307d]; *Auto-Owners Ins. Co. v. Anderson*,756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]; *and Thomas v. Prudential Prop. & Cas.,* 673 So. 2d 141 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1132a]

[8]See *Direct General Insurance Company v. Vreeman*, 943 So. 2d 914 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D3017c]; *Pearson v. State Farm Mutual Automobile Insurance Company,* 560 So. 2d 416 (Fla. 2nd DCA 1990); *Hollywood Injury Rehabilitation Center, Inc., (a/a/o Chelsey Colliflower) v. Allstate Indemnity Company and GEICO Indemnity Company*, 2015-002620 CONO 71 (Broward Cty. Ct., Feb. 15, 2018) [26 Fla. L. Weekly Supp. 914a]; and *Prevez-Falcom v. Enterprise Leasing Company*, 2014 Fla. Cir. LEXIS 1080 (4th Cir. Ct., Duval Cty., May 12, 2014) [22 Fla. L. Weekly Supp. 103b].

[9]See ***Section II (PIP), A-30FL (03-11) Pages 7 of 19***.

[10]*Pearson*, 560 So. 2d 416 (Fla. 2nd DCA 1990).

[11]See, Florida Statute §320.02(1), 2015.

[12]See, Florida Statute §320.02(5)(a), 2015.

* * *

Insurance—Personal injury protection—Venue—Medical provider is entitled to file suit in county where payment under policy is owed—Forum selection clause that specifies that legal action "to determine coverage" under policy shall be filed and maintained in county where policy was issued is not applicable to venue of suit seeking benefits, not coverage—Further, it would be unjust to enforce forum selection clause that is result of insurer's overwhelming bargaining power

HALLANDALE BEACH ORTHOPEDICS, INC., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO20004218, Division 73. June 15, 2020. Steven P. Deluca, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE

THIS CAUSE having come before the Court upon Defendant's Motion to Dismiss for Improper Venue pursuant to its venue selection clause and Florida Domestic Corporation Status via Fla. Stat. §47.051, and the Court having been advised in the premises is denying the defendant's Motion for the following reasons:

Relevant Facts

The Plaintiff, an assignee Medical Provider, filed suit against the Defendant PIP insurer for breach of contract and breach of the PIP statute. The Defendant responded with its Motion to Dismiss based on its venue selection clause and based on Fla. Statute §47.051. The Defendant filed a corporate representative affidavit, the policy of insurance, the declaration sheet and the police report to support its motion. The documents filed reflect the patient was the named insured, was possibly injured in a crash during the policy period, and was driving the insured car during the policy period See police report and declaration sheet.

There is no dispute the Plaintiff is located in Broward County, payment is due in Broward County, the patient's home address is listed in Miami Dade County, the accident was in Miami Dade County, the agent that sold the policy was located in Miami Dade County, and the Defendant's corporate office is in Miami Dade County. See adjuster affidavit and complaint.

Defendant's Argument

Defendant argues the Plaintiff's suit must be dismissed and re-filed in Miami Dade County for two reasons. First, the venue selection clause which states:

Any legal action against us to DETERMINE COVERAGE under this policy shall be filed and maintained in the county where the policy was issued.

Second, pursuant to F.S. §47.051 suit should be filed in Miami Dade because it is a Florida Corporation with is corporate office is located in Miami Dade and it transacts its ordinary business of insurance in Miami Dade.

Plaintiff's Argument

The Plaintiff argues the Defendant's motion must fail because the PIP statute does not provide for a forum selection clause to allow United to demand all suits to determine coverage to be filed in the county were the policy was issued, there are no binding opinions that would give a PIP insurer this ability, there are no binding opinions that address the Defendant's policy, the Defendant's clause does not apply because the Plaintiff did not file suit to determine coverage as the Plaintiff filed suit for breach of contract and violation of the PIP statute, this language would not apply because it is not clear, obvious, and unambiguous, the clause is not enforceable as it is unjust, and the Plaintiff is located in Broward County and the money owed is in Broward County, .

Analysis

There is no question the Plaintiff is located in Broward County and payment is due in Broward County. The Plaintiff, as a matter of law, is entitled to file suit where the money is owed. "Venue is proper for suits on contract or other obligations in the county where payments should have been made." *Sheffield Steel Products, Inc. v. Powell Brothers, Inc.,* 385 So.2d 161 (Fla. 5th DCA 1980). Therefore, the Plaintiff has the right to file suit in Broward County. The court denies the Defendant's §47.051 motion.

As to the forum selection clause argument that argument requires more analysis. There are no binding cases that would authorize a PIP insurer to inject a forum selection clause into a PIP policy of insurance. There are no binding cases that address the Defendant's specific forum selection clause language. Notwithstanding, this court finds the Defendant's policy language would not apply to the Plaintiff as the Plaintiff did not file suit for the court to "determine coverage" as is stated in specific language of the Defendant's policy.

According to the policy of insurance, at page 17, a person can seek ***coverage or benefits.*** Based on the four corners of the complaint the Plaintiff filed suit seeking "benefits" and not "coverage". The court will interpret the policy against the Defendant is the drafter and will find this forum selection clause not applicable based on a strict reading of the policy language. See *Pasteur Health Plan, Inc. v. Salazar*, 658 So.2d 543, 544 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1083a].

If there is an alternative interpretation of this forum selection clause it would make the language unclear and ambiguous which would make the language unenforceable. Forum selection clauses are required to be concise, obvious and unambiguous. See *Friedman v. American*, 831 So.2d 1165 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D564a] where the court found a venue selection clause to be concise, obvious and unambiguous. *Swarovski v. House of China* 848 So.2d 452 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1527a] where the court held the selection clause was unambiguous; *Bombardier Capital, Inc. v. Progressive Marketing Group, Inc.*, 801 So.2d 131 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2697a] the motion was based on an unambiguous mandatory forum selection clause; *Satelites Mexicanos v. Turn Key* 847 So.2d 1068 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1371e] the court reversed finding the forum selection clause was mandatory and unambiguous; *Teco Barge v. Hagan,*15 So.3d 863 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1537a] the court found the language was clear and unambiguous; *Celistics v. Gonzalez,* 22 So.3d

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824 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2456a] the court found there was plain and unambiguous language.

Additionally, there are three recognized exceptions to the enforcement of a forum selection clause where 1) was the forum selection clause tainted by fraud; 2) *where the forum selection clause is the product of overwhelming bargaining power on the part of one party*, and 3) where the forum selection clause is the sole basis upon which to create jurisdiction in a chose forum. *Bombardier Capital v. Progressive Marketing,* 801 So.2d 131 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2697a].

The court finds the policy of insurance is a contract of adhesion and is the product of Defendant's overwhelming bargaining power. The insured was required to buy a Florida PIP policy of insurance to drive in Florida, the insured could not negotiate the terms and conditions, and there is no obligation of the insurer to provide the policy terms before the policy is sold and there is no evidence the insured received the policy before the contract was insurance was purchased. See *Pasteur Health v. Salazar,* 658 So.2d 543, 544 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1083a] for the proposition that insurance polices are contracts of adhesion.

The court finds it would be unjust to enforce the forum selection clause as the terms and conditions of a PIP policy are dictated by the No Fault Statute and the No fault Statute does not include any provision to allow an insurer to include a forum selection clause. The Defendant's forum selection clause is overwhelmingly one-sided as the Defendant knew when it sold the policy of insurance that its insureds can get into a crash in any county in the State, receive treatment in any county, receive repairs to its car in any county in the State, insureds can move to any county in the State, and its insureds can get sued in any county in the State. The court finds it would be "unjust" to enforce this one sided language. *Bombardier Capital v. Progressive Marketing,* 801 So.2d 131 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2697a].

The court also finds the following county court decisions of to be persuasive. See *Health Diagnostic a/a/o Gonzalez v. United Auto,* CONO 11-11330 (70) (Fla. Broward County Court 2012); *Health Diagnostic a/a/o Castrejon v. United,* CONO 12-009345 (71)(Fla. Broward County Court 2015); *Elite Spine a/a/o Roman v. United,* 19-5033 (72)(Fla. Broward County Court 2019) where other courts denied United's Motion to Dismiss based on venue.

