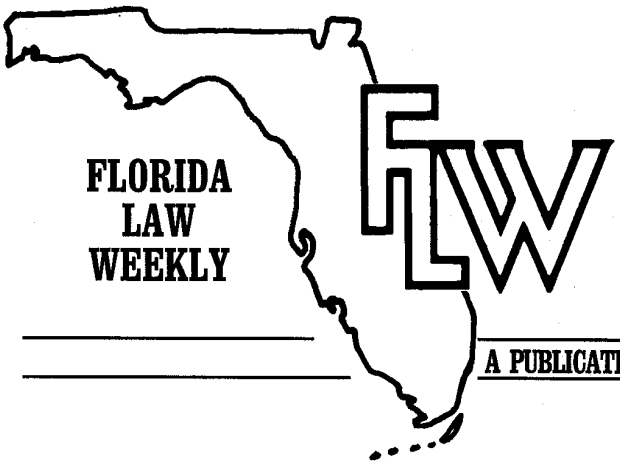
Volume 28, Number 5, September 30, 2020



FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 365-431

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CONTRACTS—PUBLIC HOUSING—SALE—RIGHT OF FIRST REFUSAL. A nonprofit investor in a public housing complex brought an action against the owner alleging that the owner's actions in soliciting purchase offers for the complex triggered the nonprofit's right of first refusal established in the operating agreement. The circuit court agreed, holding that the right of first refusal was triggered by the owner's manifest intent to sell the housing complex, as demonstrated by its actions in negotiating a sale agreement and preparing for the sale.** *OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC. v. HK ASWAN, LLC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed July 7, 2020. Full Text at Circuit Courts—Original Section, page 390a.*

- **INSURANCE—MEDPAY—SUBROGATION. An insurer filed an action against its insured seeking a resolution as to whether the made whole doctrine applied to the insurer's contractual right of subrogation for MedPay benefits. The policy at issue contained standard subrogation language stating that when the insurer pays, "[the insured's] rights of recovery from anyone else becomes ours up to the amount we have paid" and requiring the insured to protect those rights and to help the insurer enforce them. However, because the policy was silent concerning the insurer's priority vis-à-vis its insured when the insured is not made whole following an injury, the court concluded that the common law made whole doctrine applied and preserved the insured's right of priority over the insurer.** *DANYLAK v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY. Circuit Court, Twelfth Judicial Circuit in and for Sarasota County. Filed July 10, 2020. Full Text at Circuit Courts—Original Section, page 398a.*

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Bold denotes decision by circuit court in its appellate capacity.

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REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—No merit to argument that hearing officer's finding that licensee had four DUI convictions is not supported by competent substantial evidence because three of the citations are unreadable where certified copy of licensee's driving record entered into evidence reflects four DUI convictions—Questioning accuracy of self-authenticating driving record is tantamount to asking appellate court to reweigh evidence—Petition for writ of certiorari is denied

WARREN R. ALLSHOUSE, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2020-AP-000004. June 29, 2020. Counsel: Lee Meadows, Tallahassee, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(RONALD FLURY, J.) THIS CAUSE came before the Court for hearing in Leon County, Florida, on Petitioner, Warren Allshouse's, Petition for Writ of Certiorari. The Court having reviewed the pleadings and argument of counsel, and otherwise being advised in the premises finds as follows:

The Department of Highway Safety and Motor Vehicles ("The Department") permanently revoked the driving privilege of Petitioner, Warren Allshouse, for four DUI convictions as provided in § 322.27, Fla. Stat. Petitioner requested administrative review, asserting that he did not have the four predicate convictions for DUI to qualify for a permanent revocation.

In reviewing the petition, the court sits in its appellate capacity. Its review is limited to determining whether the Department's actions accorded procedural due process, observed the essential requirements of law, and were supported by competent substantial evidence. *Campbell v. Vetter,* 392 So. 2d. 6 (Fla. 4th DCA 1980). This court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *See Dep't Of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

At an administrative review hearing, the Department considered a certified copy of a printout of Petitioner's driving record as evidence without objection. The driving record states that Petitioner was convicted of DUI on the following four occasions: (1) Citation Number. 12686MJ in Columbia County in 1985; (2) Citation Number. 32757PS in Columbia County in 1988; (3) Citation Number. 24170CU in Columbia County in 1990; and (4) Citation Number. 4649 in Virginia in 1992. Petitioner's counsel filed motions and argued that the revocation was invalid because three of the citations were unreadable and failed to identify Petitioner as the person convicted or show that the charge was DUI.

The hearing officer entered a written order finding that there was competent substantial evidence to sustain the permanent revocation of Petitioner's driving privilege. Questioning the accuracy of a self-authenticating driving record is tantamount to reweighing the evidence. *See Dep't of Highway Safety & Motor Vehicles v. Sperberg,* 257 So. 3d 560 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2318a]. The Petitioner requested and received a show cause hearing to show cause why his license should not be revoked. He elected not to be a witness at the show cause hearing to testify that the driving history was inaccurate. Procedural due process was accorded and the essential requirements of law were met. Because the Final Order entered by the hearing officer acknowledges review of the Department's records in forming the officer's decision to revoke, the order was legally sufficient based on the facts presented in this case.

It is therefore ORDERED AND ADJUDGED that:

The Petition for Writ of Certiorari is respectfully Denied.

* * *

Licensing—Driver's license—Suspension—Appeals—Certiorari—Because Department of Highway Safety and Motor Vehicles has removed suspension and reinstated license, petition for writ of certiorari challenging license suspension is dismissed as moot

HARRY SHOAFF, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, BUREAU OF DRIVER IMPROVEMENT, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2020 AP 6. June 26, 2020. Counsel: Fred Conrad, for Petitioner. Elana J. Jones, Chief Counsel, for Respondent.

ORDER DISMISSING PETITION AS MOOT

(CHARLES W. DODSON, J.) THIS CAUSE came before the Court upon Petitioner's Petition for Writ of Certiorari filed on March 2, 2020. After reviewing the petition, response, reply and contents of the court file, and otherwise being fully advised in the premises, the Court finds the FOLLOWING:

Petitioner challenges the suspension of his driver's license by order of the Respondent on January 31, 2020. As relief, Petitioner seeks to quash the order and have his license reinstated. Upon review of the record, the Court finds that action taken by the Respondent on May 22, 2020, during the pendency of this case, removed the challenged sanction from Petitioner's driving record and reinstated Petitioner's license. (RA-1)

A case becomes moot, for purposes of review, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief. *See Montgomery v. Dep't of Health and Rehabilitative Services,* 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). Because Petitioner has received the relief sought in his Petition, this case is now moot. *Goodwin v. State,* 593 So. 2d 211, 212 (Fla. 1992).

To the extent that Petitioner wishes to challenge the suspension order issued on May 27, 2020 and being heard on July 1, 2020, Petitioner may do so by filing a new action pursuant to section 322.2615(13) and Section 322.31, Fla. Stat..

Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Certiorari is hereby **DISMISSED** as moot. Petitioner's Motion for Attorney's Fees is hereby **DENIED**. Petitioner's Petition for Writ of Prohibition and Request for Sanctions are **DENIED**. Petitioner's Emergency Motion to Stay the lower tribunal proceedings is **DENIED**. The Clerk is directed to **CLOSE** this case.

* * *

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Order upholding license revocation is supported by competent substantial evidence of licensee's driving record demonstrating that licensee received four DUI convictions—No merit to argument that municipal conviction in Georgia is insufficient to support permanent license revocation—Petition for writ of certiorari is denied

MARCELO MATIAS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2020 AP 3. June 29, 2020. Counsel: Lee Meadows, Tallahassee, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANGELA C. DEMPSEY, J.) **THIS CAUSE** came before the Court upon Petition for Writ of Certiorari filed on February 4, 2020. The Court having considered the Petition, Respondent's Response thereto,

and examined the record before this Court, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief as follows.

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

2. Petitioner argues that there was no competent substantial evidence for the hearing officer below to sustain the revocation of his driving privilege. On June 21, 2006, Petitioner's driving privilege was permanently revoked pursuant to Section 322.26(1)(a), Florida Statutes for having four DUI convictions. The permanent revocation was added to the record on May 18, 2007, and notice was provided on June 1, 2007. Approximately 12 and a half years after notice of the permanent revocation of his driving privilege, Petitioner requested a hearing to show cause why his driving privilege should not have been revoked, pursuant to Section 322.27(5), Florida Statutes. The sole issue raised by Petitioner is whether the Department's January 10, 2020 order is insufficient because it lacks "meaningful" findings of fact or conclusions of law. Petitioner argues that one of the four convictions relied upon by Respondent was obtained through "municipal court" and therefore is insufficient to support a permanent revocation of his driving privilege.

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

4. Petitioner had the burden to show cause why his driving privilege should not have been permanently revoked. *Midgett v. Department of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 795b (Fla. 4th Jud. Ct. 2009). Rule 15A-1.0195, F.A.C. gives a person whose license has been cancelled, suspended, or revoked the opportunity to petition the Department to show cause why his or her driving privilege should not have been cancelled, suspended, or revoked. Petitioner did not meet this burden. Petitioner did not present any evidence establishing any error, mistake, or any other evidence indicating that the revocation of his license was incorrect. *See McKinnon v. Department of Highway Safely and Motor Vehicles,* (Fla. 13th Jud. Ct)(April 1, 2020) [28 Fla. L. Weekly Supp. 201a].

5. Petitioner's argument that a municipal conviction in Georgia is insufficient to support a permanent revocation of his driving privilege does not apply. Florida law does not control how Georgia implements its DUI laws. Section 322.44, Florida Statutes, mandates the licensing authority of Georgia to give effect to the conduct as if it had occurred in Georgia.[1] Section 322.65, Florida Statutes, requires Florida to enter into agreements with other jurisdictions for the exchange of driver records through the National Driver Exchange. Georgia reported Petitioner's conviction for citation number 5577, indicating it was eligible to be reported to the National Driver Exchange. If Georgia made any error in reporting the DUI conviction, Petitioner's recourse is to seek relief in Georgia.

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

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

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[1]Ga. Code Ann. Section 40-6-391 (h)(2)(2019) states that municipal court convictions for DUI are to be treated the same as other DUI convictions and are reportable to the National Driver Registry.

* * *

Criminal law—Driving under the influence—Evidence—Blood test—Consent—Voluntariness—Error to grant motion to suppress blood test based on finding that consent to blood test was not freely and voluntarily given because defendant was read implied consent form—While implied consent form read to defendant included warning that refusal could result in suspension of her driving privilege and that it could be used against her in a criminal proceeding, it did not include a threat of criminal offense—Because there was no threat of criminal offense, the appropriate test is to analyze voluntariness based on totality of circumstances

STATE OF FLORIDA, Appellant, v. KAITLYN ODOM, Appellee. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2019 AP 17. L.T. Case No. 2018 CT 1845. August 26, 2020. An appeal from the County Court for Leon County, Monique R. Richardson, Judge. Counsel: James Beville, Assistant State Attorney, for Appellant. Aaron Wayt, for Appellee.

[Lower court order at 27 Fla. L. Weekly Supp. 635a.]

(DEMPSEY, ANGELA C., CIRCUIT JUDGE) Appellant challenges the lower court's ruling granting the Appellee's Motion to Suppress Blood Test. At the hearing on the Motion to Suppress, the parties stipulated to the admission of the Implied Consent Form and the facts as stated in the probable cause affidavit, summarized as follows.

On June 1, 2018, law enforcement responded to a crash at 2:20 a.m. off West Tennessee. Appellee crashed into another vehicle with enough force that both vehicles went over the median and Appellee then crashed into a utility pole. Appellee was transported to Tallahassee Memorial Hospital where she was treated for an obviously broken ankle. Just prior to hospital staff administering pain medication, Officer David Keller, with Tallahassee Police Department, read Appellee the Implied Consent entered into evidence. Appellee requested an attorney, but was advised she was not entitled to one at that point. The results of the blood draw were ethyl alcohol, 0.242 g/100ml of blood. Appellee was charged with two counts of Driving Under the Influence Causing Damage to Person or Property with Blood Alcohol Level of .15 or Higher.

The lower court granted the Motion to Suppress, finding that Appellee's consent to the blood test was not freely and voluntarily given because she was read informed consent pursuant to *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a]. The court provided no further analysis of voluntariness.

For a warrantless blood draw based on consent to be legal, the consent must be voluntary. Voluntariness is determined based on the totality of the circumstances. *Birchfield* held that consent cannot be voluntary if obtained on pain of committing a criminal offense, i.e. if

implied consent includes that admonition. The *Birchfield* opinion addressed three cases, including Birchfield who was told he could be criminally prosecuted for his refusal to submit to a blood test. *Birchfield* at 2186. The second case involved Mr. Bernard who refused a breath test which does not require a warrant. *Id*. Finally, the Court addressed Beylund, who like Appellee, consented to a blood test. *Id*.

The *Birchfield* Court reversed Mr. Birchfield's conviction because "motorists cannot be deemed to have consented to submit to a blood test upon pain of committing a criminal offense." *Id*. The Court also reversed Mr. Beylund's conviction and remanded the case for the lower court to determine the voluntariness of the consent to search from the totality of the circumstances. *Id*. at 2187.

In the instant case, Officer David Keller, with Tallahassee Police Department, read the Implied Consent form found at page 72 of the record which includes the warning that a refusal could result in suspension of her driving privilege and that it could be used against her in any criminal proceeding. It does not include a threat of criminal offense.

The order entered by the trial court also cited three other trial court cases. They all appear to be distinguishable. The first case is *State v. Baumer,* 26 Fla. L. Weekly Supp. 39a (Sarasota Cty Ct., March 6, 2018). In *Baumer* the implied consent law enforcement read to the defendant included a threat of criminal liability; also weighing against voluntariness, it was read at the jail. In *State v. Nichols,* 24 Fla. L. Weekly Supp. 935a (7th Jud. Cir. Ct. February 3, 2017), the Court found that consent cannot be freely and voluntarily given with threat of arrest or charge. Finally, in *State v. Dorman,* 26 Fla. L. Weekly Supp. 399a (Duval Cty Ct., June 26, 2017), the state conceded the motion to suppress should be granted.

The question presented in the instant case is if the implied consent law includes charging a criminal offense, but the officer does not read the part of the implied consent law that includes threat of committing a criminal offense, can consent be freely and voluntarily given. In *Campbell v. State,* 288 So 3d 739 (Fla. 5th DCA 2019) [45 Fla. L. Weekly D11e], the Court recognized that *Birchfield* is limited to cases where consent was given only after threat of criminal offense. There was no threat of criminal offense in this case as shown in the Implied Consent Form. Therefore, the test becomes one of voluntariness, which must be determined based on the totality of the circumstances.

The lower court found consent was not freely and voluntarily given based on *Birchfield,* without analyzing voluntariness based on the totality of the circumstances.

Accordingly, this Court reverses the granting of the motion to suppress and remands for further proceedings consistent with this opinion.

REVERSED and REMANDED.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Appeals—Certiorari—Where arguments that licensee does not possess Class E license or that he is precluded by law from possessing both Class E license and Class C license at same time were not preserved for review where these arguments were not raised before hearing officer who invalidated suspension of licensee's Class C license due to improper implied consent warning but upheld suspension of his Class E license—Petition for writ of certiorari is denied

RICHARD ANTHONY FRANCIS, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 3rd Judicial Circuit (Appellate) in and for Columbia County. Case No. 2019-398-CA. June 11, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(WESLEY R. DOUGLAS, J.) **THIS CAUSE** came before the Court on the "Petition for Writ of Certiorari," filed on October 14, 2019, and the "Response to Petition for Writ of Certiorari," filed on March 20, 2020. The Petitioner challenges the administrative hearing officer's "Findings of Fact, Conclusions of Law and Decision," entered on September 16, 2019. The decision affirmed the suspension of the Petitioner's driving privileges for one year for his refusal to submit to a breath, blood, or urine test pursuant to section 322.2615, Florida Statutes, and set aside the Order of Disqualification of his Class C Commercial Driver's License. *Findings of Fact, Conclusions of Law and Decision.*

Petitioner's Argument

The Petitioner asserts the decision upholding the suspension of his Class E driving privileges while setting aside the suspension of his Class C Commercial Driver's License violated his right to due process, departed from the essential requirements of law, and was not supported by competent, substantial evidence. He asserts there is no competent, substantial evidence to establish he possesses a Class E license in addition to his Class C CDL and that, pursuant to section 322.03(1)(b), Florida Statutes, he is precluded from having more than one valid driver's license at one time. He requests this Court grant the Petition for Writ of Certiorari and Order the Department of Highway Safety and Motor Vehicles to remove the administrative suspension from his permanent driving record.

Standard of Review

On certiorari review of administrative action, the circuit court must determine whether procedural due process was accorded, the essential requirements of law were observed, and whether the hearing officer's factual findings are supported by competent, substantial evidence. *See e.g., City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla.1982); *Dep't of Hwy Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a]; On Motion for Certification 40 Fla. L. Weekly D1107a].

Procedural due process is accorded when the party receives notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *See Jones v. State,* 740 So. 2d 520, 523 (Fla. 1999) [24 Fla. L. Weekly S290a] (citing *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971)); *see also Joshua v. City of Gainesville,* 768 So. 2d 432, 438 (Fla. 2000) [25 Fla. L. Weekly S641a].

The essential requirements of law are observed when the hearing officer applies the correct law. *See Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (noting application of the correct law is synonymous with the observation of the essential requirements of law); *Brown v. Walton Cty.,* 667 So. 2d 376, 376 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2609b] (noting application of the correct law is the observation of the essential requirements of law). When the lower court applies the correct law, there is no basis for certiorari relief, even if the reviewing court disagrees with the lower court's application of the law to the facts. *See Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]; *Dep't of Hwy Safety & Motor Vehicles v. Carillon,* 95 So. 3d 901, 903 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1801a]; *TRG Desert Inn Venture, Ltd. v. Berezovsky.* 194 So. 3d 516, 520 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1427a].

In determining whether the hearing officer's factual findings are supported by competent, substantial evidence, the circuit court must review the record for evidence supporting the findings. *See Blake v. St. Johns River Power Park Svs. Employees' Ret. Plan,* 275 So. 3d 804, 808-09 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1757a] (citing *Dep't of Hwy Safety & Motor Vehicles v. Wiggins,* 151 So. 3d 457,

464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a]) ("The sole starting (and ending) point is a search of the record for competent, substantial evidence *supporting* the decision."). "Whether the record also contains competent, substantial evidence that would support some other result is irrelevant." *See Clay Cty. v. Kendale Land Dev., Inc.,* 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a]. The circuit court must defer to the hearing officer's findings unless no competent, substantial evidence supports the findings. *See Hirtzel,* 163 So. 3d at 529 (citing *Wiggins,* 151 So. 3d at 465).

A circuit court's certiorari review is limited to the issues raised before the hearing officer. Where an argument or objection is not made before the hearing officer, the issue is waived on certiorari review. *See Dep't of Hwy Safety & Motor Vehicles v. Lankford.* 956 So. 2d 527, 527-28 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a]; *Dep't of Hwy Safety & Motor Vehicles v. Marshall,* 848 So. 2d 482, 485 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b] (holding circuit court misapplied the law in *sua sponte* considering issue not preserved for review or raised in the petition).

Relevant Facts and Analysis

The Petitioner's arguments challenging suspension of his "normal driving privileges" were not raised before the hearing officer. Thus, they are not preserved for certiorari review. His arguments that the hearing officer's decision violated his right to due process, departed from the essential requirements of law, and was not supported by competent, substantial evidence are without merit.