Defendant shall file an answer and respond to outstanding discovery within 45 days of June 3, 2020.

* * *

Insurance—Personal injury protection—Evidence—Medical provider's motion in limine seeking to exclude documents insurer failed or refused to timely provide during pretrial discovery, including documents necessary to support insurer's affirmative defense that it had fully complied with its contractual obligations regarding payments due under policy—Motion granted

WESTON MEDICAL REHAB & WELLNESS, a/a/o Damond Stevens, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-17-012609-Div. 53. August 15, 2018. Robert W. Lee, Judge. Counsel: Abdul-Sumi Dalal, Johnson | Dalal, Plantation, for Plaintiff. Jacob Berger, Plantation, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE DOCUMENTS NOT PROVIDED DURING PRETRIAL DISCOVERY

THIS CAUSE came before the Court for consideration of the Plaintiff's Motion in Limine to Exclude Documents and Testimony Not Provided During Pretrial Discovery. The Court having reviewed the Motion and entire Court file; reviewed the relevant legal authorities; and been sufficiently advised in the premises the Court finds as follows:

Introduction

1. Plaintiff seeks to preclude the introduction of certain evidence by Defendant, GEICO Indemnity Company (hereinafter "GEICO"), that was not produced or identified during pre-trial discovery. Plaintiff anticipates that Defendant will attempt to offer into evidence documents and witness testimony which it failed or refused to timely produce during the discovery phase.

2. At issue in this case is whether Defendant properly reimbursed the Plaintiff for the medically necessary services it provided. In its Answer and Affirmative Defenses, Defendant claims "no bills for PIP benefits are due and owing as Defendant paid Plaintiff's bills at the full amount due pursuant to Fla. Stat. §627.736(5)(a)(2) and the new/amended policy of insurance issued by the Defendant." Defendant's Second Affirmative Defense alleges that Defendant "fully complied with its contractual obligations pursuant to the instant policy of insurance. Section II, Part 1, under the subsection titled 'Payments We Will Make' . . ."

Litigation History

3. On August 9, 2017, Plaintiff filed the instant action for Breach of Contract.

4. On October 16, 2017, Defendant filed its Answer and Affirmative Defenses alleging no amounts are due and owing.

5. Over the course of litigation, Plaintiff has made several attempts to obtain discovery materially related to Defendant's Affirmative Defenses to no avail. More specifically: On October 9, 2017, Plaintiff served its initial discovery requests including its Request to Produce, Request for Admissions, and Interrogatories. Defendant did not respond.

6. On January 2, 2018, Plaintiff notified Defendant of its overdue discovery. Defendant did not respond.

7. On January 15, 2018, Plaintiff filed and served its Exparte Motion to Compel Defendant's responses to Plaintiff's discovery requests and on January 17, 2018, this Court entered an Order granting same. Pursuant to said Order, Defendant was to respond to Plaintiff's discovery no later than January 29, 2018. Defendant did not respond.

8. On February 23, 2018, Plaintiff filed and serves its Exert Interrogatories. Defendant did not respond.

9. On April 2, 2018, Plaintiff notified Defendant of its overdue discovery responses. Defendant did not respond.

10. On April 18, 2018, Plaintiff filed and served its Exparte Motion to Compel Defendant's Answers to Plaintiffs Expert Interrogatories and on April 19, 2018, this Court entered an Order granting same. Pursuant to said Order, Defendant was to respond to Plaintiff's discovery no later than April 30, 2018. Defendant did not respond.

11. Plaintiff's multiple production requests attempted to secure documents that would support Defendant's allegations in its affirmative defenses. Defendant produced none.

12. On June 21, 2018, this Court entered an Order directing the Defendant to file a written response to Plaintiff's Motion in Limine to Exclude Documents not Provided During Pretrial Discovery within ten (10) days. The Defendant once again violated this Court's Order as it failed to timely file a written response.

13. On July 13, 2018, after approximately eight (8) months of being dilatory, the Defendant filed its responses to Plaintiff's discovery requests, in violation of two previous Court Orders compelling same and this Court's trial Order requiring all discovery to be completed no later than June 14, 2018.

14. Because of Defendant's actions, or in this case inaction, Plaintiff has been forced to litigate this case, mediate this case, arbitrate this case, and now try this case without the benefit of the information concealed by the Defendant. Had Defendant disclosed the

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factual information Plaintiff would have been able to conduct its own investigation and prepare a response to Defendant's affirmative defense.

Legal Analysis

15. The purpose of a motion in limine is generally to prevent the introduction of improper evidence.

16. Any attempt by the Defendant to utilize those documents it failed to produce during pretrial discovery at trial is contrary to the Florida Rules of Civil Procedure. There can be no justification for Defendant's failure to disclose material evidence in support of its defense, and it should not be permitted to use them at trial. Fla.R. Civ. P. 1.380(b)(2)(B). Under Rule 1.380(b)(2)(B), discovery sanctions are also appropriate for failing to respond to interrogatories, including the exclusion of evidence. Because the documents were not provided to Plaintiff during discovery nor identified in response to Plaintiff's interrogatories, this evidence and all related testimony should be excluded from at trial.

17. Florida law is resolute in its prevention to trial by ambush, through "surprise, trickery, bluff and legal gymnastics." *Northup v. Acken,* 865 So.2d 1267, 1271 (Fla. 2004) [29 Fla. L. Weekly S37a]; *Grinnell Corp. v. Palms 2100 Ocean Blvd., LTD.,* 924 So. 2d 887, 893 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D726a]. "[T]he primary purpose of pretrial discovery is twofold: (1) to 'discover' evidence relevant and pertinent to the triable issues pending before the court, and (2) if in written form to serve, of itself, as evidence at trial if otherwise admissible. . . . [S]uch discovery rules are to be liberally construed to accomplish their purpose." *Jones v. Seaboard Coast Line RR. Co.,* 297 So.2d 861, 863 (Fla. 2d DCA 1974). In that case, the Court observed that "litigation should no longer proceed as a game of "blind man's bluff." *Id.*

18. The Fourth District explained the significance of a Pretrial Order in *Grau v. Branham*:

> The lawyers who make the opening statement must have a reasonably firm idea of what the evidence will show. Liberal rules of discovery assure this. Once the trial starts the lawyers are engaged in the unfolding of the evidence they have already collected. That is why there are discovery cutoffs. All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as what occurred in this case.

Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993)

19. In *Grau,* the Fourth District reversed and remanded the case for a new trial reasoning that "it is not enough that the defendant simply know what a witness may say before he testifies. . . prejudice also exists by the fact that appellant is unable to counter the offered testimony." *Grau,* 626 So.2d at 1061

20. The issue in this case is similar to *Grau* in that this Court issued an Order indicating a discovery deadline for the parties. Prior to that date, Plaintiff made numerous attempts to secure the information necessary for trial. Defendant made none. Plaintiff moves this Court to follow the same reasoning the Fourth District held in *Grau,* stating: ". . . we strongly feel that once trial starts parties' attorneys should be allowed to concentrate on the presentation of the evidence at hand. Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party." *Grau* at1061

21. Similar discovery tactics, as utilized by the Defendant in this case, have been admonished by the Florida Supreme Court. In *Bainter v. League of Women Voters of Fla.,* 150 So.3d 1115 (Fla. 2014) [39 Fla. L. Weekly S689a], the Court stated that: 'We simply do not countenance and will not tolerate actions during litigation that are not forthright and that are designed to delay and obfuscate the discovery process. As this Court has long stated, **full and fair discovery is essential to the truth-finding function of our justice system**, and parties and non-parties alike must comply not only with the "technical provisions of the discovery rules," but also with 'the purpose and spirit of those rules in both the criminal and civil context.'" (citations omitted) (emphasis added)

22. This Court has also indicated that it would not tolerate such discovery tactics. *My Clear View Windshield Repair, Inc. a/a/o Gina Holden v. Government Employees Insurance Company,* 23 Fla. L. Weekly Supp. 648b (Brow. Cty.) (Lee, J. 2014). In that case, like the case at bar, Defendant shielded itself from discovery of material *CASA.,* one information going to the heart of the case, and then one day prior to the Court's imposed discovery deadline, attempted to interject that information to defeat Plaintiff's case at trial. This Court, granted Plaintiff's Motion in Limine preventing the Defendant from using the information at trial, reasoning that "[w]hen the Defendant refused to provide the discovery responses. . . it did so at its own peril and cannot now rightfully complain that it is barred from using its trade-secret shield as a sword."

23. Similar to the Defendant in that case, GEICO failed and refused to timely provide Plaintiff with any discovery that would support or refute its claim. Thus, allowing Defendant to utilize this information, or any information derived from it, during trial is tantamount to a "trial by ambush." *See also Clear Vision Windshield Repair a/a/o Richard Voss v. Government Employees Insurance Company,* Broward County Case No.: COCE-14-19856-Div. 53 (Brow. Cty.Ct.) (Lee, J., May, 2015) [23 Fla. L. Weekly Supp. 649a]

24. Because this evidence was not timely disclosed, notwithstanding Plaintiff's tireless efforts, it should be excluded and Defendant should not be permitted to utilize its witnesses to elicit testimony regarding information it shielded from pretrial discovery. This is so because Defendant's failure to produce the documents shielded it from the discovery of information that went to the very heart of the case. Defendant should not be allowed to attempt to utilize witness testimony to use that same information it refused to disclose to defeat Plaintiff's case at trial. Defendant's refusal to produce the production documents during pretrial discovery and/or any other factual information derived from said documents was at its own peril, and it should be barred from utilizing them as a shield and sword.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff's Motion in Limine to Exclude Documents Not Provided During Pretrial Discovery is GRANTED. The Defendant is barred from using any and all documents at summary judgment and trial.

* * *

Insurance—Default—Vacation—Answer which was not filed until after 4:00 p.m. not basis for vacating order granting default which was entered earlier that same day—Rule 1.500 allowed court to enter default where defendant failed to serve answer within 20 days and further provides that party may not plead or otherwise defend action after court has entered default—Moreover, defendant did not establish excusable neglect or due diligence

ICONIC IMAGING INC., Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19009342, Division 60. May 22, 2020. Michael Davis, Judge. Counsel: Vincent J Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Jeffrey C. Hagans , for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE ORDER GRANTING DEFAULT

This cause having come before the Court on Defendant's Motion to Vacate Order Granting Default, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED**, as follows:

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The Defendant was served with the Statement of Claim on August 5, 2019. On September 4, 2019 the Court entered an order, pursuant to the stipulation of the parties, to invoke the Rules of Civil Procedure and for the Defendant to file a responsive pleading by September 24, 2019 or suffer default without further notice or hearing.

The Court, in response to Plaintiff's Motion for Default, entered a Default against the Defendant at 10:42 a.m. on October 10, 2019. The Defendant's Answer was not served or filed until 4:08 p.m. on October 10, 2019. The Default was entered before the Answer was filed or served.

Pursuant to Florida Rule of Civil Procedure 1.500 the Court properly entered the Default. Defendant's arguments that the Answer was filed on the same day that the Default was entered and that the Default was not docketed by the clerk until after the Answer was served have no merit. Florida Rule of Civil Procedure 1.140 requires that an Answer be *served* within 20 days. Florida Rule of Civil Procedure 1.500(b) allows the Court to enter a Default if a "party has failed to plead or otherwise defend as provided by these rules . . . or any order of court."

Florida Rule of Civil Procedure 1.500(c) further provides that a party may not plead or otherwise defend an action after the Court has entered a Default. When the Court entered the Default on October 10, 2019 at 10:42 a.m. the Defendant had not served the Plaintiff with an Answer.

In addition to and notwithstanding the foregoing, the Defendant did not meet their obligations under Florida Rule of Civil Procedure 1.540(b) to vacate a Default. The Defendant did not establish excusable neglect or due diligence. The Defendant presented no sworn testimony and did not move to vacate the Default with due diligence.

Based on the foregoing the Defendant's Motion to Vacate Order Granting Default is hereby Denied.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Where insurer confessed judgment based on jurisdictional limits in original complaint, court lacks jurisdiction to grant medical provider's motion to amend complaint to increase amount in controversy

SPECIALTY HEALTH ASSOCIATES, LLC., a/a/o Norman Kope, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-SC-033144-XX. June 3, 2020. Benjamin B. Garagozlo, Judge. Counsel: Thomas E. Flanagan, III, Kane Lawyers, PLLC, Delray Beach, for Plaintiff. Megan Lindsey, Law Office of Kelly L. Wilson, Orlando, for Defendant.

ORDER

THIS CAUSE, having come before the Court for a hearing pursuant to Defendant's motion for entry of confessed judgment along with Plaintiff's motion to enter final judgment for policy limits, and motion to certify a question to the District Court as being one of great importance, along with previously filed motion to amend Statement of Claim. The Court having reviewed the pleadings, heard argument of counsel[1], and being otherwise fully advised in the premise, the Court finds as follows:

PRELIMINARY STATEMENT

This is a breach of contract action with the amount in controversy being less than $500.00. Specialty Health Associates, LLC., as assignee of the insured—Norman Kope (hereinafter may also be referred to as "Plaintiff") has brought this lawsuit claiming that GEICO Indemnity Company (hereinafter may also be referred to as the "GEICO" or "Insurer") breached the automobile insurance policy at bar with respect to Personal Injury Protection "PIP" coverage reimbursements herein.

FINDINGS OF FACT

1. Plaintiff's Statement of Claim filed on June 19, 2018, alleging an amount in controversy of $100.00 - $500.00 {a copy of the demand letter was not attached thereto}.

2. On June 11, 2019, Defendant confessed judgment and filed a "Notice of Confession of Judgment' on June 12, 2019. Said confession of judgment was for $500.00—reflecting the maximum jurisdictional amount as alleged in the Statement of Claim together with $68.82 as interest further stipulating to Plaintiff's entitlement to reasonable attorney's fees and costs.

3. Thereafter, on July 26, 2019, Plaintiff filed a motion for leave to amend the complaint stating the incorrect amount was pled and the correct sum is $500.00-$2500.00.

4. Plaintiff also filed an objection to the confession of judgment with an a demand letter attached alleging the amount actually owed was $2,244.58. Plaintiff now seeks the entry of Orders denying the confession of judgment or the entry of a final judgment in the amount of $10,000, or in the alternative asking for leave of court to amend Plaintiff's Statement of Claim.

ISSUES

5. For reasons set forth infra, the Court will limit the analysis to whether the Court lacks jurisdiction to take any other action other than to enter a judgment once the Defendant-insurer has unilaterally confessed to judgment[2].

ANALYSIS AND CONCLUSIONS OF LAW

6. Defendant in support of its motion for entry of confessed judgment cites to the case of *Geico v. Barber,* 147 So.3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a]. The *Barber* Court held that ". . . after [Defendant] confessed to judgment, the trial court lacked jurisdiction to take any action other than to enter judgment in the amount of the UM policy limits in favor of [Plaintiff]". *Geico v. Barber,* 147 So.3d. at 111, *citing Safeco Ins. Co. of Illinois v. Fridman,* 117 So.3d 16 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1159c].

7. The Plaintiff argues the case of *Geico v. Barber,* 147 So.3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] should not be followed since this decision was quashed by the Florida Supreme Court in *Fridman v. Safeco Ins. Co. of Illinois,* 185 So.3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a].

8. With due respect to the Plaintiff's argument, the *Barber* decision has not been overruled by the *Fridman* Court. Rather, the Florida Supreme Court in the *Fridman* case ruled that a trial court may retain jurisdiction to allow a plaintiff to amend a complaint in order to seek bad-faith damages against an insurer. *Id*. at 1230.

9. As evident by Plaintiff's Statement of Claim, the relief sough is for a quantifiable amount. There is no claim for an excess judgment i.e. seeking '*bad-faith*' damages or other '*extracontractual benefits*'.