At the beginning of the hearing, the hearing officer stated: "This is a formal review held in conformance with . . section 322.2615[1], and section 322.64[2] of the Florida Statutes. ***This review concerns the suspension and disqualification of the driving privilege*** of Richard Francis on August 4, 2019 for refusal to submit to a lawful breath, blood or urine test." *Hearing Transcript, p. 3.* After completion of witness testimony, the hearing officer asked the Petitioner's counsel if there were any "motions, objections or issues" he would like to raise for the record. Counsel replied:

> Your Honor, the motion that I—it will really count as my closing as well. ***Since we are also, we're doing a normal DHSMV hearing in regards to the defendant's normal driver's license, and*** we're also asking, the Court to take a look at 322.64.

Hearing Transcript, pp. 5-7. Counsel argued the evidence established the arresting officer did not administer an Implied Consent warning for a CDL driver, but the officer did administer the warning for "a regular driver's license." Counsel requested the hearing officer analyze the scope of review for CDL disqualifications and consider whether the arresting officer had probable cause to believe the Petitioner "was in a commercial vehicle or has a CDL." Counsel referred the hearing officer to *Massey v. Dep't of Hwy Safety & Motor* Vehicles, 21 Fla. L. Weekly Supp. 630(a) (Fla. 12th Cir, Ct. Oct. 16, 2013), and asserted that, in that case: "The Department conceded this issue where there was a lack of evidence showing he was warned of CDL qualification prior to refusal then validation for the CDL driver's license must be invalidated." *Hearing Transcript, pp, 17-18.*

Counsel then stated "that's basically our argument. ***We understand that he read the proper Implied Consent for his regular driver's license, just not the CDL***." *Hearing Transcript, p. 18.* The hearing officer again asked counsel if there were any motions, objections, or issues counsel wanted to raise. Counsel replied there were not. The hearing officer then asked if there was anything counsel would like to add in closing. Counsel replied: "***Your Honor, we're just moving to disqualify the CDL disqualification. That's our main concern here.***" *Hearing Transcript, pp. 18-19.*

When considering the hearing officer's statement of the issues for resolution, and the representations of the Petitioner's counsel to the hearing officer, the Petitioner knew the hearing was to address the suspension of his "normal driver's license" and the disqualification of his CDL. When considering the hearing officer's repeated questions to the Petitioner's counsel regarding whether there were additional motions, arguments or objections he wanted to raise, the Petitioner was given a meaningful opportunity to make any arguments he believed necessary for appropriate resolution of the issues, including those he makes for the first time in the instant Petition.

Notably, counsel did not argue that the Petitioner did not have a Class E license, that he was precluded by law from simultaneously possessing a CDL and a Class E license, or that it would be legally incorrect for the hearing officer to suspend his general driving privileges while allowing him to retain his CDL. Despite acknowledging the hearing was to address his "normal" driver's license *and* his CDL, the Petitioner made no argument regarding his "normal" driving privileges. He only requested the hearing officer "disqualify" the CDL disqualification, which the hearing officer did.

In reaching her decision, the hearing officer applied sections 322.2615 and 322.64, Florida Statutes; the applicable law for resolution of the issues that were before the hearing officer. Because the hearing officer applied the correct law, the decision did not depart from the essential requirements of law. *See Heggs,* 658 So. 2d at 525) ("A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to the facts, is not an illegal or irregular act or proceeding remediable by certiorari."); *State v. Pietrasiuk.* 197 So. 3d 640, 641 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1930a] (citing *Custer Med. Ctr. v. United Auto. Ins. Co.,* 62 So. 3d 1086, 1093 (Fla. 2010) [35 Fla. L. Weekly S640a] (holding erroneous conclusions do not constitute departures from the essential requirements of the law remediable by certiorari); *Ivey,* 774 So. 2d at 682 ("[T]he departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error")).

The hearing officer found the Petitioner refused to submit to field sobriety tests upon being asked to do so by law enforcement subsequent to a lawful arrest, and the Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one-year or, in the case of a second refusal, for a period of 18 months. These findings are supported by Officer Plemmons' testimony. *Hearing Transcript, pp. 5-14.* The Petitioner does not contest the finding that he refused to submit to field sobriety tests, and he acknowledges the evidence establishes he was read the Implied Consent warning for his "regular driver's license, just not the CDL." Thus, the hearing officer's findings are supported by competent, substantial evidence.

Conclusion

Because the issues raised in the Petition were not raised before the hearing officer, they are not preserved for certiorari review. For the reasons previously expressed, the Petitioner was accorded procedural due process, the hearing officer complied with the essential requirements of law, and the hearing officer's findings were supported by competent, substantial evidence. Accordingly, the Petitioner is not entitled to certiorari relief.

Attorney Fees and Costs

Similarly, the Petitioner is not entitled to attorney fees and costs. "[A]ttorney's fees must be requested by filing a separate motion and not merely as a line request in a pleading." *See Garcia v. Collazo,* 178 So. 3d 429, 430 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2189f]; *Webber v. Dep't of Bus. & Prof'l Reg.,* 198 So. 3d 922, 923 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1771b] (denying request for attorney fees not made by separate motion) (citing, *inter alia,* Fla. R. App. P.

9.400(b)(2); *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n,* 758 So. 2d 692, 696 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2257c; Rehearing denied 25 Fla. L. Weekly D380b] (quoting *Salley v. City of* St. *Petersburg,* 511 So. 2d 975, 977 (Fla.1987) ("failure to file a motion for attorney's fees in accordance with Florida Rule of Appellate Procedure 9.400(b) is a proper basis for the denial of fees on appeal.")).

A party seeking appellate attorney's fees must "provide substance and specify the particular contractual, statutory, or other substantive basis for an award of fees on appeal." See *Collazo,* 178 So. 3d at 430 (citing *United Servs. Auto. Ass'n. v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000) [25 Fla. L. Weekly S705a] ("It is simply insufficient for parties to only refer to rule 9.400 . . . in support of a motion for attorney's fees for services rendered in an appellate court.")).

Here, the Petitioner did not file a separate motion requesting attorney fees and costs. The request for attorney fees and costs consisted of one sentence in two sections of the Petition. In the "Relief Sought" section, the Petitioner's request for attorney fees and costs consists of the following sentence: "Petitioner requests attorney's fees in the amount of $3,500 and an additional $105 in transcript costs for a total of $3,605 pursuant to Fl. Stat. 57.105." In the "Conclusion" section, the Petitioner states: "Since competent substantial evidence does not exist to support the findings, Petitioner's Order of Suspension should be quashed, the entry removed from Petitioner's driving record, and attorney's fees awarded." The Petitioner's one sentence requests for attorney fees contained within his Petition for Writ of Certiorari are insufficient to establish entitlement to appellate attorney fees and costs.

Therefore, it is hereby **ORDERED:** The Petition for Writ of Certiorari is **DENIED**. The request for attorney fees and costs is **DENIED**. The Petitioner may appeal this decision to the First District Court of Appeal within **30 days** of the date of this Order.

[1]Section 322.2615, Florida Statutes addresses, *inter alia,* suspension of general driving privileges.

[2]Section 322.64, Florida Statutes, addresses, *inter alia,* suspension of CDL driving privileges.

* * *

Licensing—Driver's license—Suspension—Lawfulness of stop—Officer acting outside jurisdiction—Hearing officer's finding that officer conducted lawful extra-jurisdictional stop is supported by competent substantial evidence where record indicates that stop was authorized under mutual aid agreement and by doctrine of fresh pursuit

LYNDON RODNEY COOLMAN, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2019-AP-66 . Division AP-A. May 14, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Albert J. Tasker, IV, and Seth Schwartz, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM) This cause is before this Court on Petitioner, Lyndon Rodney Coolman's "Petition for Writ of Certiorari," filed on August 2, 2019. The Petition raises one argument for review: Whether the Department's order failed to comply with the essential requirements of the law when the hearing officer determined Officer Torres conducted a legal traffic stop of Petitioner.

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

Petitioner argues the Department's order failed to comply with the essential requirements of the law when the hearing officer determined Officer Torres conducted a legal traffic stop of Petitioner. Specifically, Petitioner contends Officer Torres could not legally stop Petitioner outside the jurisdiction of the Neptune Beach Police Department in the absence of a valid mutual aid agreement or fresh pursuit of Petitioner.

"As a general principle, public officers of a county or municipality have no *official* power to arrest an offender outside the boundaries of their county or municipality." *State v. Phoenix*, 428 So. 2d 262, 265 (Fla. 4th DCA 1982) (emphasis in original) (citation omitted). However, an officer may arrest an offender outside their jurisdiction pursuant to a mutual aid agreement where two law enforcement agencies agree to permit "extraterritorial conduct by the outside police municipality." *Daniel v. State*, 20 So. 3d 1008, 1011 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2264a].

An officer also may make an arrest outside their jurisdiction when in fresh pursuit of an offender who has committed a misdemeanor, a violation of Chapter 316, or a violation of a county or municipal ordinance. 901.25(2), Fla. Stat. (2018). To be in fresh pursuit, an officer must act without unnecessary delay; the pursuit must be continuous and uninterrupted; and a close temporal relationship must exist between the offense and the pursuit's beginning. *State v. Gelin*, 844 So. 2d 659, 661 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D746b].

Here, competent, substantial evidence supports the hearing officer's finding that law enforcement legally stopped Petitioner. The record indicates the Neptune Beach Police Department and the Atlantic Beach Police Department entered into a Mutual Aid Agreement. The Mutual Aid Agreement provides for an officer of the Jacksonville Beach Police Department, Atlantic Beach Police Department, or the Neptune Beach Police Department to make an arrest outside that officer's jurisdiction, but in Duval County, for an offense committed within the officer's jurisdiction.

However, even excluding the Mutual Aid Agreement, competent, substantial evidence supports the hearing officer's findings based on the doctrine of fresh pursuit. Officer Torres initially observed Petitioner weaving within his lane and intermittently braking in the City of Neptune Beach. Officer Torres followed Petitioner from Third Street and Florida Boulevard, during which time he observed Petitioner significantly varying his speed, as well as exceeding the speed limit, a traffic violation proscribed by Chapter 316.

Petitioner stopped at the intersection of Third Street and Atlantic Beach Boulevard, the boundary between the City of Neptune Beach and the City of Atlantic Beach. Officer Torres activated his emergency lights at the intersection once the traffic light turned green, so Petitioner would not remain in the middle of traffic during the stop. When Office Torres activated his lights, he was located in the City of Neptune Beach. The above facts support a finding that Officer Torres lawfully pursued and stopped Petitioner. *See Dep't of Highway Safety and Motor Vehicles v. Leonard*, 718 So. 2d 314, 316 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2107a] (finding that St. Augustine police lawfully arrested a driver for a DUI pursuant to the fresh pursuit doctrine when the police observed the driver operating his vehicle erratically in the City of St. Augustine but did not stop the driver until he drove outside the city limits of St. Augustine); *State v. Potter*, 438 So. 2d 1085, 1086 (Fla. 2d DCA 1983) (holding that the fresh pursuit doctrine applied to an officer's stop outside the city limits when the officer observed the driver commit a traffic violation within the city limits); *State v. Joy*, 637 So. 2d 946, 948 (Fla. 3d DCA 1994) ("Thus, when Officer Diaz, while still in his jurisdiction of Hialeah, formulated a reasonable suspicion that Joy was speeding, the officer was in

fresh pursuit of Joy and lawfully stopped him in Hialeah Gardens."). Therefore, Petitioner's claim is denied. In light of the above, this Court further finds that Petitioner's request for attorney's fees and costs is without merit.

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

* * *

Insurance—Personal injury protection—Error to strike affidavit of expert on reasonableness of charges

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Melida Solis, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-146-AP-01. L.T. Case No. 12-18068 SP 23 (01). June 23, 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.)

OPINION

(PER CURIAM.) (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider. This case is indistinguishable from our decision in *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].

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 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.

* * *

Insurance—Personal injury protection—Error to strike affidavit of expert on reasonableness of charges

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Raul Bustillo, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-369-AP-01. L.T. Case No. 13-411 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 its adjuster, Lizbeth Velazquez. 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.

* * *

Appeals—Non-final order—Circuit court acting in its appellate capacity lacks jurisdiction over appeal of order vacating default final judgment, which is neither appealable non-final order nor final order—Order is not reviewable by certiorari where there was no error that cannot be remedied on appeal from final judgment

DOVE INVESTMENT CORP., Appellant, v. ELOY GRAUPERA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-315-AP-01. L.T. Case No. 2005-19687-SP-05. July 9, 2020. An Appeal from County Court in and for Miami-Dade County, Diana Gonzalez-Whyte, Judge. Counsel: Hugh Brett Shafritz, Shafritz and Associates, P.A., for Appellant. Eloy Graupera, Appellee, in proper person.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER OF DISMISSAL

(PER CURIAM) This is an appeal from an order vacating a default final judgment. Finding we have no jurisdiction; we dismiss this appeal.

In the underlying lawsuit, the original Plaintiff filed an action on December 27, 2005 stemming from a default on a credit card account. The court docket indicates that service on Appellee was accomplished on January 24, 2006.[1] Appellant asserts that Appellee appeared at a pre-trial conference, although, as we discuss below, there is no record to support this assertion. A final judgment was entered on March 10, 2006 in favor of the Plaintiff in the amount of $3,351.87. An entry on

the court's docket states that the case file was subsequently destroyed sometime around May 5, 2008.

A writ of garnishment was entered on October 16, 2013, with a notice of service on Appellee filed by Plaintiff's counsel on October 31, 2013. On August 28, 2019, a writ of garnishment was filed against the garnishee, E-Trade Financial Corporate Services. On September 16, 2019, Appellee filed a "Request for Hearing." Appellee's Request was set for hearing on October 8, 2019, at which time the trial court vacated the final judgment. The Appellant filed a motion for rehearing, but the Court docket does not indicate whether the motion was ever ruled upon. Appellant appeals from the order vacating the final judgment.

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 2015) [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].

As the trial court vacated the final judgment, the case was reopened. As a result, the order being appealed from is not a final order. Since 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 is governed by Rule 9.130 in the district courts of appeal. *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 vacating a final judgment. 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).

Any argument that the subject order is a final order which would be appealable under section 59.06, Florida Statute is without merit. "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 judgment below was vacated and the case 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 appeal of the trial court's order authorized by Section 59.04, Florida Statutes. This statute permits an appeal from an order granting a new trial:

> Upon the entry of an order granting a new trial, the party aggrieved may prosecute an appeal to the proper appellate court without waiting for final judgment. If the judgment is reversed, the appellate court may direct that final judgment be entered in the trial court for the party obtaining the verdict unless a motion in arrest of judgment or for a judgment notwithstanding the verdict be made and prevail.

The order below vacates final judgment; it did not grant a "new" trial nor is there a "verdict" to reinstate. Section 59.04 by its plain language governs appeals of orders which set aside a "verdict" entered following a trial on the matter. *See e.g. Housing Authority of City of Tampa v. Burton,* 874 So. 2d 6 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1142a] (Section 59.04 authorizes appeal from order setting aside jury verdict and granting a new trial).

Furthermore, the trial court's order is not reviewable by certiorari as 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 vacated the final judgment against Appellee and the case remains pending. There was no error for which Appellant cannot seek plenary appeal if and when a final judgment is secured.

In addition to the fact that this Court lacks jurisdiction to consider this appeal, we also note that the Appellant failed to provide a record on appeal. Florida Rule of Appellate Procedure 9.200(e) places the burden to ensure that the record is prepared and transmitted on the Appellant. *See Sparre v. State,* 2019 WL 6906463 [289 So. 3d 839] (Fla. 2019) [44 Fla. L. Weekly S315a] (Appellant's duty to provide a complete record for review of proceedings below). Without a record, the Court is unable to ascertain and resolve the factual issues so as to conclude that the trial court erred. Thus, the failure to provide a record may be fatal to an Appellant's claim. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979); *Williams v. Jessica L. Kerr, P.A.*, 271 So. 3d 82 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D532a]; *Esaw v. Esaw,* 965 So.2d 1261, 1264-65 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2403c].

While we are dismissing this appeal for lack of jurisdiction, Appellant's arguments may have merit. Although we cannot compel the trial court to do so, we believe that it would be prudent for the trial court to entertain the motion for rehearing and, if appropriate, conduct an evidentiary hearing.

We therefore DISMISS this appeal as an order which vacates a final judgment is not an appealable order. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

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[1]Appellant failed to provide a record in support of this appeal. The Court has sua sponte considered the trial court docket in support of the facts detailed in this opinion.

* * *

Attorney's fees—Prevailing party—Unpaid wages—Appeals—Absence of transcript or record—Affirmance of lower court ruling—Fact that trial court found that plaintiff who sued for unpaid wages was not employee of defendant does not preclude award of attorney's fees in prevailing defendant's favor under section 448.08—Proposal for settlement—No merit to arguments that nominal offer of settlement was made in bad faith and was ambiguous—Trial court's determination as to amount of attorney's fees cannot be disturbed in absence of transcript of hearing on issue

CARLOS ALBERTO ISLA, Appellant, v. AMAYA LATHING & PLASTERING, LLC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-16-AP. L.T. Case No. 2017-14293-CC-05. July 14, 2020. An Appeal from the County Court in and for Miami-Dade County, Alexander S. Bokor, Judge. Counsel: Anthony M. Georges-Pierre, Remer & Georges-Pierre, PLLC, for Appellant. Andrew T. Trailor, Andrew T. Trailor, P.A., for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) Appellant brings this appeal contesting the award of attorney's fees by the trial court to Appellee. In support of this argument, Appellant raises three issues: first, that the award of attorney's fees pursuant to Florida Statutes §448.08 was improper given the trial court's finding that Appellant was not an employee; second, that the Appellee's offer of judgment was made in bad faith and was ambiguous, and therefore an award of attorney's fees could not be premised on the offer's rejection; and finally, that the award of fees was excessive. We find that each of these arguments is unsupported by applicable law and the record before this Court.

Appellant brought a claim against Appellee for breach of an oral construction employment contract, alleging that Appellant was an employee of Appellee and entitled to accrued wages. Appellant later amended the complaint alleging that his company, Kat Karlos, Inc., (Kat Karlos) entered into an oral construction contract with Appellee. He averred that Appellee breached this contract, and that as an employee of Kat Karlos, he was entitled to accrued wages from Appellee either as a third-party beneficiary to the contract or as the "alter ego" of Kat Karlos.

Appellant failed to provide a record containing applicable documents or transcripts of the hearings before the trial court on the issues raised in this appeal. Without such records or transcripts, the Court is unable to determine if the trial court may have erred. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979). The decision of the trial court comes before this Court cloaked with the presumption of correctness, and the burden is on Appellee to rebut that presumption by pointing to irregularities in the record. *Smith v. Orhama, Inc.,* 907 So. 2d 594 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1748a]; *Ahmed v. Travelers Indem. Co.,* 516 So. 2d 40, 40 (Fla. 3d DCA 1987). Without a record, and absent fundamental error, the trial court must be affirmed. *Id.*

Among the documents that Appellant failed to include in the record on appeal was the final summary judgment. Although we are under no obligation to do so, the Court has *sua sponte* taken judicial notice of the final summary judgment contained in the records of the Clerk of Court. In making its ruling, the trial court found that as a matter of law Appellant was not an employee. The court further found that Appellant was not a third-party beneficiary of the construction contract between Appellee and Kat Karlos. Finally, the court rejected Appellant's alter ego theory. As a result of these findings, the court found that summary judgment in favor of Appellee was proper and that Appellee was entitled to attorney's fees.

Appellant maintains that there is an incongruity in the trial court's findings. How on the one hand could he not be an employee, and yet have fees awarded in favor of Appellee under §448.08 as if Appellee was an employer? This question can be answered by a review of the plain language of the statute itself:

> **§448.08 - Attorney's fees for successful litigants in actions for unpaid wages.**
>
> The court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee.

Appellant brought an action for accrued wages. His claim was premised on several theories based on an employer-employee relationship. Appellant's claim was found to be without merit and Appellee was the prevailing party. Thus, the statutory entitlement to fees under §448.08 have been met. The fact that the trial court found that Appellant was not an employee does not change this conclusion. *See Lochrain Engineering v. Willingham Real Growth Investment Fund, Ltd.,* 563 So. 2d 79 (Fla. 5th DCA 1990) ("As to any particular theory of recovery on which plaintiff would be entitled to attorney fees if plaintiff prevailed, defendant should be entitled to attorney fees if defendant prevailed.")

Appellant also contends that Appellee is not entitled to attorney's fees due to his rejection of Appellee's offer of settlement. Appellant asserts that Appellee's offer of ten dollars was made in bad faith. He also argues that the offer was ambiguous, claiming that the offer lacked non-monetary conditions "such as the time and form of payment, release of other claims, confidentiality, non-disparagement, etc." Appellant's arguments are meritless. While the Appellee's offer was nominal, such offers may be appropriate where, as here, "the offeror has a reasonable basis to believe that exposure to liability is minimal." *Zachem v. Paradigm Properties Management Team, Inc.,* 867 So. 2d 1263, 1263 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D669b]. Given the trial court's conclusion in entering summary judgment in favor of Appellee, it appears that Appellee's belief was well taken. As to Appellant's contention that Appellee's offer of settlement was ambiguous, Appellant seeks to create an ambiguity where no ambiguity exists. Appellee's offer conformed to the requirements of Florida Statute §768.79(2):

> An offer must:
>
> (a) Be in writing and state that it is being made pursuant to this section.
>
> (b) Name the party making it and the party to whom it is being made.
>
> (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
>
> (d) State its total amount.

Appellee's offer contained each of the required terms. Thus, Appellant's arguments regarding the sufficiency of Appellee's offer of settlement are baseless.

Appellant's final argument is that the trial court's award of attorney's fees was excessive. However, as indicated earlier, Appellant failed to provide a transcript of the hearing before the trial court on this issue. The Court's review has been limited to the trial court's final judgment awarding fees and costs. In it, the trial court noted that it had made detailed findings on the record. Since this Court does not have the benefit of that record, Appellant cannot overcome the presumption of correctness attendant to the trial court's decision. As a result, the trial court's determination as to the amount of attorney's fees will not be disturbed.

The decision of the trial court is hereby **AFFIRMED**. Appellee's Motion for the Award of Appellate Attorney's Fees pursuant to Florida Rule of Appellate Procedure 9.400 is hereby **GRANTED**. This matter is **REMANDED** for a determination of the amount of a reasonable fee. (WALSH and SANTOVENIA, JJ., concur.)

* * *

Landlord-tenant—Eviction—Deposit of rent into court registry—Where alleged tenant has asserted in defense of eviction action that transaction in which she conveyed home to alleged landlord was not actually sale but a disguised loan secured by her home, trial court should have conducted evidentiary hearing to determine nature of transaction by which alleged landlord acquired title to property and real owner of property rather than entering default based on alleged tenant's failure to deposit rent into court registry—Further, trial court departed from essential requirements of law by letting execution issue on judgment while interrelated counterclaims remained pending

GEISELA GARCIA, Appellant, v. CARLOS L. RAMOS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-80-AP01. L.T. Case No. 2017-10683-CC-26. July 10, 2020. An appeal from the County Court in and for Miami-Dade County, Florida, Lawrence D. King, Judge. Counsel: Henry A. Lopez-Aguiar and Arnaldo Velez, for Appellant. Eduardo A. Maura and Pamela Ferretjans, for Appellee.

(Before MILIAN, R. ARECES,[1] and LOPEZ, JJ.)

(LOPEZ, J.) In the instant case, Carlos L. Ramos ("Appellee") filed a Complaint for Tenant Eviction against Grisel Garcia ("Appellant").

R. at 4-15. In the Complaint, Appellee alleged that he was the owner and lessor of the subject property and that the Appellant had an oral month-to-month tenancy since November 1.2013 through December 1, 2017. R. at 4. Appellant filed an Answer and Affirmative Defenses and Counterclaims ("Answer") and a Motion to Transfer to Circuit Court ("Motion to Transfer"). In her Answer, Appellant alleged that Appellee was not the owner of the property and that the Quit Claim Deed she signed was not intended to be a conveyance but was intended to be collateral to secure repayment of a debt. R. at 19-20. The Motion to Transfer was based on the Counterclaims which sought to quiet title, as well as recession and cancellation of the deed transferring the property at issue from the Appellant to the Appellee. R. at 16-24. In response, Appellee filed a Motion to Strike Garcia's Affirmative Defenses ("Motion to Strike") based on failure to meet the pleading requirements of the Florida Rules of Civil Procedure. R. at 37-41.

On February 27, 2018, the trial judge granted the Motion to Strike, based on Appellant's failure to set forth the reasonable grounds for the relief requested and on her failure to place money into the Court Registry. R. at 81-82. On that same date, the trial judge entered an order granting the Motion to Dismiss. R. at 83. Both orders were entered without a hearing. Also on that same date Appellee filed a Motion for Default Final Judgment for Tenant Eviction based on the Appellant's failure to deposit rent owed into the Court Registry and her failure to file a responsive pleading. R. at 77-78. On February 28, 2018 the trial court judge entered a Final Judgment for Removal of Tenant and Amended Order Granting Plaintiff-Counter-Defendant's Motion to Dismiss ("Amended Order of Dismissal"). R. at 83-85. The Amended Order of Dismissal granted Appellee's Motion to Dismiss, but also granted Appellant's Motion to Transfer as to the Counterclaims only. R. at 84. Appellant filed an Emergency Motion for Reconsideration, to Set Hearing and to Set Aside Order Granting Plaintiffs Motion to Strike Defendant's Answer and Affirmative Defenses and Order Granting Plaintiff-Counter-Defendant's Motion to Dismiss; she additionally filed an Emergency Motion to Set Aside Final Judgment for Removal of Tenant and Motion to Modify Amended Order Granting Plaintiff-Counter-Defendant Motion to Dismiss. R. at 86-92. The trial court denied both on March 1, 2018. R. at 156-59.

In Florida, a landlord may proceed with an action for possession in county court when seeking to remove a tenant from its premises. *Toledo v. Escamilla,* 962 So. 2d 1028, 1029-30 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1876a]. However, a landlord/tenant relationship is a condition precedent. *Id.* at 1030. If there is no landlord/tenant relationship, then the county court lacks subject matter jurisdiction over the action. *Id.* Additionally, in an eviction action where there is a factual dispute in the case concerning who is the true owner of the property, the trial court must first conduct an evidentiary hearing to determine the nature of the transaction in question and who is the true owner of the residence before requiring a deposit into the registry. *Minalla v. Equinamics Corp.,* 954 So. 2d 645, 648-49 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D758a]. The trial court commits a reversible error when imposing the payment requirement upon the defendant before holding the evidentiary hearing and making the necessary determinations as to the relationship between the parties. *Id. See also Bernstein v. New Beginnings Tr., LLC,* 988 So. 2d 90, 95-96 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1777a] (trial court erred by not holding evidentiary hearing before awarding partial summary judgment of eviction because genuine issue of material fact existed as to whether residents of home conveyed the home to the buyer and leased it back with an option to purchase actually intended a mortgage rather than a sale).

The instant case is very similar to *Minalla,* where the purported tenant asserted that the transaction in which she conveyed her home to the purported owner was not actually a sale, but a disguised loan secured by her home. *Id.* at 646. The Third DCA determined that because there was a factual dispute concerning who was the true owner of the property, the trial court was required to conduct an evidentiary hearing regarding the nature of the transaction and who was the true owner of the residence in question. *Id.* at 648-49. The Court reversed based upon the trial court's failure to conduct such a hearing. *Id.* at 649.

This Court treats the present appeal as a Petition for Writ of Certiorari for two reasons. First, because the trial court failed to conduct an evidential* }' hearing, as required by law. *See Minalla.* 954 So. 2d at 648-49. Consequently, the trial court may not have had subject matter jurisdiction and should have not entered a final judgment before conducting an evidentiary hearing. *See Espinosa v. Alonso*, 15 Fla. L. Weekly Supp. 16a (Fla. 11th Jud. Cir. Ct. Oct. 17, 2007). Second, because the trial court in the Amended Order of Dismissal granted Appellant's Motion to Transfer the Counterclaims to the circuit court. As a result, the trial court departed from the essential requirements of law when it let execution issue on the judgment while other interrelated claims remained pending. *See Innovision Practice Grp., P. A. v. Branch Banking & Tr. Co.,* 135 So. 3d 501. 503 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D622a].

Therefore, the Petition for Writ of Certiorari is **GRANTED** and the Order Granting Plaintiffs Motion to Strike Defendant's Answer and Affirmative Defenses. Amended Order Granting Plaintiff-Counter-Defendants Motion to Dismiss, and Plaintiffs Final Judgment for Removal of Tenant are **QUASHED**. **REMANDED** for proceedings consistent with this opinion. (MILIAN, J., concurs. R. ARECES, J., concurs with written opinion.)

(R. ARECES, J., Concurring Opinion.) I concur in the reversal of the Final Judgment, but respectfully disagree with the reasoning.

The error attributed to the lower court by the majority is a failure to have conducted an evidentiary hearing to determine whether the Plaintiff/Appellee was, in fact, the owner/landlord of the subject real property. I disagree. Instead, I believe the lower court does not have the jurisdiction to conduct said evidentiary hearing and erred when, upon reviewing the Affirmative Defenses and Counterclaim, did not immediately transfer the action to Circuit Court.

The lower court's decision to exercise subject matter jurisdiction did not involve the resolution of any facts. This Court, therefore, reviews, *de novo,* the County Court's decision to exercise jurisdiction over the matter. *See e.g. Beroes v. Florida Dept. Revenue ex. rel. Palacios,* 958 So. 2d 489, 492 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1384a].

The Florida legislature has given the *Circuit Court* exclusive jurisdiction over "all actions involving the title. . .of real property." *See* Fla. Stat. 26.012(2)(g) (2017). Moreover, Florida Rule of Civil Procedure 1.170 provides that "[i]f the demand of any counterclaim . . . exceeds the jurisdiction of the court in which the action is pending, the action must be transferred *immediately* to the court of the same county having jurisdiction of the demand in the counterclaim." *See* Fla. R. Civ. P. 1.170(j) (2017) (emphasis added).

In this case, Appellant filed an Answer, Affirmative Defenses and Counterclaim wherein she claims to be the rightful owner of the subject real property and seeks, among other things, to quiet title to said property. The Affirmative Defenses and Counterclaim, therefore, raise legal issues beyond the County Court's jurisdiction. The Counterclaim, moreover, which seeks relief in excess of the County Court's jurisdiction, would, pursuant to Rule 1.170(j), make the entire action subject to immediate transfer to the Circuit Court.

The majority, nevertheless, relies on two cases from the Third

District Court of Appeal—namely, *Toledo v. Escamilla,* 962 So. 2d 1028 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1876a] and *Minalla v. Equinamics Corp.,* 954 So. 2d 645 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D758a]. Respectfully, these cases do more to support this concurrence than the majority opinion.

The majority reads *Minalla* as requiring the County Court to conduct an evidentiary hearing concerning the ownership of the real property at issue. *Minalla,* however, is inapposite, and the majority's reliance on it is misplaced.

Minalla concerns an appeal from a *Circuit Court* action. Unlike County Courts, Circuit Courts *have* jurisdiction to preside over matters pertaining to the title of real property. *See* Fla. Stat. 26.012(2)(g) (2017). A decision that requires a *Circuit Court* to conduct an evidentiary hearing on issues over which it has jurisdiction, cannot reasonably be read to expand the jurisdictional limitations of the *County Court.* In fact, the issue of whether a County Court has jurisdiction over an eviction action, where title to the subject property is in dispute, is not at all addressed by *Minella.* It was, however, addressed by *Toledo.* And *Toledo* controls this case.

Like this case, *Toledo* concerns a *County Court's* judgment of eviction. In *Toledo,* a Circuit Appellate Panel, like this one, required the County Court to conduct an evidentiary hearing to determine if the defendant was, in fact, an equitable owner of the subject property. *See* 962 So. 2d at 1029. The County Court conducted said evidentiary hearing, found the defendant was not an equitable owner of the property, and entered a judgment of eviction. *Id.* The Circuit Appellate Panel then affirmed the judgment of eviction. The Third District Court of Appeal, however, *reversed* the Circuit Appellate Panel, because it applied the wrong law. *Id.* Specifically, the Third District Court of Appeal held,

> We find that the circuit court failed to apply the correct law in affirming the county court's judgment as **the county court lacked subject matter jurisdiction to enter the judgment of eviction**. . . .We also find that when [defendant] asserted in her answer that she was not a tenant and that she had an equitable interest in the property, ejectment, not eviction, was the proper remedy, and **the matter should have been transferred to the circuit court**. The circuit court has "exclusive original jurisdiction" over ejectment actions. *See* § 26.012(2)(f), Fla. Stat. (2004). **Thus, the county court did not have subject matter jurisdiction to determine whether [defendant] had an equitable interest in the [subject property].**

Id. at 1030 (emphasis added) (internal citations omitted); *see also Mesnikoff v. FQ Backyard Trading, LLC,* 239 So. 3d 765, 770 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D541a] (finding, as an alternative ground, that the county court lacked jurisdiction to enter a judgment of eviction where the "tenant" claimed to have an equitable interest in the property); *Ward v. Estate of Ward*, 1 So. 3d 238, 239 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D28f] ("In their answer to the complaint for eviction filed in the county court. . .petitioners asserted a claim to an equitable interest in the property they inhabited, which should have been resolved by the circuit court.").

This case is a lot like *Toledo,* except clearer. Here, *in addition* to defenses similar to those raised in *Toledo,* Defendant filed a Counterclaim that seeks relief that indisputably exceeds the County Court's jurisdiction. *See* Fla. Stat. 26.012(2)(g) (2017) (stating the circuit court has exclusive jurisdiction "in all actions involving the title. . .of real property"); *see also* Fla. R. Civ. P. 1.170(j) (2017) ("[i]f the demand of any counterclaim. . .exceeds the jurisdiction of the court in which the action is pending, the action must be transferred *immediately* to the court of the same county having jurisdiction of the demand in the counterclaim.").

The majority, nevertheless, finds that the law requires the County Court to conduct an evidentiary hearing. The majority is incorrect.

If the County Court holds an evidentiary hearing, as required of it by the majority, it will, necessarily, make a determination that concerns title of real property. The County Court will *either* (1) find that Appellee is the owner of the property and, thus, a landlord who can avail himself of the residential eviction laws to Appellant's detriment; or, (2) that *Appellant* is the owner thereby preventing the Appellee from exercising some right he may have as an owner/landlord of the subject property. Irrespective of how the County Court rules, it will have, at a minimum, exceeded its jurisdiction, and, at worst, exposed the Parties to the risk of inconsistent judgments, should the Circuit Court, in its determination of Appellant's Counterclaim, disagree with the County Court.

In short, the County Court does not have jurisdiction over matters concerning the title to real property. The County Court should have "immediately" transferred the action to the Circuit Court, which, by rule, would have had "full power and jurisdiction over the demands *of all parties.*" Fla. R. Civ. P. 1.170(j) (emphasis added). I would, therefore, in accordance with the plain meaning of Fla. Stat. § 26.012(2)(g) and Rule 1.170(j), *and* consistent with the Third District Court of Appeal's binding opinion in *Toledo,* find the lower court erred in not immediately transferring this matter to Circuit Court, reverse the lower court's Final Judgment dated February 28, 2018 and remand to the lower court for proceedings consistent with this opinion.[2]

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[1]Judge Areces did not participate in oral argument.

[2]I do not believe it is necessary to treat the appeal as a petition for writ of certiorari. *See* Fla. R. App. P. 9.030(c) (2018) ("circuit courts shall review, *by appeal.* . .final orders of lower tribunals as provided by general law.") (emphasis added). Actions to remove a tenant are subject to summary procedures. *See* Fla. Stat. § 83.21 (2017). Florida's summary procedures allow for an appeal from a final judgment. *See* Fla. Stat. § 51.011(5) (2017). However, *even if* it is appropriate to treat this appeal as one seeking a writ of certiorari, I would reach the same result and grant the writ. The lower court's decision departed from the fundamental requirements of law, and has materially, and irreparably, prejudiced the Appellant for the remainder of the proceedings by dispossessing her of a home she claims to be her homestead.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Accord and satisfaction—Reasonableness of charges—Trial court correctly rejected insurer's accord and satisfaction defense, ruling that insurer's partial payment did not meet the elements of accord and satisfaction under either common law or the Uniform Commercial Code—Trial court abused its discretion by excluding insurer's conflicting affidavit on whether medical bills at issue were reasonable in price—Taking excluded affidavit into account, it was error to grant summary judgment on issue of reasonableness

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Juana Espinosa Ruiz, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-358-AP-01. L.T. Case No. 2013-011946-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.) On May 16, 2009, Juana Espinosa Ruiz ("Ruiz") was involved in an automobile accident and sustained personal injuries. She was insured under an automobile policy issued by the Appellant, United Automobile Insurance Company ("United Auto"). Ruiz was treated by Appellee, Miami Dade County MRI, Corp. ("MRI"). Ruiz assigned her right to PIP benefits under the United Auto policy to MRI. MRI subsequently then billed United Auto for

services rendered to Ruiz. When United Auto only made a partial payment for the services billed, MRI filed a complaint for breach of contract. In response, United Auto raised the defense of accord and satisfaction and challenged the reasonableness of MRI's charges. The trial court entered summary judgment in favor of MRI on both issues. We agree the trial court was correct in rejecting United Auto's accord and satisfaction defense. However, we reverse on the issue of reasonableness.

ACCORD AND SATISFACTION

United Auto filed a motion for final summary judgment on the affirmative defense of accord and satisfaction, and MRI responded with a motion for summary judgment 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"). We affirm this ruling for the reasons set forth in *United Automobile Insurance Co. v. Miami-Dade MRI a/a/o Ramos*, 2018-218 (Fla. 11th Cir. Ct., June 11, 2020) [28 Fla. L. Weekly Supp. 777a].

REASONABLENESS

Having succeeded in defeating United Auto's accord and satisfaction defense, MRI filed a motion for summary judgment contending its charges were reasonable. MRI relied on an affidavit from its operations manager to establish the reasonableness of its charges. United Auto responded with an affidavit from its adjuster, Denorah Lang. The trial court rejected the conflicting affidavit offered by United Auto and entered summary judgment in favor of MRI.

This case is indistinguishable from our decision in *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]. As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to exclude United Auto's conflicting affidavit on whether the medical bills at issue were reasonable in price. Taking United Auto's excluded 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 conditionally **GRANTED**, limited to the issue on which it prevailed and conditioned upon ultimately prevailing. Appellant's Motion for Attorney's Fees is conditionally **GRANTED**, limited to the issue on which it prevailed, 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.