10. Simply put therefore, the Court lacks jurisdiction to take any action other than to enter judgment for the maximum jurisdictional amount set out in the Statement of Claim together with an award of reasonable attorney's fees and taxable costs. *See*: *Advanced 3D Diagnostics, Inc. v. Geico,* 27 Fla. L. Weekly Supp. 1036b (Orange Cty. Ct. Nov. 13, 2019) (where insurer confessed judgment based on jurisdictional limits in original complaint, court lacks jurisdiction to grant medical provider's motion to amend complaint to increase amount in controversy); *see also*: *Chirocare of Sunrise, LLC v. Geico,* 27 Fla. L. Weekly Supp. 202a (Broward Cty. Ct. March 21, 2019 nunc pro tunc April 13, 2018) (where medical provider filed complaint seeking damages with maximum jurisdictional amount not to exceed $500, and insurer thereafter filed confession of judgment to maximum jurisdictional amount and stipulated to provider's entitlement to reasonable attorney's fees, insurer made valid confession of judgment and court lacks jurisdiction to consider amended complaint seeking additional damages). Whereupon it is hereby;

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ORDERED AND ADJUDGED that;

11. Defendant's motion for entry of confessed judgment is *granted.* Defendant shall submit a Final Judgment in favor of the Plaintiff, Specialty Health Associates, LLC., as assignee of the insured—Norman Kope and against the Defendant, GEICO Indemnity Company, for the sum of $500.00, along with the pre-judgment interest in the amount of $68.82, for a total sum of $568.82, *nunc pro tunc to the date of confession of Judgment,* all of which shall accrue interest at statutory rate, for which sum let execution issue. The Judgment shall further reflect that the Court finds Plaintiff is entitled to reasonable attorney's fees and taxable costs, and reserves jurisdiction to determine the amount of attorney's fees and taxable costs. it is further:

ORDERED AND ADJUDGED that;

12. Consistent with the above rationale, the Court denies Plaintiff's motion to enter final judgment for policy limits; Plaintiff's motion to certify a question to the District Court as being one of great importance, along with Plaintiff's motion to amend Statement of Claim.

---

[1]The Court must pause to convey this Court's appreciation for each counsel's level of advocacy skills and professionalism displayed at the hearing.

[2]While there is a strong public policy interest in favor of liberally allowing amendments to a lawsuit, timeliness of Plaintiff's motion to amend the Statement of Claim filed after Defendant's notice of confession—per the parties' stipulation—is not to be considered until the Court answers the question of whether the Court "lacks jurisdiction to take any action other than the entry of a judgment".

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Limitation of actions—Permissive counterclaim—Where defendant's counterclaim alleging communications violating FCCPA did not arise out of same aggregate set of operative facts as plaintiff's action to recover monies owed for installing roof on defendant's home, counterclaim is permissive and is subject to statute of limitations—FCCPA counterclaim that arose more than two years before it was filed is time-barred

AFFORDABLE ROOFING & GUTTERS, Plaintiff, v. COSSETT GARCIA and TAMY CHINEA, Defendants. County Court, 20th Judicial Circuit in and for Lee County. Case No. 20-CC-000877. June 12, 2020. Tara Pascotto Paluck, Judge. Counsel: Robert S. Tanner, Law Office of Robert S. Tanner, Sunrise, for Plaintiff. Joseph Christopher LoTempio, The Dellutri Law Group, P.A., Fort Myers, for Defendant.

FINAL SUMMARY JUDGMENT ON COUNTER-DEFENDANTS' STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE

THIS MATTER came before the Court upon Counter-Defendants' Motion for Summary Judgment on Statute of Limitations Affirmative Defense. The Court has reviewed the pleadings, the parties' filings and the summary judgment evidence. The motion was heard on June 4, 2020 with counsel for all parties present. Having heard argument of counsel and being apprised in the premises, the Court FINDS, ORDERS, and ADJUDGES that:

1. Affordable Roofing & Gutters of Florida, Inc. ("Affordable") filed this case as a small claims action in which Affordable sought to recover monies from Cossett Garcia ("Ms. Garcia") for a new roof that Affordable installed pursuant to their contract.

2. Ms. Garcia filed a verified answer that asserted a general denial without defenses and a verified counterclaim against Affordable and its president, Jonathan Leonard solely predicated upon alleged violations of Florida Statutes, section 559.55 et seq., the Florida Consumer Collection Practices Act ("FCCPA"). In her verified pleading, Ms. Garcia acknowledged that "as a result of her agreement with [Affordable], Ms. Garcia incurred a consumer debt," and that "[s]ubsequently, a dispute arose between Ms. Garcia and [Affordable] regarding repayment of the debt." Verified Answer, Counterclaim and Demand for Jury Trial at ¶¶ 11 and 12.

3. Affordable and Mr. Leonard answered with defenses which included a statute of limitations defense.

4. FCCPA violations are subject to a two-year statute of limitations. Fla. Stat., §559.77(4). Communications and conduct occurring more than two years before filing the FCCPA action are not actionable. *See e.g.*, *Harrington v. RoundPoint Mortg. Servicing Corp*., 163 F. Supp. 3d 1240, 1247 (M.D. Fla. 2016) (only communications occurring within two years of the date the FCCPA lawsuit was filed may be actionable). *See also Milgram v. Chase Bank USA, N.A.*, 2020 WL 409546, *7 (S.D. Fla. Jan. 25, 2020) (dismissing FCCPA claim based on violations that occurred more than two years before the claim was filed).

5. Affordable and Mr. Leonard presented record evidence establishing that none of the communications or conduct alleged in the counterclaim occurred within the two years before the date that the counterclaim was filed.

6. Ms. Garcia presented no record evidence establishing a date when any of the alleged violations occurred. Thus, the record evidence presented by Affordable and Mr. Leonard is undisputed. Ms. Garcia did not request a continuance pursuant to Rule 1.510(f).

7. The issue presented is whether Ms. Garcia's counterclaim is compulsory or permissive.

8. Compulsory counterclaims are not subject to statutes of limitations, but permissive counterclaims must be timely filed. *Smith v. Fla. Dep't of Corr.*, 27 So. 3d 124, 127 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D228a] ("The statute of limitations will not bar the filing of a compulsory counterclaim, but it is well-settled that a permissive counterclaim will be barred if it is filed beyond the statute of limitations."). *See also Wichmann v. Conrad & Scherer, LLP*, 237 So. 3d 1018, 1021 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D143c], reh'g denied (Jan. 25, 2018) ("It is well settled that a permissive counterclaim will be barred if it is filed beyond the statute of limitations.").

9. Permissive counterclaims do not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim while compulsory counterclaims do. The "logical relationship" test adopted in *Londono v. Turkey Creek Inc.*, 609 So.2d 14 (Fla.1992) is used to determine whether a counterclaim is permissive or compulsory.

10. In *Whigum v. Heilig-Meyers Furniture Inc.*, 682 So. 2d 643 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2384b], the court applied the logical relation test to a fact pattern analogous in all material respects to the instant case. The *Whigum* court explained:

> [A]n action to collect a consumer debt is not a compulsory counterclaim to an action under a statute regulating consumer collection practices. We recognize that the "transaction or occurrence" must be interpreted broadly under *Londono,* and that there is some overlap in the facts. Nevertheless, the actions do not "arise" out of the same aggregate set of operative facts. The debtor's action under the statute is based on the commission of prohibited debt collection practices, and the creditor's action on the debt is based on the failure to pay for consumer goods sold on credit. Furthermore, the filing of one action does not "activate" the filing of the other in a circumstance in which the second action might otherwise remain dormant. A retail sales company can pursue a collection suit for the recovery of a consumer debt whether the debtor complains about its presuit collection practices or not. The two actions do not depend on each other.

Whigum, 682 So. 2d at 646.