(DE LA O, specially concurs.) I concur in the result. Although I believe that the language United Auto placed in the payee line of the check to MRI satisfies the conspicuousness requirement under the UCC, I equally believe in *stare decisis*. This Court having previously held in *United Automobile Insurance Co. v. Miami-Dade MRI a/a/o Ramos*, 2018-218 (Fla. 11th Cir. Ct., June 11, 2020) [28 Fla. L. Weekly Supp. 277a] that the same facts did not constitute sufficient accord and satisfaction, I am bound to concur here.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Accord and satisfaction—Reasonableness of charges—Trial court correctly rejected insurer's accord and satisfaction defense, ruling that insurer's partial payment did not meet the elements of accord and satisfaction under either common law or the Uniform Commercial Code—Trial court abused its discretion by excluding insurer's conflicting affidavit on whether medical bills at issue were reasonable in price—Taking excluded affidavit into account, it was error to grant summary judgment on issue of reasonableness

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MIAMI DADE COUNTY MRI CORP., a/a/o Maria Gonzalez, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-368-AP-01. L.T. Case No. 12-15317 SP 23 (06). June 23, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon., Joseph Mansfield, 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.) On May 19, 2008, Maria Gonzalez ("Gonzalez") was involved in an automobile accident and sustained personal injuries. She was insured under an automobile policy issued by the Appellant, United Automobile Insurance Company ("United Auto"). Gonzalez was treated by Appellee, Miami Dade County MRI, Corp. ("MRI"). She assigned her right to PIP benefits under the United Auto policy to MRI. MRI subsequently then billed United Auto for services rendered to Gonzalez. When United Auto only made a partial payment for the services billed, MRI filed a complaint for breach of contract. In response, United Auto raised the defense of accord and satisfaction and challenged the reasonableness of MRI's charges. The trial court entered summary judgment in favor of MRI on both issues. We agree the trial court was correct in rejecting United Auto's accord and satisfaction defense. However, we reverse on the issue of reasonableness.

ACCORD AND SATISFACTION

United Auto filed a motion for final summary judgment on the affirmative defense of accord and satisfaction, and MRI responded with a motion for summary judgment 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"). We affirm this ruling for the reasons set forth in *United Automobile Insurance Co. v. Miami-Dade MRI a/a/o Ramos,* 2018-218 (Fla. 11th Cir. Ct., June 11, 2020) [28 Fla. L. Weekly Supp. 277a].

REASONABLENESS

Having succeeded in defeating United Auto's accord and satisfaction defense, MRI filed a motion for summary judgment contending its charges were reasonable. MRI relied on an affidavit from its operations manager to establish the reasonableness of its charges. United Auto responded with an affidavit from its adjuster, Denorah Lang. The trial court rejected the conflicting affidavit offered by United Auto and entered summary judgment in favor of MRI.

This case is indistinguishable from our decision in *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]. As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to exclude United Auto's conflicting affidavit on whether the medical bills at issue were reasonable in price. Taking United Auto's excluded 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 conditionally **GRANTED**, limited to the issue on which it prevailed and conditioned upon ultimately prevailing. Appellant's Motion for Attorney's Fees is conditionally **GRANTED**, limited to the issue on which it prevailed, 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.

(DE LA O, J. specially concurs.) I concur in the result. Although I believe that the language United Auto placed in the payee line of the check to MRI satisfies the conspicuousness requirement under the UCC, I equally believe in *stare decisis.* This Court having previously held in *United Automobile Insurance Co. v. Miami-Dade MRI a/a/o Ramos,* 2018-218 (Fla. 11th Cir. Ct., June 11, 2020) [28 Fla. L. Weekly Supp. 277a] that the same facts did not constitute sufficient accord and satisfaction, I am bound to concur here.

* * *

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 Rodas Santo, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-103-AP-01. L.T. Case No. 12-14243 SP 23 (02). June 23, 2020. On Appeal from the County Court in and for Miami-Dade County, Florida, Hon. Caryn 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.) (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider. This case is indistinguishable from our decision in *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].

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 of its adjuster 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 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.

* * *

83 BROOKLYN BAGEL COMPANY, LLC d/b/a/ TOASTED BAGELRY and DELI, KHALED MOHAMED, AND ISLAM MOHAMED, Appellants, v. RENARDO DELGADO SILVESTRE, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-185-AP-01. L.T. Case No. 2017-168-CC-24 (MB 01). June 26, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Diana Gonzalez-Whyte, Judge. Counsel: Greenberg Traurig, P.A., and Ronald M. Rosengarten, for Appellant. Lisa Kuhlman, for Appellee.

(Before WALSH, BOKOR, and DEL RIO, JJ.)

OPINION

(PER CURIAM.) Affirmed. *See Avael v. Sechrist*, 2020 WL 193296445 (Fla. 3d DCA April 22, 2020) [45 Fla. L. Weekly D974a].

* * *

Counties—Code enforcement—Zoning—Short-term vacation rentals in residential zone—Code enforcement special magistrate did not depart from essential requirements of law by finding that residential zone property that has been used for short-term vacation rentals of fewer than seven days violated county code—Although county code does not expressly prohibit short-term vacation rentals in residential zone, code defines a permitted dwelling unit as residence that may be rented on weekly or longer basis, and code as a whole intends to restrict short-term rentals to properties meeting specific location and licensing criteria with which appellants' property does not comply

DARA KHOYI and ANVAR K. KHOYI, Appellants, v. HILLSBOROUGH COUNTY, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 18-CA-11209, Division X. L.T. Case No. CE18009334. June 3, 2020. On review of a decision of the Hillsborough County Code Enforcement Special Magistrate. Counsel: Natasha Khoyi, FordHarrison LLP, Tampa, for Appellants. Kenneth C. Pope, Senior Assistant County Attorney, and Christine Beck, County Attorney, Tampa, for Appellee.

APPELLATE OPINION

(COOK, J.) This Court is asked to review a decision of the Hillsborough County Code Enforcement Special Magistrate (CESM). The order to be reviewed determined that the property of Appellants

Dara and Anvar Khoyi, which has been used for vacation rentals, violated the Hillsborough County Code. It imposes a fine for continued violations. The alleged violations stem from the fact that the Khoyis regularly leased their residentially-zoned property as a vacation rental for terms of less than seven days' length, an alleged improper use of zone under the code. Secs. 2.02.01, 2.02.02, and 5.02.01, Hillsborough County Land Development Code. The subject property, known as Villa Adriana, is zoned Planned Development (PD) for residential use. When the economy collapsed in 2007, the Khoyis began using their property as a vacation rental and event venue as an attempt to keep their home. The Khoyis do not deny renting the dwelling for periods of less than seven days.[1] They contend, however, that the code does not expressly prohibit short-term rentals merely because it *defines* "dwelling unit" as a residence that may be rented for periods exceeding seven days' duration. For this reason they contend the decision finding the property in violation of its zoning departs from the essential requirements of law. Having reviewed the applicable code as well as provisions in other jurisdictions, this court finds that the Hillsborough County Code as a whole intends to restrict short-term vacation rentals to properties meeting specific locational and licensing criteria, with which the subject property does not comply. The court finds no basis to disturb the decision of the special magistrate.

This court has jurisdiction. Section 162.11, Florida Statutes. On appeal, courts review decisions of code enforcement boards to determine whether Appellants were afforded due process, whether competent substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). There is no due process issue presented in this appeal. Moreover, because the Khoyis admit to renting their property on a short-term basis, there is no evidentiary issue presented. The court must solely determine whether the special magistrate departed from the essential requirements of law when he concluded that the code's definition of a "dwelling unit," which states that it is "for owner occupancy or for rental, lease . . . on a weekly or longer basis," prohibits vacation rentals for periods of less than seven days.

In determining whether the definition of "dwelling unit" prohibits such short-term vacation rentals, the code is not a model of clarity. As the Khoyis point out, unlike ordinances in other jurisdictions, Hillsborough County's code does not clearly proscribe short-term rentals based on the duration of the lease term or define short-term lease or "vacation rental." In contrast, Miami Beach has more specific restrictions and regulations regarding vacation rentals, providing different restrictions in different zones, and specifically refers to vacation rentals as "short-term rentals" and to their occupancy as "transient use and occupancy." City of Miami Beach, Fla., Code of Ordinances, Secs. 142-1111, 142-905(b), 102-306. In Miami Beach, rentals of less than six months' duration are prohibited in most residential zones. *Id.* at Sec.142-905. In another example, the City of Marathon explicitly prohibits rentals of less than seven days' duration. Marathon, Fla., Code of Ordinances Sec. 8-12(a)(1). Monroe County's ordinance defines a "vacation rental" and restricts them to certain zones, providing very detailed regulations on vacation rentals for those zones where they are permissible. Monroe County, Fla., Code of Ordinances, 101-1 (defines "vacation rental"), Secs.134-1, 130-83 and 84, 102-56.

The following definitions in Hillsborough County's code assist the court's analysis:

> **Dwelling Unit**: A room or groups of rooms forming a single independent habitable unit that is used for, intended to be used for, or may be used for, living, sleeping, sanitation, cooking, and eating purposes by one family only; for owner occupancy or for rental, lease, or other occupancy *on a weekly or longer basis*. . . .
>
> **Lodging unit**: A room or group of rooms forming a separate habitable unit used or intended to be used for living and sleeping purposes by one family only, without independent kitchen facilities; or a separate habitable unit, with or without independent kitchen facilities, occupied or intended to be occupied by transients on a rental or lease basis.
>
> **Bed and Breakfast Establishment**: A building often of historical significance containing a number of lodging units intended primarily for rental to provide overnight accommodations with board. No personal care services shall be provided at this facility.
>
> **Resort Dwelling**: A resort *dwelling* is an individually or collectively owned single-family, two-family, or multi-family dwelling unit which is *rented or leased to transients on a daily or longer basis* and is licensed in accordance with Florida Department of Business and Professional Regulation per Chapter 509, Florida Statutes.[2]

(Emphasis supplied.)

The *definition* of "dwelling unit" incorporates rentals of *more* than a week's duration. Appellants argue that this alone does not prohibit a particular structure from being a short-term rental. Arguably, its *use* as a short-term rental could simply mean that the structure is not, by definition, a "dwelling." For example, it could be defined as one of the subcategories of "lodging unit," a "resort dwelling," or a "bed and breakfast establishment." When we turn to the code's table of allowable uses for residential zones, however, it shows that several types of dwellings and other uses, such as day care facilities, are permitted or permissible (requires approval) uses in the subject property's zone. The table of allowable uses does not allow, and we have not been made aware of, any *allowable* use in the subject property's zone that contemplates short-term rentals of the sort presented here. With regard to "dwellings," if dwellings are a permitted use, and the definition of "dwelling" includes leases for a week *or longer*, it would seem to follow that leases of a shorter duration are not allowed in most residential zones. This appears to be the county's intent.

Regarding *uses* that incorporate short-term rentals in residential zones, one that is permissible, but not automatically allowed, are bed and breakfast establishments. These are conditionally allowed in some residential zones, but not in all of them. Such establishments contemplate short-term rentals (i.e. overnight) such as Appellants were using, but also include other services such as the provision of on-site breakfast and other meals. If Appellants' PD zoning allows bed-and-breakfasts as a conditional use, further administrative oversight is nonetheless required for a property owner to do so, and operating such an establishment without it would still constitute an improper use of zone.

Nowhere in Hillsborough County's code is the term "vacation rental" found, but the code's definition of "resort dwellings" is similar to those called vacation rentals or dwellings in other jurisdictions. Unlike other dwellings, "resort dwellings" may be leased on a short-term basis. Single family homes may be used for this purpose. As does Monroe County, Hillsborough County restricts "resort dwellings" to certain zones, here called an overlay district. The code's sec. 3.21.01 sets forth the purpose and intent for the resort overlay district. It says:

> The purpose of the Resort Dwelling Overlay District (RDOD) is to permit the use of single-family, two-family, or multi-family dwelling units as *resort* dwellings in specific areas of the County that have been designated as appropriate for a mixture of permanent residential and *resort* rentals. It is the intent of this Part to provide design standards that will preserve the residential character of the area while minimizing the impact of *resort* uses on permanent residents.
>
> To operate in the overlay a rezoning is required. In addition, the property must meet the following criteria:

A. The use of the *Resort* Dwelling *Overlay* District shall be restricted to properties that are consistent with one or more of the following:

1. The property is located within 500 feet of Tampa Bay;

2. The property abuts the Hillsborough River, the Alafia River, or the Little Manatee River; or

3. The property is located within 500 feet of a state or county regional park containing a minimum of 30 acres, a regional recreational use, or a golf club.

The foregoing confirms the County's intent with regard to short-term rentals by restricting them to locations where, in the minds of the decision-makers, transient and permanent residents can more peacefully co-exist. The code also requires resort dwellings to be licensed in accordance with Florida Department of Business and Professional Regulation under Chapter 509, Florida Statutes. Being in an overlay district, such dwellings may be located in more than one type of zone, based on strict locational and other criteria. Because they are permitted only in the overlay district, resort dwellings do not appear anywhere on the code's table of allowable uses. To be designated as a resort dwelling, the property must be rezoned. It cannot be disputed that the subject property does not meet any of the locational criteria to be considered for the resort overlay district.

In conclusion, the subject property violates the code. The zone the subject property is located in contemplates single family residential dwellings, which may be rented, but only for periods of more than a week's duration unless given the administrative approval required for a bed and breakfast establishment. Other short-term rentals aren't prohibited within the county, but they are either limited to the "resort overlay district," require administrative approval or both. The code does not run afoul of §509.032(7)(b), Florida Statutes, because it was adopted before June 1, 2011. It would, therefore, be exempt from pre-emption by the state.

The judgment is AFFIRMED. (COOK and BARBAS, JJ.)

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[1]Appellants were also cited for continuing to hold parties and events on site, which was the subject of an earlier proceeding before this court. *Dara Khoyi and Anvar K. Khoyi, v. Hillsborough County*, 26 Fla. L. Weekly Supp. 554a (Fla. 13th Jud. Cir. [Appellate] 2018). The court declines to address the issue in this appeal.

[2]As with hotels and motels, which the code allows only in special public interest and manufacturing areas with special locational criteria, resort dwellings are not on the table of allowable uses. They are placed in the county's resort dwelling overlay district. As will be shown, resort dwellings may be single family homes permitted for use as short-term vacation rentals. They are required to meet specific locational criteria for approval.

(RICE, J., dissenting without opinion.) *See City of Miami v. AIRBNB, Inc.*, 260 So. 3d 478, 484-488 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2700a] (Lagoa, J., dissenting); § 509.032(7)(b), *Fla. Stat.*; Op. Att'y Gen. Fla.19- 07 (2019); Op. Att'y Gen. Fla. 14-09 (2014).

* * *

Counties—Code enforcement—Due process—Notice—Neither county code nor due process required personal service of notice of hearing regarding code violations—Requirements of due process were met where county served notice of hearing on contractor by first class mail and certified mail at address on file with Department of Business and Professional Regulation and posted notice at courthouse, and record reveals that contractor contacted county staff to seek postponement of hearing

LANCE GILMET, Petitioner, v. HILLSBOROUGH COUNTY DEVELOPMENT SERVICES DEPT., BUILDING AND CONSTRUCTION SERVICES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-6031, Division A. L.T. Administrative Case No. 20180891. May 29, 2020. Counsel: Chad N. Dunigan, Koeller Nebeker Carlson & Haluck, LLP, Orlando, for Petitioner. Luis Whitehead, III, Senior Assistant County Attorney, and Christine Beck, County Attorney, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(THOMAS, J.) This case is before the court on Lance Gilmet's Petition for Writ of Certiorari filed August 12, 2019. The court has reviewed the petition, response, reply, appendices, and applicable law. Based on this court's determination that, despite his argument to the contrary, Petitioner was afforded requisite notice of the proceeding below, the petition is denied.

Petitioner Lance Gilmet is a state-certified general contractor. As a holder of a general contractor's license, he acted as the qualifying licensee for Ashton Residential Tampa, LLC, a home builder. Gilmet was acting in that capacity when, on or about October 19, 2016, a permit for Ashton Residential to build the home that is now owned by Roland and Emilio Boyd was issued on his application. Gilmet did not provide an address on the permit application. The home was built, and, on March 17, 2017, a certificate of occupancy was issued.

According to the record, the home suffered from a number of significant cracks that began developing within a month of the Boyds' moving in. Some of the cracks were substantial. Some were hidden and discovered only when carpet was removed. The record shows that the Boyds communicated their concerns directly to Ashton Residential soon after taking possession. Unsatisfied by Ashton Residential's response, however, the Boyds eventually complained to Hillsborough County, which initiated an action against Gilmet through the County's Building Board of Adjustment, Appeals and Examiners. After concluding its investigation, the County issued a Notice of Violation to Gilmet on December 10, 2018. The notice was sent by certified and regular mail to Lance Gilmet at Ashton Residential's corporate address in Lake Mary, Florida. According to the record, at the time the County sent notice, Gilmet's license was still linked with Ashton Residential. A corporate representative of Ashton Residential signed for the notice. A hearing was initially set for February 19, 2019. On February 5, 2019, Ashton Residential sent a letter to the Board seeking a 45-60 day continuance of the hearing to enable it to respond to and address the Boyds' concerns. According to the record transcript, a county staff member indicated that Gilmet called and requested a 60-day continuance. The hearing was continued to April 16, 2019, for which additional notice was provided.

After the requested extension, the hearing was held April 16, 2019. Ashton Residential appeared through counsel, along with Ashton Residential's current qualifying licensee Darryl Colwell. Gilmet did not appear. At the hearing, notice to Gilmet was an issue. Staff indicated that Gilmet was served at the address on his contractor's license. The record also indicates that even as late as the day of the hearing, Gilmet's license was still linked to Ashton Residential, despite testimony that he had left Ashton Residential shortly after completing the Boyds' house. In response to the concerns voiced about notice, a board member with evident professional subject-matter expertise informed participants that a licensee is responsible for updating his address with the Department of Professional and Business Regulation (also known as DBPR), as well as for the consequences for failing to do so. The consequences included the Board's determination that Gilmet was responsible for several violations of the county code as well as for deviating from the building plans. Sanctions included the assessment of an administrative fee of $102, and the requirement that Gilmet correct the defects to the Boyds' home or face the loss of permitting privileges in Hillsborough County, as well as its municipalities Tampa, Temple Terrace, and Plant City.[1]

In his petition, Gilmet contends, among other things, he was denied procedural due process because he was not personally served with notice of the hearing at his "personal address of record." The court

disagrees. Not only does the code not require personal service of process in this context, general notions of due process similarly do not require it. *Schimenti v. School Bd. of Hernando Cnty,* 73 So.3d 831, 834 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D2369a]. Procedural due process is afforded so long as notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

With regard to the specific proceeding below, the code allows, but does not require, personal service. Section 113.5.3.2, Hillsborough County Code, provides that service may be provided to an alleged violator by certified mail, return receipt requested. The County did this, sending notice to Lance Gilmet at Ashton Residential's corporate address—the address associated with Gilmet's license. The same code section provides that when an individual cannot be served or located,[2] then service is sufficient if sent to the alleged violator's last known address as it appears on the records of construction services *or* by posting the notice for at least 10 calendar days prior to the hearing at the Hillsborough County Courthouse and providing a copy by first class mail, addressed to the alleged violator at the last known address furnished to Hillsborough County.[3] As noted above, Gilmet did not provide the County with his personal address when he applied for the building permit or when he requested the continuance. The record indicates that the County used the address on file with DBPR to serve Gilmet by first class mail as well as by certified mail. In addition, the record shows that the County posted notice at the courthouse as required by the code. Finally, the record shows Gilmet *may* have had actual as well as constructive knowledge of the proceeding against him because the record contains a reference that he personally contacted staff to seek a postponement of the hearing. Even if he did not, due process does not require a showing that an interested party had actual notice. *Id.* Here, Gilmet had constructive notice, and that is sufficient to meet the requirements of due process.