11. As in *Whigum*, the cause of action filed by Ms. Garcia does not arise out of the same aggregate set of operative facts as the cause of action filed by Affordable. Ms. Garcia's action is based upon communications and conduct occurring after Affordable completed the roofing working and alleges violations of a statute, the FCCPA, which is not implicated in Affordable's action to recover monies owed

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for installing the roof. Ms. Garcia's FCCPA action is not triggered by Affordable's contract action. Based upon *Whigum* and the other authorities cited in the motion for summary judgment, the Court finds that the counterclaim filed by Ms. Garcia for FCCPA violations is a permissive counterclaim to Affordable's action to recover monies owed. As such, Ms. Garcia's counterclaim is subject to the FCCPA two-year statute of limitations.

12. The pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact. Ms. Garcia's claim arose more than two years before she filed her counterclaim and are, therefore, time barred. Affordable and Mr. Leonard are entitled to judgment as a matter of law on their statute of limitations defense.

13. Final judgment is hereby entered in favor of the counter-defendants, Affordable Roofing & Gutters of Florida, Inc. and Jonathan Leonard, and against the counter-plaintiff, Cossett Garcia, on Cossett Garcia's claims under the Florida Consumer Collection Practice Act. Cossett Garcia shall take nothing in her lawsuit and go hence without day.

14. Jurisdiction of this action is retained to enter further orders as are proper, including but not limited to judgment on the claim brought by Affordable Roofing & Gutters of Florida, Inc. and on any claim for attorney fees and taxable costs.

* * *

Contempt—Failure to provide full, completed Fact Information Sheet and attachments, in violation of court order

SYLVIA SAN GIL, Plaintiff, v. DIEGO LUQUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-016284-SP-05 Judicial Section CC 01. May 15, 2019. Christina Marie DeRaimondo, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff. Diego Luquez, Pro se, Defendant.

ORDER ADJUDICATING DEFENDANT IN CONTEMPT OF COURT

THIS MATTER having come before the Court on Plaintiff for Order Adjudicating Defendant In Contempt of Court, the Court having heard argument and evidence thereon, and being otherwise sufficiently advised, the Court having found that the DEFENDANT DIEGO LUQUEZ has willfully violated this Court order of February 12, 2019, said motion is **GRANTED.** It is further ordered that this Court finds the Defendant to be in civil contempt of this Court's authority.

Defendant shall provide to Plaintiff's counsel the full, completed Fact Information Sheet along with its attachments ***and*** **pay** Plaintiff ***$1,540*** *in attorney's fees,* ***$61.12*** *in costs,* for the amount of ***$1,662.24 TOTAL*** no later than ***June 5, 2019*** or be subject to a **Writ Of Bodily Attachment** upon the filing of a Verified Notice of Non-compliance by Plaintiff's Counsel, Hegel Laurent, ESQ., at which point DEFENDANT DIEGO LUQUEZ will be incarcerated until he purges himself of the contempt by paying said amount ***and*** by filing the full, completed Fact Information Sheet along with its attachments. If necessary for compliance the Plaintiff, may seek to reduce this Order to a Final Judgment.

Payment of this order shall be satisfied by payment of the total amount in legal U.S. tender directly to the **LAURENT LAW OFFICE, P.L. TRUST ACCOUNT at the attorney's current address with the Florida Bar, which is presently **Laurent Law Office, P.L., 930 South State Road 7, Plantation, FL 33317**.**

* * *

SYLVIA SAN GIL, Plaintiff, v. DIEGO LUQUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-016284-SP-05, Judicial Section CC 01. November 21, 2018. Christina Marie DiRaimondo, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff. Diego Luquez, Pro se, Defendant.

Trial Date

ORDER Regarding Discovery - Remains the Same

The Plaintiff's Motion For Order Permitting Discovery is GRANTED.

The Plaintiff shall submit Requests For Production to the Defendant within Three (3) days but only as it relates to any invoices or documents that the Defendant intends to rely on as expenditures or credits that offset the Plaintiff's Security Deposit.

The time for the Defendant to Respond to Discovery is five(5) days -- provided discovery is served by regular mail and certified mail.

Trial is still set for 3:45PM on Thursday, December 6, 2018 as prescribed by the court's order earlier this week.

ORDERED on NOVEMBER___, 2018.

County Judge

For Plaintiff: Hegel Laurent, ESQ., 930 South State Road 7. Plantation, FL 33317

For Defendant: Diego Luquez, 9647 NW 47th Terrace Doral, FL 33178

FILED FOR RECORD NOV 20 2018 CHRISTINA MARIE DiRAIMONDO County Court Judge

* * *

Landlord tenant—Security deposit—Wrongful withholding—Landlord who failed to create or serve notice of intent to impose claim on security deposit as mandated by Florida law forfeited right to keep possession of the security deposit—Landlord ordered to return security deposit to tenant

SYLVIA SAN GIL, Plaintiff, v. DIEGO LUQUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-016284-SP-05 Judicial Section CC 01. December 17, 2018. Christina Marie DeRaimondo, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiff. Diego Luquez, Pro se, Defendant.

FINAL JUDGMENT FOR PLAINTIFF SYLVIA SAN GIL: Defendant Diego Luquez Is Ordered To Return The $3,250.00 Security Deposit Within Ten (10) Days Of The Date Of This Order;

THIS CAUSE having come before this Court upon the two (2) Count Complaint of Plaintiff-Tenant SYLVIA SAN GIL on this Friday, December 8, 2018, this Court having considered the evidence on the record and the arguments set forth in the pleadings as well as those presented before the Court *ore tenus* and the Court being fully advised in the premises, finding that there is jurisdiction of the subject matter and over the parties, it is:

ADJUDGED that the Plaintiff, SYLVIA SAN GIL, shall recover the security deposit from the Defendant, DIEGO LUQUEZ, all of which let execution issue after the Ten (10) day time period for compliance in Paragraph (5) *supra.*

THE COURT' FINDS:

1. The Plaintiff was represented by Laurent Law Office, P.L. // Hegel Laurent, ESQ. at the trial as he has been throughout the entire case. The Defendant appeared pro se at the trial and urged the Court to allow him to proceed accordingly. The Landlord's testimony and the Tenant's Complaint acknowledge the retention of the security deposit. The Defendant did not allege any counterclaim to the Plaintiff's two-count complaint (COUNT I: return of unlawfully withheld security deposit due to defective notice; COUNT II: damages for wrongful withholding of the security deposit). Both parties before the Court were ready for trial on both Counts with the

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exhibits being marked and each party served as their own witnesses and there were no other witnesses.

2. The Court finds persuasive the Plaintiff's claim that the Landlord failed to comply with Florida law by not creating or serving a Notice of Intent To Impose A Claim On A Security Deposit (a "NISD" claim) as mandated by Florida law. A Landlord forfeits the right to keep possession of the Tenant's security deposit if the requirements of Florida Statute 83.49(3)(a) are not followed precisely. Fla. Stat. § 83.49(3)(a) ("If the landlord fails to give *the required notice* within the 30-day period, he or she forfeits the right to impose a claim upon the security deposit.") (emphasis added), *see also Durene v. Alcime,* 448 So. 2d 1208, 1210 (3d DCA 1984) ("The statutory language is clear and unambiguous."). This basis alone requires the Defendant in this case to return the security deposit to the Plaintiff.

3. Plaintiff's Count I for Injunctive Relief pursuant to Section 83.49(3)(A) of the Florida Statutes is GRANTED and the Court hereby declares that the security deposit held by Defendant-Landlord DIEGO LUQUEZ, pursuant to the lease agreement executed by the parties, is the sole property of the Plaintiff SYLVIA SAN GIL. This renders COUNT II, which seeks damages pursuant Section 83.49(3)(B), moot as the Defendant is now entitled to a full return of the security deposit.

4. Defendant-Landlord DIEGO LUQUEZ, whose address is [redacted], shall return to SYLVIA SAN GIL, whose address is Laurent Law Office, P.L., 930 South State Road 7, Plantation, FL 33317, her security deposit in the amount of the sum of **$3,250.00 (THREE THOUSAND TWO HUNDRED FIFTY DOLLARS) (USD) within ten (10) days of the date of this order.** The Defendant shall deliver the above-described funds via certified check or money order and made payable to the Trust Account of the Plaintiff's Attorney, ***Laurent Law Office, P.L., Trust Account,*** and sent to the address of the Plaintiff's Attorney, at ***Laurent Law Office, P.L., 930 South State Road 7, Plantation, FL 33317.***

5. Failure to comply could amount to CONTEMPT OF COURT and a continuing failure to comply could subject the Defendant/Defendants to a WRIT OF BODILY ATTACHMENT—which is an order by the Court commanding the Sheriff to physically bring a person before the Court. That jurisdiction of this case is retained to enter further orders including a monetary judgment that are proper to satisfy this judgment.

6. Jurisdiction is also hereby reserved to award additional attorneys' fees and costs as may be needed to collect this judgment if permissible.

* * *

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Volume 28, Number 4
August 31, 2020
Cite as 28 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Campaign tactics—Fundraising—A candidate's committee of interested persons may not solicit financial contributions through a fundraising letter which contains a list of committee members, including close family members of the candidate

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-14 (Election).[1] Date of Issue: May 18, 2020.

ISSUE

May a candidate's Committee of Interested Persons solicit financial contributions through a fundraising letter which contains a list of the Committee members, including close family members of the candidate?

ANSWER: No.

FACTS

The inquirer, a candidate for judicial election, has established a Committee of Interested Persons (Committee) as allowed by Fla. Code Jud. Conduct, Canon 7C(1). Some of the members are close family members of the inquirer. The Committee wishes to send out a campaign letter which includes a solicitation for financial contributions and support. The Committee plans to include a list of the Committee members in the letterhead.

DISCUSSION

Fla. Code Jud. Conduct, Canon 7A(3)(b), the (Code) requires the Candidate for Judicial office to "encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as applies to the candidate." Section 7C(1) prohibits a candidate from soliciting "campaign funds, or solicit attorneys for publicly stated support." On the other hand, this section allows the candidate to establish a committee of interested persons "to secure and manage the expenditures of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy," including any person or corporation or attorney at law. The definition section of the Code, provides that, 'Members of the Candidate's family' "denotes a spouse, child, grandchild, parent, grandparent, or other relative with whom the candidate maintains a close familial relationship."

The Judicial Ethics Advisory Committee (JEAC) has previously considered circumstances involving candidates' family and these sections of the Code of Judicial Conduct. Recently, in Fla. JEAC Op. 20-07 [28 Fla. L. Weekly Supp. 171a], the JEAC examined the requirements of the above Canons and applied the prohibition of soliciting campaign funds to family members as defined by the Canons. There we opined that the candidate's father-in-law could send a solicitation letter, so long as he was not a close family member of the candidate.

The JEAC has historically and consistently held that, when the candidate is required by the Canons to "encourage" family members not to do what the Canons prohibit the candidate from doing, the candidate may not condone the family members' conduct.[2] For example, these sections have led to the JEAC finding that a candidate's parents could not author and send a letter soliciting campaign contributions to their friends and acquaintances. Fla. JEAC Op. 08-09 [15 Fla. L. Weekly Supp. 527b].

Likewise, while the Committee could hold a campaign function at candidate's parents' home, neither the candidate nor the parents could be present when the solicitation for funds were to be made. Fla. JEAC Op. 12-14 [19 Fla. L. Weekly Supp. 755a]. Additionally, the JEAC and the Florida Supreme Court found that a candidate cannot knowingly allow the spouse to attend a political party function and campaign on the candidate's behalf. Fla. JEAC Op. 12-16 [19 Fla. L. Weekly Supp. 899a]; *In Re Angel*, 867 So. 2d 379 (Fla. 2004) [29 Fla. L. Weekly S87a].

However, when it relates to a political arena, the JEAC has recognized that the spouse has autonomy and they may engage in their own political activities. Such an exception is not applicable to fundraising. Lastly, while the Code allows judges' names to be listed as an officer of an organization in the organization fundraising letters, unlike here, the fundraising being sought by those organizations are not for the benefit of the judge. Commentary to Canon 4D(2) and Canon 5C(3)(b).

In sum, the letter from the Committee soliciting contributions may not list the candidate's close family members.

REFERENCES

In Re Angel, 867 So. 2d 379 (Fla. 2004)
Fla. Code Jud. Conduct, Canon 4D, Canon 5C, Canon 7A and Canon 7C
Fla. JEAC Ops. 20-07, 12-16, 12-14, 08-09

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[1]The Judicial Ethics Advisory Committee has appointed an Election Practices Subcommittee. The purpose of this subcommittee is to give immediate responses to campaign questions in instances where the normal Committee procedure would not provide a response in time to be useful to the inquiring candidate or judge. Opinions designated with the "(Election)" notation are opinions of the Election Practices Subcommittee of the Judicial Ethics Advisory Committee, and have the same authority as an opinion of the whole Committee.

[2]This prohibition is similar to the one found in Canon 7C(3). This provision requires the candidate to prohibit employees (Judicial Assistants) and to discourage other employees and officials subject to the candidate's direction and control to do what the candidate is prohibited from doing by Canon 7.

* * *

Judges—Judicial Ethics Advisory Committee— Elections — Endorsements—Campaign tactics—A person seeking judicial office is not prohibited from writing a book or seeking comments from members of the judiciary that will be included in the book—Publishing book during an election cycle containing comments from members of the judiciary does not necessarily serve as an endorsement by those judges—Candidate may give away copies of book written by candidate at campaign events—Giving away anything that has more than nominal value may violate section 104.061—Candidate may release campaign-related videos that promote the availability of books candidate has written

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-15. Date of Issue: June 9, 2020.

ISSUE

1) Whether it is improper for a candidate for judicial office to ask sitting judges to answer questions or offer comments that would be included in a book the candidate is writing about the judiciary.

Answer: No.

2) Whether publishing a book during an election cycle containing comments from members of the judiciary serve as an endorsement of the candidate by the judges who offered comment

Answer: No. As long as the comments are not an actual endorsement.

3) May a candidate for judicial office give away copies of books the candidate has written at campaign events?

Answer: Yes.

4) May a candidate for judicial office release campaign related videos that promote the availability of books the candidate has written?

Answer: Yes.

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FACTS

The inquiring candidate is currently writing a book. It is not the first book the candidate has written. All of the candidate's prior books relate to some aspect of Florida law. The books are sold online accompanied by a video advertising the book for sale and all of the other books in the series. The candidate's newest book will relate to the "basics" of Florida's Judiciary. The candidate intends to include in the book the names of and statements by state court judges and justices. The candidate advises the book will not mention the author is a candidate for judicial office. However, the candidate intends to bring copies of his books, including the book relating to the judiciary, to each campaign forum to distribute along with flyers and other campaign materials.

DISCUSSION

Issue 1:

There are no prohibitions in the Canons that prevent a candidate from asking members of the judiciary questions the answers to which will appear in a book the candidate is writing. It will be up to the judges to determine whether they should answer the question in light of the restrictions of the Canons. Any judge who responds to the candidate's inquiry should make certain the answers provided do not cast doubt on the judge's capacity to act impartially, undermine the judge's independence, integrity, or impartiality, demean the judicial office, interfere with the performance of judicial duties or lead to frequent disqualification. Fla. Code Jud. Conduct, Canon 4A.

Issue 2:

The candidate also asks if publishing a book during the elections cycle with comments from the sitting judges could be seen as judicial endorsement of the candidate's candidacy. A majority of the members of this committee do not believe that on the surface simply offering commentary in a book serves as a judicial endorsement. However, whether a comment actually qualifies as an endorsement depends on what the judge or justice says. It will be up to the candidate and the judges to ensure that those statements are not endorsements. Several members of this committee believe that using quotes from members of the judiciary particularly during an election campaign qualifies as an endorsement even if unintended. In JEAC Op. 10-18 [18 Fla. L. Weekly Supp. 119a] a member of the judiciary sought to use a photo of the candidate speaking on the floor of the Florida Supreme Court with the justices in the background. The candidate had received an award that was presented at the supreme court. The committee determined that the use of the photograph would wrongfully give the impression the justices had endorsed the judge's candidacy. We stated, "The judge should avoid use of photographs depicting other judges, both in campaign literature and on any web site."