In light of the foregoing, the court determines that Petitioner's remaining issues were not preserved for appellate review. *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So.2d 188, 189-190 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b].

It is therefore ORDERED that the petition is DENIED on the date imprinted with the Judge's signature.

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[1]The record indicates substantial evidence was taken and debated at the hearing.

[2]The code does not set forth what effort must be undertaken to locate a party. The record shows that the County tried unsuccessfully to locate Petitioner.

[3]Petitioner did not furnish an address at any stage of this matter. The court concludes it was reasonable for the County to attempt more direct service using the licensee's published address rather than jump to constructive service at the outset.

* * *

Criminal law—Plea—Vacation—State concedes error in trial court's denial of motion to vacate plea where there is nothing in record to refute defendant's claim that his attorney misadvised him regarding length of time he would be required to participate in diversion program

AKEEM GARY JAMAL ALLEN, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18-51AC10A. L.T. Case No. 18-3740MM10A. June 12, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kathleen McHugh, Judge. Counsel: Richard G. Bartmon, for Appellant. Nicole Bloom, for Appellee.

OPINION

(SIEGEL, A., J.) **THIS CAUSE** comes before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's order denying the Appellant's motion to vacate plea. The State of Florida has conceded error and agrees the trial court should have vacated the Appellant's plea. Having considered Appellant's Initial Brief, Appellee's Answer Brief, including the concession of error, the trial court record, and applicable law, this Court finds as follows:

The Appellant (Defendant) was charged with Battery (Misdemeanor). On September 27, 2018, the Defendant appeared in court for a change of plea, and the parties agreed the Defendant would enter a pretrial diversion program.

The Defendant maintained that his counsel affirmatively told him he could "double up" on classes, thereby shortening his time in the diversion program. During the plea hearing, there was no mention of the Defendant's ability to "double up" on classes. The same day he took the plea, the Defendant's counsel filed a motion to vacate the plea, claiming the nature of the Defendant's allegations required her to withdraw as the attorney of record. The Office of Criminal Conflict was appointed. The Defendant's new counsel filed an additional motion to vacate the plea, claiming that the Defendant had wanted to go to trial, he felt pressured to plead guilty, and he believed he was allowed to "double up" on the diversion program classes, thereby shortening his time in the program.

During the hearing on the motion to vacate the plea, the Defendant testified that his initial counsel told him he could finish the diversion program in less than 26 weeks; however, upon reporting to the program he was told it would take six to eight months to complete the program, and there was no way to "double up" or accelerate the program. The Defendant stated he would not have plead guilty had he known those facts. The Defendant's new counsel argued that the plea colloquy did not disprove the Defendant's claim of misadvise, and the Defendant had shown "good cause" to vacate his plea. The State argued that the Defendant was bound by the guilty plea. The trial court ultimately denied the Defendant's motion.

Once again, the State of Florida has conceded error in this appeal and agrees with the Defendant that his plea should have been vacated by the trial court.

"The standard of review of a trial court's denial of a motion to withdraw plea is abuse of discretion." *Woodly v. State,* 937 So. 2d 193, 196 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2223a].

Pursuant to Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)-(e) and Florida Rule of Criminal Procedure 3.170(1), a defendant may withdraw a plea within thirty (30) days after the rendition of the sentence, but only upon the following grounds: (a) the lower tribunal's lack of subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by a motion to withdraw plea; (c) an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved; or (e) as otherwise provided by law. *See Snodgrass v. State,* 837 So. 2d 507 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D278a]; *Simeton v. State,* 734 So. 2d 446 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1113a].

In the instant appeal, the State concedes that the trial court's plea colloquy did not conclusively refute the Defendant's claim of misadvise of counsel regarding the length of time the Defendant would be required to participate in the State's diversion program. The State further conceded that the record contains no evidence contradicting the Defendant's assertions of the terms of the diversion program agreement. Florida Rule of Criminal Procedure 3.170(f) requires liberal construction, and the trial court should have allowed the Defendant to withdraw his plea based on counsel's misadvise. *See, State v. Leroux,* 689 So. 2d 235 (Fla. 1996) [21 Fla. L. Weekly S557a].

As the State of Florida has conceded, and there is nothing in the record that refutes the Defendant's claim of attorney misadvise, the Defendant's motion to vacate plea should have been granted.

Accordingly, it is

ORDERED AND ADJUDGED that the trial court's order denying Appellant's motion to vacate plea is hereby **REVERSED** and this matter is **REMANDED** to the trial court for proceedings not inconsistent with this Opinion. (MURPHY III, J., and FEIN, M., JJ. concur.)

* * *

STEPHANIE CORREA, Appellant, v. WESTBURY J CONDOMINIUM ASSOCIATION, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-007519 (AP). L.T. Case No. CONO18-001005. June 10, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John Hurley, Judge. Counsel: Stephanie Correa, Pro Se, Deerfield Beach, for Appellant. Michael D. Bogen, Bogen Law Group, P.A., Coral Springs, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the final judgment of foreclosure is hereby **AFFIRMED**. Appellee's Motion for 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, and **DENIED** as to costs, **WITHOUT PREJUDICE** to Appellee 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."). Further, Appellant's Motion for Attorney's Fees and Costs is hereby **DENIED**. (BOWMAN, LOPANE, and FAHNESTOCK, JJ., concur.)

* * *

Criminal law—Search and seizure—Residence—Exigent circumstances—Warrantless search of apartment of defendant who threw baggie believed to contain cannabis into open door of apartment as officer approached him outside his apartment was not justified by exigent circumstances where there was no danger that defendant, who was immediately detained outside of apartment pending arrival of backup, would escape or destroy evidence and officer had no reason to believe anyone was inside apartment—Trial court erred in denying motion to suppress

NATHAN JONES, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 16-000050AC10A. L.T. Case No. 16-003912MM10A. June 12, 2020. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Judge Levey Cohen. Counsel: Lisa Lawlor, Public Defender's Office, Fort Lauderdale, for Appellant. Nicole Bloom, State Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) **THIS CAUSE** is before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's order denying his motion to suppress. Having considered the Appellant's initial brief, Appellee's answer brief, the trial court record, and applicable law, this Court finds and decides as follows:

Nathan Jones ("Appellant") is appealing the trial court's denial of his motion to suppress. (R. 33-34).[1] On April 27, 2016, Appellant was charged with unlawful use of a false name (Count 1) and possession of cannabis (Count 11). (R. 3). On April 5, 2016, Officer Colon approached Appellant after seeing him have difficulty with a bicycle lock near the door to his apartment. (R. 1-2). At the suppression hearing, Officer Colon testified that the Appellant's neighborhood is "a pretty high crime area," (R. 77, line 16), and Officer Colon "didn't know what exactly was going on." (R. 77, line 20-21). Appellant gave the officer a false name and threw what appeared to be a small, clear, plastic baggie of cannabis into the open door of his apartment as Officer Colon approached. (R. 2. R. 80, lines 11-13). Officer Colon testified that he stood somewhere between twenty (20) feet away from Appellant (R. 85, lines 3-4) and ten feet away from Appellant (R. 93, lines 5-18), when he saw the baggie in Appellant's hand. Officer Colon stated that he suspected the baggie contained cannabis. (R. 79, line 19). After Appellant threw the baggie inside his apartment, he agreed to speak to Officer Colon. Officer Colon detained Appellant outside his apartment and called for backup so he could enter and retrieve the plastic baggie. (R. 80, line 21-22). Without obtaining consent or a warrant, Officer Colon entered Appellant's home and retrieved the baggie. (R. 2, R. 80, line 22; R. 91, line 1-6). Officer Colon had no reason to believe anyone else was inside the home when he entered it to retrieve the baggie. (R. 91, line 7-10). Officer Colon entered Appellant's home and retrieved the baggie which tested positive for cannabis. (R. 81, lines 22-23, R. 90, lines 23-25, R. 92, lines 9-10, R. 3).

At the motion to suppress hearing, the State argued there were exigent circumstances to permit Officer Colon's entry into the apartment. (R. 106, lines 10-25). Specifically, evidence could have been destroyed or removed while waiting for a warrant. (R. 106, lines 10-12 and lines 24-25). The trial court denied the motion to suppress based on the State's argument regarding exigent circumstances. (R. 36; R. 110, lines 17-18). The trial court acknowledged that the denied motion to suppress was dispositive. (R. 37). The case proceeded to trial on August 16, 2016, and the jury returned a verdict of not guilty as to count I and guilty as charged as to count II. (R. 52; R. 57-58). A notice of appeal was filed on August 24, 2016.

A trial court's ruling on a motion to suppress is a mixed question of law and fact that should be reviewed using a two-step approach: deferring to the trial court's findings of fact as long as they are supported by competent, substantial evidence, but reviewing *de novo a* trial court's application of law to the historical facts. *Delhall v. State,* 95 So. 3d 134, 150 (Fla. 2012) [37 Fla. L. Weekly S468a].

A private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment. *Ruiz v. State,* 50 So. 3d 1229, 1231 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D99c]. Even when police officers have probable cause, they may not enter a dwelling without a warrant absent consent or exigent circumstances. *See Rebello v. State,* 773 So. 2d 579, 580 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2702b]. "[E]xigent circumstances exist where the occupants of a house are aware of the presence of someone outside, and are engaged in activities that justify the officers in the belief that the occupants are actually trying to escape or destroy evidence." *Lee v. State,* 856 So. 2d 1133, 1138 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2458a] (citation omitted). But "a key ingredient of the exigency requirement is that the police lack time to secure a search warrant." *Rolling v. State,* 695 So. 2d 278, 293 (Fla. 1997) [22 Fla. L. Weekly S141a]. "Once the defendant makes a prima facie showing that law enforcement conducted a warrantless search, the burden of sustaining the legality of the search shifts to the state." *Lewis v. State,* 979 So. 2d 1197, 1200 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1128a]. The state bears the burden "to demonstrate that the procurement of a warrant was not feasible" because of the exigencies of the situation. *Hornblower v. State,* 351 So. 2d 716, 717 (Fla. 1977) (citation omitted).

In the case at bar, the State did not present competent, substantial evidence to meet its burden of demonstrating exigent circumstances to justify law enforcement's warrantless search of Appellant's home and seizure of contraband. First, there is no doubt that entry into, and search of, Appellant's home occurred without a warrant. Officer Colon had enough time to call for backup and wait for officers to arrive, but did not request a search warrant. There was no danger of Appellant escaping because Officer Colon immediately detained him outside the apartment. Also, Officer Colon testified that he had no reason to believe anyone was inside the apartment. Thus, there was no reason law enforcement lacked time to secure a search warrant. Officer Colon had neither consent nor exigent circumstances to permit his warrantless entry into Appellant's home. Therefore, police's warrantless entry into Appellant's apartment was illegal. Any evidence obtained as a result of this unconstitutional intrusion into the privacy of Appellant's home shall be suppressed as "fruit of the

poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

Accordingly, the county court's ruling in favor of the Appellee is hereby REVERSED, and this case is REMANDED to the county court to vacate the guilty verdict and entry of an order granting the dispositive motion to suppress. (MURPHY, and FEIN, JJ., concur.)

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[1]The record on appeal shall be referred to as R. followed by the page number listed in the bottom right of the record.

* * *

JESSICA MASIA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 16-000024AC10A. L.T. Case No.15-2294MM10A. June 17, 2020. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Judge Melinda Brown. Counsel: Lisa Lawlor, Public Defender's Office, Fort Lauderdale, for Appellant. Nicole Bloom, State Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM) Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** this matter. Although we find that the trial court erred in failing to hold a *Richardson* hearing, Appellant was not prejudiced and its failure to do so was thus harmless. (SIEGEL, MURPHY, FEIN, JJ., concur.)

* * *

Criminal law—Domestic battery—Continuance—Trial court did not abuse its discretion in denying defense motion for continuance made on day of trial based on state's failure to disclose state witness's criminal record—State did not commit sanctionable discovery violation by failing to provide information that was in its constructive possession but was equally available to defendant and that defendant obtained couple of weeks before trial—Trial court did not err in precluding defense from questioning witness about her criminal history where, despite having ample time to do so, defense did not obtain certified copies of convictions and had no way to lay predicate for impeaching questions

WILLIAM WESLEY HACKETT, JR., Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 19-38-AP. L.T. Case No. 19-MM-2433-A. June 5, 2020. Appeal from the County Court for Seminole County, Honorable Jerri L. Collins, Judge. Counsel: Blaise Trettis, Public Defender and Christopher Gorton, Assistant Public Defender, for Appellant. Phil Archer, State Attorney and Jason Miller, Assistant State Attorney, for Appellee.

(NELSON, D., J.) The Appellant was tried and found guilty of domestic battery. He appeals two rulings by the trial court—the denial of a continuance and the denial of his motion for judgment of acquittal. The denial of the motion for judgment of acquittal is affirmed without further comment, but the issue relating to the denial of the continuance merits further discussion.

The Appellant filed a notice of expiration of speedy trial on June 17, 2019. The jury was selected and sworn on June 24, 2019 and on June 26, 2019, the evidentiary portion of the trial was to begin. On July 25, 2019, he filed a motion in limine asserting that the State failed to disclose State witness Christine Ortkiese's criminal record. When arguing the motion, the Appellant provided a rap sheet indicating that Ms. Ortkiese had at least one prior felony conviction out of Orange County. He admitted that he had obtained the information about her criminal record "a couple of weeks" earlier. The Appellant sought a continuance to allow him to obtain a certified judgment, but that request was denied. The trial court found that there was no discovery violation and further precluded the Appellant from asking the witness about her criminal history because he did not have a certified judgment to support the impeachment.

The State did not commit a sanctionable discovery violation by failing to provide information that was in its constructive possession but was equally available to both parties. In a *Richardson* hearing, the trial court would have assessed whether the Appellant was procedurally prejudiced.

> As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered.

State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995) [20 Fla. L. Weekly S136a], *holding modified by Scipio v. State,* 928 So. 2d 1138 (Fla. 2006) [31 Fla. L. Weekly S114a]. The Appellant had the information he needed well in advance of trial and with ample time to obtain a certified judgment. Yet, he did not request a certified judgment from Orange County, notify the State of the issue, or timely request the State to provide a copy of the judgment. If the Appellant had a bona fide desire to obtain this information, he would have received a copy of the document either directly from Orange County or through the State via a timely motion to compel. As such, his preparation would not have been changed.

The decision to grant or deny a continuance rests within the trial court's discretion. *Trocola v. State,* 867 So. 2d 1229 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D636a].

> The "common thread" connecting cases finding a "palpable" abuse of discretion in the denial of a continuance seems to be that defense counsel must be afforded a reasonable opportunity to investigate and prepare any applicable defenses. *D.N. v. State,* 855 So. 2d 258, 260 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2273a] (*citing Weible v. State,* 761 So. 2d 469, 472 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1536a]). "This right, however, is not absolute. At some point, the right bends before countervailing interests involving the effective administration of the courts." *McKay* [*v. State,* 504 So. 2d 1280, 1282 (Fla. 1st DCA 1986)].

Id. at 1231. When trial counsel showed up in court on the day of trial and argued that the case should be continued, he implied that the continuance should be charged to the State as a result of the its discovery violation.

> Florida's criminal discovery rules are designed to prevent surprise by either the prosecution, or the defense. Their purpose is to facilitate a truthful fact-finding process . . . This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush. Because full and fair discovery is essential to these important goals, we have repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context.

Ward v. State, 165 So. 3d 789, 792-93 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1247a] (*quoting Scipio v. State,* 928 So. 2d 1138, 1144 (Fla. 2006) [31 Fla. L. Weekly S114a].

The Appellant had a reasonable opportunity to investigate and prepare his defense. Counsel for the Appellant admitted that he had obtained the information about the witness' criminal record "a couple of weeks" earlier. Nonetheless, he took no action to follow up on that evidence. The trial court reasonably exercised its discretion to deny the continuance, keeping in mind that the Defendant was entitled to be tried within fifteen days of his notice of expiration and that the jury had already been sworn. A continuance under those circumstances would have resulted in dismissal of the charges on speedy trial or double jeopardy grounds. This Court does not approve of such tactics and will not permit the Appellant to gain a windfall for this improper "gotcha" method of trial practice.

Notwithstanding the denial of the continuance, he further argues

that the trial court further erred in precluding him from questioning the witness about her prior criminal history. Counsel proffered questions to try to establish how many impeachable convictions she had, but the witness was unable to distinguish between arrests and convictions. "[T]he mere possession of a rap sheet alone without any attempt to obtain certified copies of the convictions or corroborate the convictions is not sufficient to permit counsel to pose impeaching questions based upon prior convictions." *Barcomb v. State,* 68 So. 3d 412, 416 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1983a]. As counsel had no way to lay a predicate to impeach the testimony, the trial court properly exercised its discretion in precluding this line of questioning.

AFFIRMED. (ALVA and MCINTOSH, JJ., concur.)

* * *

Municipal corporations—Annexation—Notice—City council departed from essential requirements of law by failing to provide in public notice an accurate map of land to be annexed—No merit to argument that five-acre missing parcel was de minimus

PELICAN ISLAND AUDUBON SOCIETY, GRAHAM COX, and DONNA HALLERAN, Petitioners, v. CITY OF SEBASTIAN, Respondent. Circuit Court, 19th Judicial Circuit (Appellate) in and for Indian River County. Case No. 19-AP-142. June 30, 2020. Petition for writ of certiorari to the Sebastian City Council. Counsel: George Glenn, Jr., Vero Beach, for Petitioners. Laura Wendell, Weiss Serota Helfman Cole & Bierman, P.L., Fort Lauderdale, for Respondent.

(PER CURIAM.) This case involves the Sebastian City Council's ("City Council") ordinance for voluntary annexation of 1,118 acres of privately owned land. The Petitioners, landowners within the city limits, seek this court's review under §171.081(1), Fla. Stat. (2019). We find that the Petitioners have standing to bring this action. *See Matlacha Civic Association, Inc. v. City of Cape Coral*, 273 So. 3d 243, 246 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1338a] (citing *City of Tampa v. Hillsborough County*, 504 So.2d 10, 11 (Fla. 2d DCA 1986).

During this first tier review, the circuit court must determine whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *County of Volusia v. City of Deltona*, 925 So. 2d 340, 343 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D233a] (citing *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S463a]. The reviewing court cannot reweigh evidence or substitute its view for that of the agency. *Id*.

We agree with the Petitioners' sole argument that the City Council departed from the essential requirements of law by failing to provide an accurate map of the land to be annexed in the public notice, as required by statute. §171.044(2), Fla. Stat. (2019) states:

> . . .The description **shall include a map clearly showing the area** and a statement that the complete legal description by metes and bounds and the ordinance can be obtained from the office of the city clerk.

(Emphasis added). The Florida Supreme Court has stated that the word "shall" is mandatory in nature. *Wheaton v. Wheaton*, 261 So. 3d 1236, 1243 (Fla. 2019) [44 Fla. L. Weekly S94a]. The City Council concedes that the public notice map was missing a five acre parcel, but it argues that the flaw is de minimus. The complete map was attached to the ordinance. We find that the City Council was required to include a complete map in the public notice showing the area to be annexed in its entirety, and the five acre missing parcel was not de minimus. Therefore, the petition for writ of certiorari is granted, and the City Council's ordinance is quashed.

We grant the Petitioners' motion for appellate attorney's fees. §171.081, Fla. Stat. (2019). Determination of amount will be determined by Judge Jeffrey Hendriks.

The Petitioners' motion for appellate costs is not properly before this court, so it is denied without prejudice to be refiled in the lower tribunal. *See Arthur v. Arthur*, 54 So. 3d 454, 460 (Fla. 2010) [36 Fla. L. Weekly S78a]. If the motion to tax appellate costs is timely filed in the lower tribunal, appellate costs must be taxed in favor of the party who prevailed in the appeal. *Perez v. Fay*, 198 So. 3d 681, 683 (Fla. 2d DCA 2015) [41 Fla. L. Weekly D1a] (citing Fla. R. App. P. 9.400(a)).

The petition for writ of certiorari is granted, and the City Council's ordinance is quashed. (HEISEY, MEADOWS, JJ., and HENDRIKS, Acting Circuit Judge, concur.)

* * *

Prisoners—Indigency—Trial court erred in dismissing prisoner's complaint under statute providing for review of sufficiency of claims filed by indigent prisoners where clerk determined that prisoner was indigent under section 57.081, but there was no record of court adjudicating him indigent

ALFONSO DEL NEGRO, Appellant, v. CAITLIN KELLY, Appellee. Circuit Court, 19th Judicial Circuit (Appellate) in and for Martin County. Case No. 18-AP-18. L.T. Case No. 18-CC-1262. November 19, 2019. Appeal from the County Court for Martin County; Jennifer Waters, Judge. Counsel: Alfonso Del Negro, pro se, Santa Rosa Correctional Institution Annex, Milton, for Appellant. Caitlin Kelly, pro se, Tallahassee, for Appellee.

AMENDED OPINION[1]

(PER CURIAM.) The issue in this case is whether the trial court erred in dismissing the case based on §57.085, Fla. Stat. (2018), the prisoner indigency statute, without first adjudicating the Appellant indigent. Based on the following, we find that reversal is warranted.

While incarcerated in the Martin County jail, the Appellant filed a "complaint for injunctive relief over five thousand dollars" in the county civil division. At the same time he filed the complaint, the Appellant also filed an application for civil indigency and a financial affidavit. Upon review, the clerk determined him indigent. Both the Appellant's application for indigency and the clerk's determination of indigency state that the applicable statute is §57.081, Fla. Stat. (2018).[2] Three and a half months later, the trial court dismissed the complaint pursuant to §57.085, Fla. Stat. (2018).

The Appellant alleges that the trial court erred in dismissing his case based on its interpretation of the prisoner indigency statute. A trial court's interpretation of a statute is subject to de novo review because it presents a question of pure law. *Rachins v. Minassian*, 251 So. 3d 919, 923 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1572a].

The Florida Supreme Court has stated that "where the plain language of a statute is unambiguous and conveys a clear meaning, the statute must be given its obvious meaning." *Shepard v. State*, 259 So. 3d 701, 704 (Fla. 2018) [43 Fla. L. Weekly S546a]. When a court construes a statute, its " 'task is to ascertain the meaning of the phrases and words used in a provision, not to substitute [the Court's] judgment for that of the Legislature.' " *Id*. (quoting *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So.3d 1220, 1228 (Fla. 2009) [34 Fla. L. Weekly S251a]).

The statute at issue states:

> Before an **indigent prisoner** may intervene in or initiate any judicial proceeding, the court must review the prisoner's claim to determine whether it is legally sufficient to state a cause of action for which the court has jurisdiction and may grant relief. The court shall dismiss all or part of an indigent prisoner's claim which:
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> (a) Fails to state a claim for which relief may be granted;
>
> (b) Seeks monetary relief from a defendant who is immune from such relief;
>
> (c) Seeks relief for mental or emotional injury where there has been no related allegation of a physical injury; or
>
> (d) Is frivolous, malicious, or reasonably appears to be intended to harass one or more named defendants.

(Emphasis added) §57.085(6), Fla. Stat. (2018). The Fourth District Court of Appeal has held that since the statute refers to an "indigent prisoner", the trial court must first adjudicate the prisoner indigent before dismissing the case under this provision. *Jones v. Joseph*, 989 So. 2d 744, 745 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2143a]; *Jones v. Ferguson*, 979 So. 2d 1245 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1212a]; *Craft v. Holloway*, 975 So. 2d 620 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D660b].

In the instant case, the record is devoid of a trial court order adjudicating the Appellant indigent. Instead, it only contains a clerk's determination of indigency under §57.081, which was improper because it appears from this record that the Appellant was a prisoner. Even if the clerk had properly determined the Appellant's indigency under the prisoner statute, the trial court was required to adjudicate him indigent either prior to or while simultaneously dismissing his complaint under §57.085, Fla. Stat. (2018) (R14). *Jones*, 989 So. 2d at 745.

Reversed and remanded for proceedings consistent with this opinion. (SWEET, BUCHANAN, JJ., and ALONZO, Acting Circuit Judge, concur.)

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[1]Amended to correct the spelling of the Appellant's first name only.

[2]Paragraph (1) of §57.081 begins with the following language: "any indigent person, **except a prisoner as defined in s. 57.085**. . ." (Emphasis added). §57.085(1), Fla. Stat. (2018) defines prisoner as ". . .a person who has been convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing." The Appellant's address on his complaint is the Martin County jail. Though the record does not explicitly state why the Appellant was in jail, it reflects that the Appellant was transferred from the Martin County jail to the Orange County Corrections Department and eventually to Santa Rosa Correctional Institution Annex. Therefore, §57.081, Fla. Stat. (2018) does not apply, which makes the clerk's determination of indigency problematic.

* * *

Real estate brokers and salespersons—Commission—Cooperating broker's action against listing broker and sales associate seeking to recover commission on sale of property—Arbitration—Where listing broker filed motion to dismiss and compel arbitration under mandatory arbitration clause of constitution and bylaws of national realtor association, and cooperating broker claims that his request to arbitrate was denied by county realtor association because it was filed more than 180 days after closing of transaction, trial court erred in granting motion to dismiss rather than issuing stay and directing parties as to if and where they must seek arbitration

THOMAS CORCORAN, Appellant, v. GARRETT BELL and APRIL GUTHERIE aka APRYL GUTHERIE, Appellees. Circuit Court, 19th Judicial Circuit (Appellate) in and for Martin County. Case No. 17-AP-3. L.T. Case No. 16-CC-1056. November 5, 2019. Appeal from the County Court for Martin County; Curtis Disque/Jennifer Waters, Judges. Counsel: Charles Kohler[1], Satellite Beach, for Appellant. Catherine Grieve, Weston, for Appellee.

(PER CURIAM.) The issue in this case is whether the trial court erred in granting the Appellee's "motion to dismiss and compel arbitration" when it stated in its order "the motion to dismiss is granted." On de novo review, we find that the record lacks support for the trial court's ruling; therefore, we reverse and remand to the trial court with directions to render an order clarifying its factual findings and/or providing clear instructions to the parties. *R.S.B. Ventures, Inc. v. Berlowitz*, 211 So. 3d 259, 263 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D258a] (the standard of review for an order granting a motion to dismiss is de novo).

The Appellant, a real estate broker in Martin County and member of the Realtor Association of Martin County, sued the Appellees, a real estate broker in Brevard County and a member of the Space Coast Association of Realtors and his sales associate, alleging that he represented a residential real estate buyer in a transaction, but the Appellees closed the deal without paying him a commission. The Appellees filed a "motion to dismiss and compel arbitration," and they argued that the dispute is subject to mandatory arbitration under the Constitution and Bylaws of the National Association of Realtors ("NAR"). In his reply, the Appellant pointed out that he sought to arbitrate the dispute, but the Realtor Association of Martin County denied the request and stated it no longer had jurisdiction to arbitrate. The trial court[2] held a hearing on the motion, and it rendered an order simply stating that "the motion to dismiss is granted"; it did not address the arbitration issue. The Appellant filed a motion for rehearing, and the trial court[3] denied it.

I. Granting a Motion to Dismiss Rather than Issuing a Stay is Reversible Error

Since both parties are members of their local realtor organizations, they are by extension also members of the NAR and therefore bound by its arbitration clause. Both of the governing documents of the local associations contain identical language:

> **It shall be the duty and responsibility of every REALTOR® member of this association to abide by** the Constitution and Bylaws and the rules and regulations of the association, the Constitution and Bylaws of the State Association, **the *Constitution and Bylaws of the NATIONAL ASSOCIATION OF REALTORS*®, and to abide by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®, including the duty to arbitrate controversies arising out of real estate transactions as specified by Article 17 of the Code of Ethics,** and as further defined and in accordance with the procedures set forth in the Code of Ethics and Arbitration Manual of this association, as from time to time amended.

(Emphasis added). NAR's Code of Ethics and Arbitration Manual directly addresses mandatory arbitration in Article 17:

> In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. **If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter. . .**

(Emphasis added). Standard 17-4 defines specific non-contractual disputes that are subject to arbitration:

> Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. . .

Since the dispute at issue here is whether the listing broker failed to compensate the cooperating broker, the Appellees argue that the Appellant had a duty to arbitrate. In its response to the Appellees' motion to dismiss, the Appellant stated that he attempted to arbitrate through the Realtor Association of Martin County ("RAMC"), but it declined to take the case. The Appellant attached the letter from the RAMC to his response, and the letter stated that since the Appellant filed his request for arbitration more than 180 days after the closing of the transaction, RAMC did not have jurisdiction in the matter. The Appellees argue in their brief that RAMC's letter was dated four months after the complaint to initiate the lawsuit was filed, so the Appellant did not comply with the arbitration procedures of NAR by filing a request to arbitrate prior to commencing the litigation. However, RAMC's letter does not indicate when the Appellant submitted the request for arbitration, and no other information is present in the record to clarify this detail. Even if the Appellees are correct and the Appellant submitted the request to arbitrate after he commenced the lawsuit, the trial court **must** stay the proceedings pending the outcome of arbitration. *Fouche v. Pilot Catastrophe Servs., Inc.* 217 So.3d 225, 226 (Fla. 5th DCA 2017) [42 Fla. L.

Weekly D917a]; *Gomez v. S&I Properties LLC.*, 220 So.3d 539, 542 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1315a]; *see also* §682.03(6), Fla. Stat. (2016) ("If a party makes a motion to the court to order arbitration, the court on just terms **shall** stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section").

We are not satisfied with the record to make the finding that arbitration is completed. If arbitration has been completed, dismissal may be the appropriate remedy. The trial court can make that determination. An order that simply grants the motion to dismiss, without more, does not direct the parties as to 1) the finality of the order or 2) if the parties must seek arbitration, and if so, where, as RAMC has denied jurisdiction. Without a transcript, this court has no insight into the trial court's ruling to know why it did not address the arbitration issue. Therefore, this case is reversed and remanded with instructions directing the trial court to render an order clarifying its factual findings and/or providing clear instructions to the parties; the order granting the motion to dismiss is also be vacated.

II. Appellant Fees and Costs are Denied

The Appellant filed a motion for appellate attorney's fees, but it did not specify the statutory, contractual, or substantive basis for the award. *See* Fla. R. App. P. 9.400 and *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006) [31 Fla. L. Weekly S762a]. Therefore, the motion for appellate attorney's fees is denied.

In the same motion, the Appellant requested his appellate costs. Fla. R. App. P. 9.400(a) clearly states "costs shall be taxed **by the lower tribunal** on a motion served no later than 45 days after rendition of the court's order" (Emphasis added). Since the motion for appellate costs is not properly before this court, it is denied without prejudice to be refiled before the trial court. *See Arthur v. Arthur*, 54 So. 3d 454, 460 (Fla. 2010) [35 Fla. L. Weekly S38a].

Reversed and remanded to the trial court with instructions to render an order clarifying its factual findings and/or providing clear instructions to the parties. (CROOM, LINN, JJ., and MORGAN, Acting Circuit Judge, concur.)

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[1]The Appellant's counsel failed to appear at oral argument.

[2]The trial court at the hearing on the motion to dismiss was represented by the Honorable Curtis Disque.

[3]The trial court at the hearing on the motion for rehearing was represented by the Honorable Jennifer Waters.

* * *

Traffic infractions—Careless driving—Trial court's finding that driver who was involved in fatal rollover crash was guilty of careless driving was not supported by competent substantial evidence where only evidence regarding driver's driving pattern was witness's conflicting testimony about whether vehicle drifted across lane lines

MARIANA CONTRERAS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 19th Judicial Circuit (Appellate) in and for Indian River County. Case No. 19-AP-5. L.T. Case No. 18-TR-10345. November 19, 2019. Appeal from the County Court for Indian River County; Joe Wild, Judge. Counsel: Silvia Gonzalez, Miami Lakes, for Appellant. Bruce Colton, State Attorney, and Steven Wilson[1], Vero Beach, for Appellee.

(PER CURIAM.) The issue in this case is whether the trial court erred in finding the Appellant guilty of careless driving. We find that reversal is warranted on these facts.

On June 12, 2018 at approximately 10:30am on a bright sunny day, the Appellant and three passengers were travelling to Tampa for a church camp. The Appellant drove one of the other passenger's car because it was in the best condition for a long drive, she had driven it before, and she had a valid driver's license. She was driving in the center lane when the steering wheel went stiff, the car drifted back and forth within the lane, and it ultimately rolled over. The Appellant did not have time to push the brakes. The car's windows shattered, and one of the passengers was ejected and died at the scene.

Two months later, a Florida Highway Patrol trooper wrote the Appellant a citation for careless driving with a fatality. The Appellant pled not guilty and appeared before the trial court. The Appellant put on testimony from a forensic engineer, who stated that the vehicle's wheel failure occurred before the rollover, which made the rollover uncontrollable. After a nonjury trial, the trial court allowed the Appellant additional time to submit a report from her expert. Four months later, the Appellant notified the trial court that she did not intend to submit an additional report. The trial court rendered an order finding the Appellant guilty. It sentenced her to pay a $1,000.00 fine, suspended her driver's license for 6 months, attend a defensive driving school, and pay court costs. The Appellant filed a motion for rehearing, and the trial court denied it.

A judgment rendered after a nonjury trial is reviewed for competent substantial evidence. *Vieira v. PennyMac Corp.*, 241 So. 3d 193, 195 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D614a]. The trial court's findings of fact are clothed with a presumption of correctness and will not be disturbed unless they are clearly erroneous. *Id.*

The Appellant argues that there is no evidence to show that she was carelessly driving under §316.1925(1), Fla. Stat. (2018), which states:

> 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 to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.

The trial court's order did not make findings of fact, so it is unclear what evidence it relied on to find the Appellant guilty. The Appellant urges this court to consider all of the evidence that shows she was not driving carelessly. However, a reviewing court cannot reweigh the evidence. *Dusseau v. Metropolitan Dade County Bd. of County Com'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. "While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision." *Id.* As long as the record contains competent substantial evidence to support the decision, the trial court should be affirmed. *Id*. Therefore, the record in this case must be reviewed for competent substantial evidence, which is defined as "evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "To this extent the 'substantial' evidence should also be 'competent.' " *Id.*

A witness described the Appellant's driving pattern prior to the accident, stating that everything took place in less than fifteen seconds. He testified about the Appellant's driving pattern immediately prior to the crash and stated:

> For unknown reasons, the car slowly drifted into the center lane and then went back across the center lane, the lane that it was in, and then cut back to the right, and then had made a, and then overcorrected again to the left. And at that point, the car, she corrected back to the right to get back in the Interstate. And at the last second she turned, and the back end at this point had turned around and the car spun sideways.
>
> As soon as it did, it appeared to me that it never, she never hit the brakes or anything, and the tires peeled back from the rims. The rims hit the pavement. And all of the momentum of the car instantly turned into a spin, a rollover crash.

When questioned later by the trooper, the witness stated that the Appellant's vehicle started in the center lane, and it slowly drifted at first (presumably out of the lane), which is at odds with his prior testimony that the car drifted into the center lane. The trooper implied

in his first question to the witness that the car drifted out of the center lane, but the witness never affirmatively stated that the Appellant's car crossed any lane line. The witness did not observe any problems with the Appellant's vehicle before the accident, and he stated that he did not have to take evasive measures. During the trooper's testimony, he alluded to written and audio statements made by the witness, but neither are in this record. Neither trooper testified as to the Appellant's driving pattern, since they did not see it. The witness's conflicting testimony was the only evidence on the issue of the Appellant's driving pattern, and it does not clearly demonstrate beyond a reasonable doubt that the Appellant drove carelessly. §318.14(6), Fla. Stat. (2018). Therefore, the trial court is reversed because its decision is not supported by competent substantial evidence.

Reversed. (SWEET, and BUCHANAN, JJ., concur. ALONZO, Acting Circuit Judge, dissents without opinion.)

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[1]Mr. Wilson filed a "notice of no response", indicating that he did not intend to file an answer brief because this case is an appeal from a noncriminal infraction.

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Criminal law—Sentencing—Counsel—Trial court erred in failing to conduct *Faretta* inquiry at outset of sentencing phase of proceedings—New sentencing hearing is required

PETER MURRAY, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 19th Judicial Circuit (Appellate) in and for Martin County. Case No. 18-AP-19. L.T. Case No. 18-MM-2406. August 20, 2019. Appeal from the County Court for Martin County; Jerald Bryant, Judge. Counsel: Jacob Noble, Palm Beach Gardens, for Appellant. Bruce Colton, State Attorney, and Theodore Roodhof, Assistant State Attorney, Stuart, for Appellee.

(PER CURIAM.) Peter Murray appeals his conviction and sentence for trespass. We affirm appellant's conviction without further discussion. Concerning sentencing, appellant argues that the court erred by failing to conduct a *Faretta* inquiry at the outset of the sentencing phase of the proceedings; we agree. Sentencing is a critical stage of the proceedings, and it requires the renewal of the offer of counsel. *Williams v. State*, 228 So. 3d 699, 700 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2225a]. As such, we reverse appellant's sentence and remand for the court to conduct a new sentencing hearing.

Affirmed in part; reversed in part, and remanded. (BELANGER, METZGER, JJ., and WALLACE, Acting Circuit Judge, concur.)

* * *

Landlord-tenant—Eviction—Where parties to eviction action entered into settlement agreement that required tenant to make certain payments and provided for entry of monetary default judgment in the event of nonpayment, trial court did not have jurisdiction to issue final eviction judgment in response to landlord's filing of affidavit of nonpayment

NAKIA BROWN, Appellant, v. ROSEANN BROWN, Appellee. Circuit Court, 19th Judicial Circuit (Appellate) in and for St. Lucie County. Case No. 19-AP-12. L.T. Case No. 19-CC-248. February 4, 2020. Appeal from the County Court for St. Lucie County; Edmond Alonzo, Judge. Counsel: Nakia Brown, pro se, Fort Pierce, for Appellant. Roseann Brown, pro se, Port St. Lucie, for Appellee.

AMENDED[1] OPINION

(METZGER, J.) Nakia Brown ("N. Brown") appeals the final judgment of eviction by default entered in favor of Roseann Brown ("R. Brown"). N. Brown asserts that the trial court improperly entered the final judgment of eviction. We agree and reverse.