Issue 3:

A majority of the committee believe the Canons do not prohibit a candidate for judicial office from giving away copies of materials the candidate has created at campaign events which includes books the candidate has written. *See* Commentary to Canon 7C (A judicial candidate may pass out informational material related to the law, legal system, or administration of justice). However, at least four members of this committee caution that giving away books that are normally sold for profit could qualify as a violation of § 104.061, Florida Statutes (2019). The section prohibits a candidate from "directly or indirectly giv[ing] or promis[ing] anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote.[1]" Any information the candidate distributes should not call into question the candidate's impartiality, integrity or the independence of the judiciary. Fla. Code Jud. Conduct ,Canon 7A(3)(b).

Issue 4:

Campaign videos that talk about the candidate and the candidate's qualifications are permitted. Fla. Code Jud. Conduct, Canon 7 does not specifically prohibit a candidate from including information on books the candidate has written and where those books can be found and purchased. In Fla. JEAC Op. 76-17, in response to inquiry from a sitting judge, we approved the contents of an advertisement that the publishing company sought to use when promoting the sale of a book written by the inquiring judge. While the ad was itself approved, some of the members of the committee felt the ad could be seen as in poor taste and exploiting the judge's position. In Fla. Code Jud. Conduct, Cannon 1, judges are admonished to "participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved." We recognize that the Code of Judicial Conduct is applicable to only members of the judiciary with the exception of Canon 7. *In re Kinsey*, 842 So. 2d 77, 85 (Fla. 2003) [28 Fla. L. Weekly S97a]. *See also, Amendment to Code of Judicial Conduct, Canon 7 (Political Activity)*, 897 So. 2d 1262, 1264 (Fla. 2005) [30 Fla. L. Weekly S149a]. Lewis, J., concurring in results only. That fact does not mean that aspiring members of the judiciary should not be concerned about whether comingling a judicial campaign with book sales enforces high standards, undermines the integrity of the judicial candidate, demeans the judicial office sought or is in poor taste.

REFERENCES

§ 104.061, Florida Statutes (2019)
In re Kinsey, 842 So. 2d 77, 85 (Fla. 2003); *Amendment to Code of Judicial Conduct, Canon 7 (Political Activity)*, 897 So. 2d 1262, 1264 (Fla. 2005).
Florida Code of Jud. Conduct, Canons 2B, 4A, 7A(3)(b), 7C
Fla. JEAC Ops. 10-18; 76-17

[1]In light of these concerns, the inquiring candidate may wish to seek an advisory opinion from the Division of Elections pursuant to Section 106.23(2), Florida Statutes, whether Section 104.061, Florida Statutes, prohibits a candidate for judicial office from giving away copies of books the candidate has written at campaign events.

* * *

Judges—Judicial Ethics Advisory Committee—Elections—Campaign tactics—Candidate for judicial office may post message on social media site, so long as it is not sponsored by a political organization and the message otherwise abides by the requirements of the Code of Judicial Conduct

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-16.(Election).[1] Date of Issue: June 12, 2020.

ISSUE

May a judicial candidate post a message encouraging the readers to vote for or support the candidate, in social media groups (Facebook, etc.) which are composed of politically active individuals and which groups do not appear to be sponsored by any particular political organization?

ANSWER: Yes, so long the candidate abides with the Canons of Judicial Conduct.

FACTS

The candidate seeks to posts general messages in social media group's pages asking for their members' votes and support. Some of these groups are described as being composed of politically active individuals but the groups do not represent themselves as being sponsored by any political organization.

DISCUSSION

The JEAC (Committee) has previously rendered opinions where

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candidates or judges sought guidance about personally attending events sponsored by groups whose goals and activities could, as the candidate describes herein, cause them to be defined as a partisan political group, regardless of any expressed political party affiliation. Those opinions dealt with specifically identified organizations which the Committee chose to consider on a case-by-case basis. However, the proliferation of advocacy groups and organizations use of Facebook, Twitter and many other social media platforms has been so great that the Committee cannot engage in piecemeal determinations of whether a particular social media group is deemed to be a political organization, as defined in the Canons of Judicial Conduct[2]. Therefore, just as the Committee has declined to review judicial candidates' campaign advertisements, we will only provide general guidance on the ethical provisions and factors which judicial candidates must consider and not engage in a review of particular social media groups. JEAC Ops. 00-22; 98-27; and 94-35.

The key issue that needs to be resolved in all of these types of inquiries is whether the particular group is a "political organization" which will thusly be subject to the clear restrictions set out in the Code of Judicial Conduct. The previous JEAC opinions have given general guidance to all judges and candidates on the factors which should be considered in evaluating whether a particular group, either in physical or electronic form, should be considered a political organization or group as defined and contemplated by the Canons of Judicial Conduct. The fact that those opinions dealt with in-person appearances at the groups events, rather than making a virtual appearance through a website, is of no consequence. The same principles that apply to defining the organizations conducting in-person events and activities are likewise applicable to these "virtual" activities. See, JEAC Op. 20-09 [28 Fla. L. Weekly Supp. 173a] (applying the same provisions as an in-person solicitation of campaign contributions to a "virtual" solicitation.)

A review of the relevant Canons follows:

> Canon 7 of the Florida Code of Judicial Conduct mandates that a judge or candidate for judicial office shall refrain from inappropriate political activity.
>
> Canon 7A(1)(d) provides that a judge or candidate for election to judicial office shall not "attend political party functions." A "political party" is not defined by the Code. The Code more generally describes the political groups it includes in its prohibitions and requirements. The Code uses and defines "political organizations" as a "a political party or *other group*, the principal purpose of which is to further the election or appointment of candidates to political office." (emphasis supplied) Definition section of the Code of Judicial Conduct.
>
> Canon 7A(1)(d) provides that, except what is authorized in sections 7C (3), "a judge shall not. . .attend political party functions."
>
> Canon 7A(3)(b) states that a candidate for judicial office "shall. . .act in a manner consistent with the impartiality, integrity, and independence of the judiciary, . . ."
>
> Canon 7C(3) sets forth conduct in which the judicial candidate may engage: "[a] judicial candidate. . .may attend a political party function to speak on behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system or the administration of justice. . ."

A review of the JEAC opinions reveals the process which was undertaken by the Committee to determine if a particular group fell within the Code's definition of a political organization.

In JEAC Op. 95-01, the Committee considered the composition and the goals of Tiger Bay Clubs in deciding that a judge could join the group. There, the membership of the group was found to be bipartisan and the group was found to be nonpartisan in nature. However, the judge was cautioned to guard against being placed in a partisan position or act for the political advantages of a person or party.

In JEAC Op. 96-10, the Committee found that a judge could attend a pro-life event because the event did not appear to be a partisan political party function, as the invitation indicated the guest speakers were bipartisan.

The NRA has also been found not to be a political party or organization, as defined by the Code of Judicial Conduct. The Committee's opinion was based on the fact that regardless of being involved in political matters, the NRA's principal purpose was not to further the election of candidates to political office. JEAC Op. 00-22. The Committee has found likewise with regards to the NAACP and the League of Women Voters. JEAC Op. 03-23 [11 Fla. L. Weekly Supp. 167a].

On the other hand, the Committee found that a Tea Party Patriot's group was a political organization. That group was found to be either associated with or perceived as being associated with "what has become known as the Tea Party Movement." The Committee further found that the Tea Party had registered as a political party with the Florida Department of State. Therefore, based upon the group's "well-publicized political activism and ongoing political participation in [ ] political electoral processes of the Tea Party. . .," the Committee opined the gatherings of the group, as well as the Tea Party itself, should be treated as political party functions. JEAC Op. 10-19 [18 Fla. L. Weekly Supp. 120a]. Similarly, the Committee found that Organizing For America met the definition of a political organization because it's stated goal was to "alleviate political apathy and increase support for the Democratic Party." Additionally, the Committee observed that the official website for the group linked to **www.barackobama.com** and found that "[t]he organization centers itself around political activism in favor of the Democratic Party's earlier plan for national health care and the stimulus package." JEAC Op. 10-20 [18 Fla. L. Weekly Supp. 122a].