R. Brown, as landlord, entered into a residential lease with N. Brown, as tenant, for a one year term (the "Lease"). The Lease obligated N. Brown to pay R. Brown rent in the amount of $1,300 per month. On January 25, 2019, R. Brown filed a complaint for eviction alleging N. Brown failed to pay the January 2019 rent as required by the Lease (the "Complaint"). Prior to the filing of the Complaint, R. Brown posted the three-day notice by landlord to tenant per section 83.56(3), Fla. Stat. (2019) (the "Notice"). N. Brown responded to the Complaint alleging full payment of the January 2019 rent due under the Lease, before the posting of the Notice. Additionally, N. Brown deposited $1,300 (one month's rent pursuant to the Lease) into the court registry. Subsequently, the trial court issued an order setting the eviction hearing and directing the clerk to disburse "forthwith" to R. Brown the $1,300 deposited into the court registry by N. Brown. The clerk complied with the court's order and disbursed the court registry deposit of $1,300 to R. Brown.

On February 19, 2019, prior to the commencement of the court ordered eviction hearing, N. Brown, along with her counsel, and R. Brown entered into a "full settlement" agreement "of all claims in this matter" (the "Full Settlement Agreement"). The court approved the Full Settlement Agreement by signing an order entitled "Stipulation and Settlement Agreement" (the "Settlement Order"). Per the Full Settlement Agreement: $400 (security deposit) was to be deposited by N. Brown into TD Bank accnt. 5755 on or before 2/22/19; rent of $1,300 was to be deposited by N. Brown into TD Bank accnt. 5755 before 6pm on 3/1/2019; rent was to be paid by N. Brown no later than the 3rd of every month without a late penalty; N. Brown was to pay the last month's rent when due; and, the $100 that remained in the court registry was to be disbursed forthwith to R. Brown. The court, within the Settlement Order, retained jurisdiction to enforce the terms of the Full Settlement Agreement. Specifically, the Settlement Order executed by the trial judge stated that if N. Brown failed "to abide by the **terms of this agreement** and upon presentation of an affidavit of **nonpayment** to the clerk", R. Brown "is entitled to a default judgement in the **amount** agreed upon above, plus court costs, less any amount paid." (Emphasis added). The trial court, per the Settlement Order, did not retain jurisdiction to enter a judgment of eviction/possession upon default of the Full Settlement Agreement, but it did retain jurisdiction to enter a money default judgment.

On April 15, 2019, R. Brown filed an affidavit of non-payment (the "Affidavit"). R. Brown attested, within the Affidavit, that N. Brown "failed to make payment of money due" to R. Brown "in the manner provided in the" Stipulation and Settlement Agreement and the money due to R. Brown per the Stipulation and Settlement Agreement was "$325 damages". Within an amended Affidavit, R. Brown stated she would "like to evict" N. Brown "as soon as possible". Shortly thereafter, N. Brown filed a motion to dismiss the Affidavit alleging full payment of rent and objecting to R. Brown's request for eviction.

On April 23, 2019, the trial court issued, in chambers and without a hearing, a final judgment of eviction by default (the "Final Eviction Judgment"). The Final Eviction Judgment stated, among other things, the following: "this cause having been stipulated to and" R. Brown "having filed" the Affidavit and "the Court finding that the Defendant(s) has defaulted upon the payments set forth in" the Full Settlement Agreement, R. Brown "is entitled to judgment for **possession** against" N. Brown; R. Brown "is to be put into possession of the premises" described in the Lease "on or after 4/30/19". (Emphasis added).

After issuance of the Final Eviction Judgment, N. Brown filed a motion for reconsideration stating she was not in default of the Full Settlement Agreement. N. Brown also again deposited $1300 into the court registry. This appeal ensued.

Upon review of the record, it is clear that R. Brown and N. Brown entered into a full and complete settlement of all issues pending at the trial court level when they executed the Full Settlement Agreement. The court approved and signed off on the specific terms of the Full Settlement Agreement via the Settlement Order and as such, retained jurisdiction to enforce the Full Settlement Agreement only. Nowhere within the Full Settlement Agreement or the Settlement Order was it

mentioned that the parties agreed R. Brown would be entitled to a final order of eviction (possession) upon presentation of an affidavit of nonpayment. The Full Settlement Agreement was clear and unambiguous on its face, providing that if N. Brown failed to abide by the terms of the Full Settlement Agreement, R. Brown would be entitled to a default money judgment in the amount "agreed upon" in the Full Settlement Agreement. If the language of a settlement agreement is clear and unambiguous, courts may not modify the agreement and the express terms of the settlement agreement control. *Postma, LLC, v. Baker,* 276 So. 3d 828 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1968a]. The terms of the Full Settlement Agreement controlled the trial court's enforcement power. The court did not retain jurisdiction to vary the terms of the Full Settlement Agreement and impose a remedy (eviction) not specifically contained within the Full Settlement Agreement. *See Paulucci v. General Dynamics Corp.,* 842 So. 2d 797 (Fla. 2003) [28 Fla. L. Weekly S235a]; *Olen Properties Corp. v. Wren,* 109 So. 3d 263, 265 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D413b]. As such, the trial court erred when it issued the Final Eviction Judgment.

Based upon the foregoing, we reverse the trial court's Final Eviction Judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. (LINN, J. and MENZ, Acting Circuit Judge, concur.)

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[1]This opinion is amended solely to remove the "per curiam" reference, which was a scrivener's error.

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CIRCUIT COURTS—ORIGINAL

Insurance—Complaint—Insufficiency—Failure to plead with sufficient specificity, attach supporting documents, or include verified statement specifying basis for circuit court jurisdiction—Dismissal with leave to amend

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. FATIMA DIAZ, ORLANDO INJURY CENTER, INC., and OPTIMUM ORTHOPEDICS AND SPINE, LLC, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CA-006950-O. June 16, 2020. Kevin B. Weiss, Judge. Counsel: Ashley Lovelace, for Plaintiff. David B. Alexander, for Defendant Fatima Diaz. Aimee A. Gunnells, for Defendant Orlando Injury Center, Inc.

ORDER ON DEFENDANT DIAZ'S MOTION TO DISMISS AMENDED COMPLAINT
ORDER ON DEFENDANT ORLANDO INJURY CENTER'S MOTION TO DISMISS

THIS CAUSE having come on to be heard by the Court on June 15, 2020, and the Court being otherwise duly advised in the premises it is hereby **ORDERED and ADJUDGED** that:

1. The Motions to Dismiss as to the Amended Complaint is GRANTED without prejudice.

2. In addition to various technical and legal defects raised by the Defendant, the Court finds that the Amended Complaint must be pled with specificity as to each Defendant and specifically allege the facts and elements applicable to support each cause of action brought by the Plaintiff and against each Defendant. *See generally* Fla. R. Civ. P. 1.110 (b) and (f).

3. If applicable, the Plaintiff shall also attach supporting documents to the Amended Complaint as required by Fla. R. Civ. P. 1.130.

4. The Plaintiff shall file an Amended Complaint shall be filed within twenty (20) days from the date of this Order. The Amended Complaint shall contain a verified statement specifying the basis for jurisdiction in the Circuit Court.

5. The Court will reserve as to the Defendant's request for attorney's fees and costs.

* * *

Criminal law—Second degree murder—Pretrial detention—Where victim committed forcible felony by spraying mace through window screen into defendant's home, striking defendant on arm, and state has not demonstrated by proof evident or presumption great that defendant could not have reasonably believed that it was necessary to shoot victim in back to prevent imminent commission of forcible felony, motion to remove no-bond hold is granted

STATE OF FLORIDA, v. TAQUANA WASHINGTON, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F19-17590, Criminal Division. June 30, 2020. Ramiro C. Areces, Judge. Counsel: Amy Drever, Miami-Dade State Attorney's Office, for State. Jessica Albert, Miami-Dade County Public Defender's Office, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO REMOVE NO-BOND HOLD

THIS MATTER having come before the Court on Defendant's Motion To Remove No Bond Hold (the "Motion") and this Court, having read the Motion, heard the argument of counsel on June 23, 2020 and June 26, 2020, reviewed the evidence presented on the same date, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is GRANTED.

The Florida Constitution provides that a defendant is entitled to pre-trial release "*[u]nless* charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great." Fla. Const. Art. I, Sec. 14 (emphasis added). In this case, Defendant is charged with second-degree murder—a felony punishable by life.

Defendant contends the State cannot, and has not, shown that the proof of Defendant's guilt is evident, or the presumption great, because (1) the State cannot demonstrate that Defendant was not acting in self-defense; and, (2) the State cannot demonstrate that Defendant's actions amount to anything worse than manslaughter—an offense for which Defendant would be entitled to a bond.

Many, if not all, of the material facts are undisputed. The Defendant, occupant of one of four units within a single-story quadplex, was in her bedroom with the window open. The shades were pulled back and a window screen was all that separated the inside of the bedroom from the outside.

The Defendant stood, or sat, naked near the window while some boys played outside on a neighboring lot. The Defendant told the boys to leave. The Defendant may have insulted one of the boys. The mother of said boy, Ms. White walked over to Defendant's window. The victim and another woman, Ms. Holt, then walked over to the window. One of the women was carrying a stick. Ms. Holt was carrying a can of mace.

The victim and Defendant, who had argued earlier in the day, began arguing again. The victim then took the can of mace from Ms. Holt's hand and sprayed it at Defendant's window. Defendant then shot the victim in the back. The victim died a few feet from Defendant's window. It is unclear how much time elapsed between the spraying of the mace and Defendant's fatal shots.[1]

Defendant contends the State cannot—by the standard of "proof evident, presumption great"—disprove that her use of deadly force was justified because she was protecting herself from the imminent commission of one, or more, forcible felonies—specifically, aggravated battery and burglary. In light of the State's burden at this stage of the proceedings, and this Court's interpretation of the applicable law, this Court agrees.

It is undisputed that a person in their own home has no duty to retreat and may use deadly force if he or she "reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to. . .herself. . .*or* to prevent the imminent commission of a forcible felony." § 776.013 Fla. Stat. (2017) (emphasis added). There is also no question that aggravated battery and burglary are "forcible felon[ies]." *See* § 776.08 Fla. Stat. (2017).

In this case, there is no evidence the victim committed, or was about to commit, an aggravated battery. The Florida legislature has defined "aggravated battery" to mean "[a] person. . .who, in committing battery. . .intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement" or "[u]ses a deadly weapon." There is no evidence that any battery[2] committed by the victim resulted in great bodily harm, disfigurement or permanent disability.[3] Additionally, mace is not a "deadly weapon." *See Austin v. State,* 336 So. 2d 480, 481 (Fla. 3d DCA 1976) (a defendant who "pulled [victim's] head back and sprayed chemical 'mace' from a can into her mouth" did not commit an aggravated battery because mace is not a deadly weapon).

The question of whether a burglary occurred is a closer question. The Florida legislature has defined "burglary" to mean, in pertinent part, "*[e]ntering* a dwelling, a structure, or a conveyance *with the intent* to commit an offense therein." Fla. Stat. § 810.02(b) (2017).[4] The burglary statute defines "dwelling" to include the curtilage of the home. *See* Fla. Stat. § 810.011(2). Defendant argues there was a burglary of the curtilage *and* of the residence itself.

There was no burglary of the curtilage. Curtilage is an undefined term. However, the Florida Supreme Court has interpreted "curtilage" to include the requirement that it be enclosed. *See State v. Hamilton,* 660 So. 2d 1038 (Fla. 1995) [20 Fla. L. Weekly S465a]. Specifically, the Florida Supreme Court held,

> We conclude that such a construction here requires us to carry forward the common law requirement of some form of an enclosure in order for the area surrounding a residence to be considered part of the "curtilage" as referred to in the burglary statute.

Id. at 1044. In this case, the property at issue is not surrounded by a fence or some other enclosure. The property is, instead, entirely open to the street on one end. The sides of the property have some loose rocks and scattered trees running from the front of the property to the back of the property. The rocks, the largest of which appear to be no taller than six-to-eight inches, appear like a dotted line. In many places, there is a large gap of a few feet between rocks. The largest gap between rocks happens to be in front of Defendant's window—the window, which faces the large empty lot, and from which the Defendant shot and killed the victim. A large brown fence runs along the back of the property. This same fence runs, without interruption, across the back end of the large empty lot next door. There are multiple places, on both sides of the property, where a person would be able to walk onto the property without having to climb over any rocks or go around any trees. Put simply, the property is not enclosed. *See* Black's Law Dictionary 396 (2nd Pocket Ed. 2004) (defining "enclosed land" as "[l]and that is *actually* enclosed and surrounded with fences") (emphasis added).[5] The victim's presence within the Defendant's yard, therefore, is not in itself indicative of a burglary, *even if* this Court assumes the victim entered the curtilage with the intent to commit an offense therein.[6] *See e.g. Hamilton,* 660 So. 2d at 1046 (reversing a burglary conviction where the yard "was not enclosed in any manner other than 'several unevenly spaced trees' ").

This Court does, however, appear constrained to find that a burglary of the residence may have occurred. Florida courts have long stated, "[t]he entry [into a dwelling] may be made by an instrument instead of the body, but in such case, to be an entry, the instrument must be inserted not merely for the purpose of breaking but for the purpose of committing the contemplated felony." *Foster v. State,* 220 So. 2d 406, 407 (Fla. 3d DCA 1969) (quoting Miller on Criminal Law (1934) at s. 108(c)); *see also Stanley v. State,* 626 So. 2d 1004 (Fla. 2d DCA 1993) ("The entry must be made by some part of the body or an instrument used not only for the breaking but for the purpose of committing the felony."); *State v. Spearman,* 366 So. 2d 775, 776 (Fla. 2d DCA 1978) ("It is well established that the unqualified use of the word 'enter' in a burglary statute does not confine its applicability to intrusion of the whole body but includes insertion of any part of the body or of an instrument designed to effect the contemplated crime.").[7] In *Foster,* for example, the Third District Court of Appeal found there had been no "entry" because the defendant did not physically enter the premises *and* the crowbar used by the defendant "was not an instrument which would have consummated the contemplated felony." *Foster,* 220 So. 2d at 407.

This case is unlike *Foster.* Here, it is undisputed the victim sprayed mace at a screened window and that Defendant was standing at, or near, the window when the mace was sprayed. Moreover, in her sworn statement, Defendant stated some of the mace hit her arm. While most burglary cases tend to involve the unlawful entry into a dwelling or structure with the intent to commit a property-related offense, the statute does not limit its application to such offenses. Instead, the statute speaks only of an entry with the intent to commit "an offense" therein. *See* Fla. Stat. § 810.02(b) (2017). In this case, it is entirely plausible, if not probable, that the victim intended for the mace to enter the dwelling through Defendant's window screen and make contact with Defendant. The victim, according to Defendant, succeeded when the mace hit Defendant's arm. If Defendant's intended offense was a battery, and she used the mace as an instrument to effect the commission of said offense, and the victim's instrument "entered" Defendant's dwelling through the small holes in Defendant's screened window, then the conclusion appears inescapable—the victim committed burglary, as defined by the Florida legislature.[8]

Florida's legislature, moreover, has provided that a person "is *presumed* to have held a reasonable fear of imminent death or great bodily harm to. . .herself. . .when using. . .defensive force that is intended or likely to cause death or great bodily harm to another *if*. . .the person against whom the defensive force was used. . .was in the process of unlawfully and forcefully entering, *or* had unlawfully and forcibly entered a dwelling. . .*and* the person who uses . . .defensive force knew *or* had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." Fla. Stat. § 776.013(2) (2017). This presumption, however, does not apply if "[t]he person who uses or threatens to use defensive force is engaged in a criminal activity." Fla. Stat. § 776.013(3) (2017).

Defendant is not entitled to the presumption afforded to a defendant in section 776.013(2), Fla. Stat., because Defendant was engaged in criminal activity. Florida courts have held that "possession of a firearm by a convicted felon qualifies as 'unlawful activity' within the meaning of the Stand Your Ground law." *Dorsey v. State,* 74 So. 3d 521, 527 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2299a].[9] In this case, Defendant is a convicted felon and her possession of the firearm with which she shot the victim was unlawful.[10] In her sworn statement, Defendant admits it is her firearm and that, at the time of the incident, it was under her mattress.

This does not mean Defendant cannot potentially be found to have acted in self-defense under section 776.013, Fla. Stat. (2017). The law is clear that a person in a dwelling has no duty to retreat and may use deadly force if she reasonably believes it is "necessary to prevent imminent death or great bodily harm" *or* to "prevent the imminent commission of a forcible felony." Fla. Stat. § 776.013(1). In short, while Defendant cannot avail herself of the *presumption* that she reasonably feared death or great bodily harm, she may, nevertheless, argue that she reasonably believed the use of deadly force was necessary to prevent death, great bodily harm or the imminent commission of a forcible felony.

The question that remains, then, is whether the State has demonstrated by "proof evident, presumption great" that Defendant could *not,* under the circumstances presented in this case, have reasonably believed it was necessary to shoot the victim in the back. The State has not met its burden—at least not by the standard imposed on the State at this stage of the proceedings.

The Court must apply the law as written by the legislature. The Florida legislature states a person may use "deadly force" when she "reasonably believes" it is necessary to "prevent the imminent commission of a *forcible felony*." Fla. Stat. § 776.013(1)(b) (2017). In this case, multiple people approached Defendant's window. An argument ensued. One had a stick and banged on Defendant's exterior wall and/or window. Another sprayed mace in Defendant's window.

For purposes of the "justifiable use of force," the legislature has chosen not to differentiate between the *manner* in which a particular "forcible felony" is committed. In other words, by focusing on the term "forcible felony," the legislature has equated a burglary that may result in a simple battery with a burglary that may result in murder. By law, both are "forcible felonies" because they are burglaries—irrespective of the disparate consequences on the occupant of the residence. For example, a burglary committed by a person who shoots an occupant through a window with a firearm commits a forcible felony as much as a person who sprays mace through the same

window. The law permits an occupant to use deadly force if she reasonably believes said force is necessary to prevent the burglary—notwithstanding that the intended, underlying offense was incapable of causing her great bodily harm.[11] *See* Fla. Stat. § 776.013(1)(b) (a person may use deadly force if she reasonably believes that using deadly force "is necessary to prevent imminent death or bodily harm. . .*or* to prevent the imminent commission of a forcible felony.") (emphasis added). The degree to which a person may "reasonably believe" a particular use of deadly force, may, or may not be, necessary to prevent the imminent commission of a forcible felony is a difficult thing to disprove by a standard that is said to be higher than beyond a reasonable doubt. *See Thourtman v. Junior,* 275 So. 3d 726, 735 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1500c] (requiring "proof stronger than beyond a reasonable doubt").

In its Supplemental Brief, the State asks this Court not to expand the meaning of burglary to allow for the entry of a dwelling by projectile—specifically, the mace's aerosol particles, which may have entered the home through the screened window. This Court is not expanding anything. Instead, this Court is merely applying the law as interpreted by higher courts for the last several decades. While this Court agrees with the State that interpreting "entering" within the burglary statute to include "entry by projectile" may lead to some unforeseen applications of the law, this Court finds that an interpretation of the term "entering" that depends on a particular judge's preference over whether the use of any one instrument, or another, should constitute "entry," is far more unpredictable and prone to arbitrary decision-making.[12]

Moreover, while this Court does not rely on out-of-state decisions to reach its conclusion, this Court does note that several states interpreting "entering" as understood in the common law have included "entry by projectile." *See e.g. State v. Decker,* 365 P.3d 954, 958 (Ariz. Ct. App. 2016) ("even in jurisdictions that have not defined 'entry' by statute, courts have similarly recognized, based on burglary's common law underpinnings, that projectile instruments can accomplish entry if used to 'consummate a criminal objective.' "); *State v. Williams,* 873 P.2d 471, 474 (Or. Ct. App. 1994) ("Because defendant fired bullets into [victim's] house for the immediate purpose of committing the offense of tampering with a witness, he thereby made an 'entry' into the house. . . ."); 3 Wharton's Criminal Law § 323 (15th ed. 2019) ("Thus, there is an entry when the defendant. . .throws a boulder at a window, and it smashes the window and lands on the inside, it having been thrown for the purpose of killing the occupant, or when the defendant while standing outside, fires a bullet which pierces a window and lands inside, the gun having been discharged for the purpose of killing the occupant.").