More recently, the Committee has dealt with an inquiry dealing with events sponsored by a group that claimed no party affiliation. In JEAC Op. 16-08 [24 Fla. L. Weekly Supp. 393b], the event in question was sponsored by a group describing itself as "conservative." The Committee reviewed the event sponsor's mission statement which described its goals as "to educate and 'activate' the public on various issues." These "issues" were often discussed "in the context of the performance of current and possibly potential office holders," thereby indicating the issuance of endorsements of candidates agreeing with their position on those issues. Importantly, the mission statement also indicated that the group had previously used "Tea Party" in its name. The Committee, relying on the "Tea Party Patriots" opinion, JEAC Op. 10-19 [18 Fla. L. Weekly Supp. 120a], expressed its concern that the candidate's "involvement in any extent greater than that approved by Canon 7C(3) would result in the public perception that the candidate endorsed the party's goals. . ." The Committee further noted the fact that though an ' "organization's bylaws may proscribe certain activities, the actual practices of the organization may differ, placing the judge [or candidate] in an awkward position. " ' [quoting JEAC Op. 94-27]

JEAC Op. 16-08 [24 Fla. L. Weekly Supp. 393b], reaffirms the premise that judicial candidates must be vigilant and inform themselves to, not only determine whether the event is appropriate to attend but also, the advocacy goals of the sponsoring group. ' "The more zealous, and the more one-sided the advocacy of the organization, the more the weight the judge should give that factor in deciding whether to attend or not. If an organization has historically taken a very consistent, unwavering position on a highly political issue, that would create a rebuttal or presumption that an event they were sponsoring on that issue was not informative but instead an exercise in advocacy. That presumption could be rebutted by advanced publicity concerning the event, the bent of the speakers, the location of the event and the totality of circumstances surrounding the event" ', *Id.*, [quoting JEAC

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Op. 13-20 [21 Fla. L. Weekly Supp. 213b]].

All these opinions served to illustrate what types of due diligent steps candidates must employ to investigate and determine if a particular group sponsoring a social media virtual event or website meets the definition of a political organization as defined by the Code of Judicial Conduct. In all of the above instances, the Committee researched and reviewed the composition and stated goals and missions of the organization as submitted by the inquirers, as well as found in the groups' websites and other publicly available sources.

In sum, if the group sponsoring the social media platform, virtual event or website is not a political organization, thereby triggering the requirements of Canon 7C(3), the inquirer may post the request for support and vote as outlined in JEAC Op. 20-13 [28 Fla. L. Weekly Supp. 246a].

REFERENCES

Fla. Code Jud. Conduct, Canon 7A and Canon 7C.
Fla. JEAC Op. 20-13, 20-09, 16-18, 16-08, 13-20, 10-20, 10-19, 03-23, 00-22,
98-27, 96-10, 95-01, 94-35, and 94-27.

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[1]The Judicial Ethics Advisory Committee has appointed an Election Practices Subcommittee. The purpose of this subcommittee is to give immediate responses to campaign questions in instances where the normal Committee procedure would not provide a response in time to be useful to the inquiring candidate or judge. Opinions designated with the "(Election)" notation are opinions of the Election Practices Subcommittee of the Judicial Ethics Advisory Committee, and have the same authority as an opinion of the whole Committee.

[2]The social media platforms are used by many groups that are transparent in identifying themselves. However, the platforms have also been found to be misused by many other sources, including foreign governments, who have misled the users in believing they were corresponding with other entities. See, Russian Fake Accounts Showed Posts to 126 Million Facebook Users. USA Today, October 30, 2017; Intelligence Magazine, Life in Pixels. How Much of the Internet is Fake? Turns Out, A Lot Of It Actually, (December 26, 2018); With Social Media Disinformation, What-And-Who-Should We Be Afraid Of? (February 13, 2019). US Senate Select Committee on Intelligence, Report on Russian Active Measures Campaigns and Interference in the 2016 US Election Vol. 2.

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Judges—Judicial Ethics Advisory Committee—Fundraising—Charitable fundraising and volunteering—Judge serving on the board of directors of non-profit organization which has a purpose not related to the improvement of the law, the legal system, the judicial branch, or the administration of justice, may not write a letter in support of the foundation's application for grants from local and state governments

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-17. Date of Issue: June 15, 2020.

ISSUE

May a judge serving on the Board of Directors of a non-profit organization whose purpose is not related to the improvement of the law, the legal system, the judicial branch, or the administration of justice, write a letter in support of the foundation's application for grants from local and state governments?

ANSWER: No.

FACTS

The Inquiring Judge serves on the Board of Directors of a non-profit organization whose purpose is to support and promote national and international musicians. Among other activities, the organization runs a summer academy and presents recitals for the public. It funds these activities through a combination of ticket sales, charitable contributions, and grants from local and state governments.

A member of the organization has asked the Inquiring Judge to write a letter of support attesting to the value of the organization's work to the community. The letter would be appended to a grant request.

DISCUSSION

The Canons do not forbid a judge from writing a letter of support for an organization's grant application in all instances. Rather, the Canons draw a sharp distinction between organizations that are devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice (generally covered by Fla. Code. Jud. Conduct, Canon 4), and non-profit organizations that are educational, religious, charitable, fraternal, sororal or civic in nature (generally covered by Fla. Code Jud. Conduct, Canon 5C). Judges can write such letters on behalf of organizations which fall within the strictures of Fla. Code Jud. Conduct, Canon 4. *See* Fla. Code Jud. Conduct, Canon 4D(2)(c) (judge "may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice"); Fla. JEAC Op. 12-35 [20 Fla. L. Weekly Supp. 191a] (judge may write "letter on judicial letterhead in support of a district school board's federal grant application when a portion of the grant funds will be used by the district school board to fund a delinquency prevention program"); Fla. JEAC Op. 11-06 [18 Fla. L. Weekly Supp. 1062a] ("Canon 4D(2)(c) permits a judge to make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice. This Canon does not limit judges to only seeking grants for organizations solely devoted to the law, the legal system, or the administration of justice, but also to any project or program concerning the law, the legal system, or the administration of justice. The supervised childcare program, which aids the court system, certainly falls into this category.").

Of course, if a letter of support would violate other Canons, a judge cannot write the letter even where the organization serves the purposes defined in Fla. Code Jud. Conduct, Canon 4. *See* Fla. JEAC Op. 02-09 [9 Fla. L. Weekly Supp. 570a] ("even though the proposed letter to a grant provider encouraging the funding of the non-profit organization would be an activity designed to improve the law, the legal system, and the administration of justice, the letter could cast reasonable doubt on the judge's capacity to act impartially. Therefore, the Committee finds that a judge may not write a letter to the grant provider to encourage funding of this particular non-profit organization.").

Here, there is no dispute that the foundation at issue is not one contemplated under the guidelines of Fla. Code Jud. Conduct, Canon 4. Therefore, the inquiry falls squarely within the confines of Fla. Code Jud. Conduct, Canon 5. Canon 5 allows the Inquiring Judge to serve on the foundation's board because it is educational and charitable. However, it expressly forbids the Inquiring Judge from "personally or directly participat[ing] in the solicitation of funds." More to the point, Canon 5 does not contain the exception found in Fla. Code Jud. Conduct, Canon 4D(2)(c).

The Inquiring Judge asks us whether there "[m]ight [ ] be a distinction between charitable solicitation and grant application." We do not see how such a distinction can be drawn. Regardless of whether they come from individuals, foundations, corporations, or governments, grants are funds. And judges cannot solicit funds for educational or charitable organizations that do not concern the improvement of the law, the legal system, the judicial branch, or the administration of justice.

REFERENCES

Fla. Code Jud. Conduct, Canons 4D(2)(c); 5C(3)(b)(i)
Fla. JEAC Ops. 12-35, 11-06; 02-09

* * *