The State's attempt to distinguish the use of a spray can from the use of other instruments that may be used in furtherance of a "forced entry" of a dwelling is unpersuasive. Florida's burglary statute does not require "forced entry." *See Jimenez v. State,* 703 So. 2d 437, 441 (Fla. 1997) [22 Fla. L. Weekly S685a] ("Neither forced entry nor entry without consent are requisite elements of the burglary statute."),[13] The relevant factual determination is whether the mace used by the victim to effect the commission of the intended offense—in this case, battery—entered the residence. In this case, there is at least some evidence that suggests the mace did enter the residence.

Finally, the State relies on *State v. Heckman* wherein the Second District Court of Appeal reversed the trial court's order of dismissal after finding the "facts before the court at the hearing on the motion to dismiss did not establish that [defendant] was entitled to immunity." 993 So. 2d 1004, 1006 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2906b]. In *Heckman,* the victim had entered the defendant's garage and damaged the defendant's vehicle. The defendant was retreating and was fifteen-feet-away when the defendant shot him in the thigh. In this case, there was no evidence of how close the victim was to Defendant's window at the time she was shot, nor whether she was already walking away, or merely turned away because Defendant had drawn her firearm. There was also no consistent testimony concerning the period of time that elapsed between the spraying of the mace and the firing of the gun. In short, the circumstances that led to the shooting are far more chaotic and not as clear as the facts in *Heckman.*

In sum, this Court is not finding that Defendant was justified in her use of deadly force, This Court is merely finding that the State has not *disproven* the application of the justifiable use of force statute by "proof evident, presumption great."

In light of this Court's ruling on the issue of "justifiable use of force," the Court declines to address the merits of Defendant's alternative argument.

Accordingly, Defendant's Motion is GRANTED. This matter will be set for hearing tomorrow to address bond and any other matters pertaining to Defendant's continued detention or release.

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[1]In her sworn statement, Ms. White said, "It was, like, two minutes." However, Ms. White did follow up her estimate by saying, "It wasn't long at all, at all."

[2]In her sworn statement, Defendant stated some of the mace touched her arm. Ms. Holt, in her sworn statement, said the victim "didn't, like, spray it directly at [Defendant]. She sprayed it on the [window] screen."

[3]There is similarly no evidence that even if such injury, disability, or disfigurement had occurred that the victim caused said injury knowingly or intentionally.

[4]There are, in fact, two definitions of "dwelling." The one most pertinent to our analysis is the definition contained within the burglary statute. Fla. Stat. § 810.011(2) (2017). The second definition appears in the statute pertaining to the justifiable use of force when protecting a home. Fla. Stat. § 776.013(5)(a) (2017). In the burglary statute, "dwelling" includes the curtilage. In the justifiable use of force statute, "dwelling" does not include the curtilage.

[5]This is, admittedly, not the most helpful definition, However, no reasonable person would understand this property to be enclosed. *See e.g. Gonzalez v. State,* 724 So. 2d 126, 127 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2532a] ("in order to be considered curtilage' for purposes of the burglary statute, the area in question had to be enclosed-for example, by a fence or a wall.") (quotation marks and citations omitted). Additionally, this case is not like those where a fenced-in property leaves a space open solely for egress and ingress. There are various openings on the sides of the property in addition to the wide-open, street-facing side of the property. *See J.L. v. State,* 57 So. 3d 924 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D626a] (burglary statute does not apply to an open yard).

[6]This Court would not make that finding. The uncontroverted evidence demonstrates the victim did not go into the property with the mace. The mace was in Ms. Holt's hand. The victim arrived after Ms. Holt and Ms. White. After some yelling, the victim then took the mace from Ms. Holt and sprayed it at Defendant's screen. *See* Sworn Statement of Sheneithe Shawana Holt at 5-9.

[7]To the extent the crime of burglary previously required a "break-in," it no longer requires such a finding.

[8]This Court notes that forced entry is not an element of a burglary. *Jimenez v. State,* 703 So. 2d 437, 441 (Fla. 1997) [22 Fla. L. Weekly S685a] ("[n]either forced entry nor entry without consent are requisite elements of the burglary statute."), receded from on other grounds, *Delgado v. State,* 776 So. 2d 233 (Fla. 2000) [25 Fla. L. Weekly S1144a].

[9]Section 776.013, Fla. Stat. has been amended since the *Dorsey* opinion. The statute now precludes the use of the presumption if engaged in "criminal activity," as opposed to "unlawful activity." This Court does not see how that change would warrant a different ruling in this case. There is no question the possession of a firearm by a convicted felon is unlawful *and* criminal.

[10]No one has argued what standard should apply to the Court's determination of whether Defendant was unlawfully in possession of a firearm. This Court has applied the same standard applicable to *Arthur* hearings in general. The proof of Defendant's guilt on the count of unlawful possession of a firearm is evident, and the presumption of her guilt is great.

[11]Additionally, the legislature has stated a defendant is entitled to a presumption of reasonable fear of death or great bodily harm if the person against whom deadly force was used had unlawfully and forcibly entered a dwelling and the defendant knew the person against whom deadly force was used had unlawfully and forcibly entered the dwelling. *See* Fla. Stat. § 776.013(2) (2017). Neither side has argued how "forcibly," as used in this subsection, should be interpreted, nor whether the classification of a burglary as a "forcible felony" automatically renders any "entry" for burglary purposes a "forcibl[e]" entry for purposes of the statutory presumption. This Court, therefore, has not interpreted said term, but points to the statute solely to illustrate that commission, and knowledge of, a *past* act, such as having "had unlawfully and forcibly entered," can, at least in part, form the basis of a defendant's reasonable belief that deadly force

is necessary to *prevent* the imminent commission of a forcible felony. This Court, as stated above, does not believe this Defendant is entitled to the presumption. This finding, however, does not mean the factors that, ordinarily, may give rise to the presumption are irrelevant.

[12]Equally prone to arbitrary decision-making is the State's invitation to treat the entry of the mace into the home as *de minimis.*

[13]Receded from on other grounds. *See Delgado v. State,* 776 So. 2d 233 (Fla. 2000) [25 Fla. L. Weekly S1144a].

* * *

Contracts—Public housing—Right of first refusal—Action by nonprofit investor in public housing complex asserting that owner's actions in soliciting purchase offers for complex triggered nonprofit's right of first refusal established in operating agreement, irrespective of fact that sale did not occur, and asking court to compel owner to transfer title to nonprofit in accordance with agreement—Owner's manifest intent to sell housing complex, as demonstrated by its actions in negotiating sale agreement and preparing for sale, triggered nonprofit's right of first refusal—Nonprofit's exercise of its right of first refusal created option contract that nonprofit is entitled to specifically enforce—Affirmative defenses alleging unclean hands, failure to satisfy conditions precedent, recoupment, and breach of implied covenant of good faith and fair dealing fail as matter of fact and matter of law—Counterclaims for unjust enrichment and failure to satisfy conditions precedent also fail

OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC., a Florida non-profit corporation, Plaintiff, v. HK ASWAN, LLC, a Massachusetts limited liability company, HALLKEEN MANAGEMENT, INC., a Massachusetts corporation, and ASWAN VILLAGE ASSOCIATES, LLC, a Florida limited liability company, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation Division. Case No. 2019-16913-CA-01 (44). July 7, 2020. William Thomas, Judge. Counsel: David A. Davenport and Justice E. Lindell, Winthrop & Weinstine, P.A.; Lida Rodriguez-Taseff, DLA Piper LLP (US), for Plaintiff. Mark D. Solov, Jose G. Sepulvada, Ryan T. Thornton, and Alejandro D. Rodriguez, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., for Defendants.

OMNIBUS ORDER ON (i) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, (ii) PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT, (iii) PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AND (iv) DEFENDANT HALLKEEN MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT ON COUNT I

THIS MATTER came before the Court on (i) Defendants HK Aswan, LLC ("HK Aswan"), HallKeen Management, Inc. ("HallKeen Management"), and Aswan Village Associates, LLC's ("Owner" or "AVA") (collectively, "Defendants") Motion for Summary Judgment ("Defs. Mot.") against Plaintiff Opa-Locka Community Development Corporation ("OLCDC" or "Plaintiff"); (ii) OLCDC's Renewed Motion for Partial Summary Judgment ("OLCDC Renewed Mot."); (iii) OLCDC's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment ("OLCDC MJP"), and (iv) Defendant HallKeen Management's Motion for Summary Judgment on Count I ("HKM Mot.") against OLCDC. Based upon the Court's review of the motions, the supporting exhibits, deposition and other transcripts, the applicable portions of the record, argument of counsel, and being otherwise duly advised in the premises, the Court makes the following findings:

Findings of fact

This matter concerns an affordable housing apartment complex located in Opa-locka, Florida, which is known as Aswan Village Apartments ("***Aswan Village***"), and a right of first refusal granted thereon to OLCDC. OLCDC is a South Florida-based 501(c)(3) nonprofit corporation whose mission is to transform under-resourced Florida communities into desirable, engaged neighborhoods by improving access to, among other things, affordable housing. In 2000, OLCDC joined Banc of America Community Development Corporation ("***BACDC***") in forming the Company for the purpose of acquiring, developing, and operating Aswan Village as affordable housing, and to finance those activities through participation in the Low Income Housing Tax Credit ("***LIHTC***") program, 26 U.S.C. § 42 *et seq.* ("***Section 42***").

In 2003, after Aswan Village qualified for the allocation of tax credits, OLCDC and BACDC restructured the Company to admit Banc of America Housing Fund ("***BOA***"), as tax credit investor, and Aswan Development Associates, LLC ("***ADA***"), as the Class A Member. Contemporaneously, OLCDC and BACDC withdrew from the Company and were admitted to ADA, leaving BOA and ADA as the only members of the Company. The Company also entered into a First Amended and Restated Operating Agreement, which includes several amendments (the "***Amended Operating Agreement***"). In accordance with OLCDC's mission and Section 42's aims, BOA and ADA expressly agreed in the Amended Operating Agreement that the Company and Aswan Village would be operated in compliance with Section 42 to "[p]rovide quality affordable housing and combat further community deterioration."

Consistent with that mission, in connection with this Amended Operating Agreement, OLCDC bargained for, and the Company agreed to, a Right of First Refusal Agreement under Section 42 (the "***ROFR***"). It provides, in relevant part:

> Right of First Refusal. After the end of the Compliance Period, the Company will not sell the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to Purchaser (if it then qualifies as an organization described in Section 42(h)(5)(c) of the Code) (the "Buyout"), at a price (the "Buyout Price") [set forth in Section 42(i)(7) of the Code]; provided, however, that such right of first refusal shall be conditioned upon an agreement by Purchaser to maintain the Project for low-income use for at least fifteen (15) years after the later of the end of the Compliance Period (but in no event can such low-income use terminate before the end of the Extended Use Period) under Section 42 of the Code . . . . In the event that Purchaser does not purchase the Company Property on the terms set forth above, then the right of first refusal granted herein shall lapse. ***

HKM is a Massachusetts-based, for-profit corporation that operates collectively as an owner and investor and manager of affordable housing. In 2014, after the Credit Period was over and BOA had received all of its bargained-for tax credits, BOA sold its tax credit investor position. Specifically, HKM, through its specially created affiliate, HKA, acquired all of BACDC's ownership interests in ADA for between $250,000-$400,000. As a result, HKA became ADA's 51% owner and the Company's Manager. HKA then caused ADA to redeem all of BOA's interests in the Company, leaving ADA as the sole member of the Company and HKA as the controlling member of ADA and the Company. OLCDC retained its 49% position in ADA.

HKM then caused HKA to engage HKM to act as the Company's Management Agent. As such, HKM manages Aswan Village's day-to-day operations and is compensated for those services accordingly. As the Company's Management Agent, HKM is empowered with the managerial powers delegated to it by HKA. When HKM caused HKA to purchase BACDC's interests in 2014, it sought to eliminate the ROFR, but OLCDC refused. Thus, when ADA's operating agreement was amended (the "***ADA Agreement***") to allow HKA's admission into ADA, the parties expressly maintained OLCDC's ROFR as a "distinct right" in their agreements. As a compromise, the parties agreed to add Section 10 to the ADA Agreement, which the parties refer to as the "forced sale provision." It provides, in relevant part:

> From and after the end of the Compliance Period . . . , OLCDC shall have the right to direct [HKA] to cause [the Company] to put [Aswan Village] on the market for sale . . . . [The Company] will, in accordance with Section 14.02 (Right of First Refusal) of the [Amended] Operating Agreement first offer the Project for sale to OLCDC. If, after having directed [HKA] to cause [the Company] to put the Project on the market for sale, OLCDC elects to exercise its right of first refusal, then OLCDC agrees that . . . OLCDC shall purchase all of the Interests owned by HKA in ADA . . . .

Absent the invocation of this Section 10 right under the contractually agreed-upon circumstances, Defendants recognize that, because of the ROFR, they have "no real equity" in the Company and Aswan Village and have "no value except through operating cash flow." Accordingly, when Defendants consummated the aforementioned transaction to acquire BOA's position in the Company, they paid no more than $400,000 because OLCDC's ROFR preserved all of Aswan Village's equity for OLCDC, which is precisely its intent of the ROFR and consistent with the policy goals and objectives of Section 42 and LIHTC program in general. It is undisputed true that Owner has not entered into a purchase and sale agreement for the sale of the Property at any time, nor scheduled a closing to consummate a sale of the Property.

It is important for this Court to detail how the Low Income Housing Tax Credit ("LIHTC") Program works. As set forth in Section 42, the LIHTC program is a federal subsidy program specifically designed to promote the nationwide development and preservation of rental housing that is affordable to low and moderate income households. The LIHTC program subsidizes low-income housing by: (1) making available to a "qualified low-income housing project" tax credits, which provide a dollar-for-dollar income tax reduction; and (2) permitting institutional investors with large, annual, and predicable income tax obligations (known as "tax credit investors"), such as banks, to acquire these tax credits in exchange for providing capital necessary to develop the project. *Low Income Housing Tax Credit: The Role of Syndicators*, U.S. Government Accountability Office, GAO 17 285R, at 1, 4 (February 16, 2017), https://www.gao.gov/assets/690/ 682890.pdf (hereinafter, "***The Role of Syndicators***"). In the typical case, this is accomplished by the tax credit investor's equity investment into a partnership or similar "pass-through" tax entity—in this case, a limited liability company—created for the purpose of developing the apartment complex. *The Role of Syndicators*, at 1; *The Low-Income Housing Tax Credit Program at Year 25: An Expanded Look at Its Performance*, Cohn Reznick LLP at 67 (December 2012), *available at* https://www.cohnreznick.com/insights/lihtc-program-year-25-expanded-look-at-performance. In return for the infusion of capital—which is combined with debt necessary to finance the development—the tax credit investor, which consequently holds almost all of the equity in the entity (usually 99 percent or more), is allocated a commensurate amount of the tax benefits flowing from operations of the apartment complex, including the LIHTC tax credits and other tax losses and deductions. Through this framework, Section 42 advances the deliberate policy choice to *replace* a typical equity investor's expectations of "economic cash flow or appreciation" from the apartment complex *with* a comparable or better return on investment "almost solely derived from tax benefits."

To ensure low-income housing is not immediately converted to market-rate housing, the LIHTC program staggers the allocation of the tax credits over a period of ten years, known as the Credit Period. Further, to avoid recapture of the tax credits after they have been allocated, the owner of an affordable housing must continue to comply with rent affordability restrictions for a contemporaneously running period of fifteen years, known as the Compliance Period. Moreover, for any LIHTC project allocated tax credits after 1989—as is the case here—the owner of the project must also agree to comply with the affordability restrictions for an additional fifteen years after the Compliance Period, known as the Extended Use Period, meaning affordability restrictions remain in place for a total of thirty years following the apartment complex being placed into service.

But the LIHTC program's aim of creating and preserving low-income housing does not end at thirty years. Rather, the LIHTC program seeks to preserve low-income housing in perpetuity by creating a special role for nonprofits, like OLCDC, whose missions are not to profit from a sale of the low-income housing project, but to continue to develop and preserve the low-income housing in perpetuity for the betterment of the public and the community in which project is located. Specifically, the LIHTC program, which is administered locally by the Florida Housing Finance Corporation, requires each State to set aside at least ten percent of its allocable tax credits—the obtainment of which is highly competitive—for projects developed and operated in conjunction with a qualified nonprofit organization, such as OLCDC.

In addition, and as particularly relevant here, Section 42 expressly authorizes the owners of the apartment complex to grant a "qualifying nonprofit organization" a "right of first refusal" to facilitate the inexpensive transfer of the project "after the close of the compliance period" for a statutorily-defined, below-market "minimum purchase price." 26 U.S.C. § 42(i)(7)(A). In doing so, Section 42(i)(7) creates "a safe harbor for property owners," without which longstanding tax law would operate to "disqualify[ ] them from the tax credits that are the key economic incentive for their investment in affordable housing." The expectation is for the properties to remain with the nonprofit owners in perpetuity and to continue to be operated as affordable housing.

In October 2018, in response to an article regarding Miami's drinking water, HKM and HKA unilaterally commenced discussions regarding the sale of Aswan Village, engaged brokers to obtain broker opinions of value for Aswan Village, concluded that Aswan Village had substantial equity, and conducted potential disposition analyses regarding Aswan Village. (Documenting Defendants' impression that they should "sell [their] Miami area properties ASAP" and that, accordingly, they "should find out quickly" what they "could sell them for"). There is no dispute that Defendants were aware of the existence of OLCDC's "distinct" ROFR at all relevant times. There is also no dispute that Defendants engaged in a sequence of events to execute their "Florida recapitalization plan." This "recapitalization plan" included the ultimate fee simple sale of, or transfer of ownership interests in, Aswan Village and two other Florida LIHTC properties—Park City Apartments ("***Park City***") and Palmetto Park Apartments ("***Palmetto***")—to a new ownership entity.

Before Defendants approached OLCDC regarding the possible sale of Aswan Village, Park City and Palmetto, and before they informed OLCDC of their unilateral intentions and actions, Defendants had already begun soliciting proposals from third parties to acquire the three properties, including a third party known as Lincoln Avenue Capital ("***LAC***" or "Lincoln"). In fact, on April 15, 2019, LAC, a trade name for an affordable housing developer that conducts business through various entities, presented a letter of intent proposing two joint venture transactions regarding the "Aswan Village Apartments" to Mark Hess, Vice President of Acquisition and Development of HallKeen Management. ("LOI"). Mr. Hess had been communicating with Lincoln's representatives regarding Lincoln's interest in the Property for the purpose of presenting Lincoln's proposal to HK Aswan and OLCDC so they, as members of ADA, could consider the joint venture transactions proposed. The LOI expressly acknowledges its preliminary, nonbinding nature. In material part, the LOI states on

the first page:

> [T]his Letter of Intent, outlining certain terms under which Lincoln Avenue Capital (the 'Buyer') intends to negotiate a mutually acceptable Purchase and Sale Agreement ('PSA') for the purchase of the above captioned real estate . . . . This letter shall not create any binding obligations on any party hereto, and completion of the transaction remains subject to the successful negotiation and execution of a PSA between the parties.

Id.

The LOI proposed two alternative joint venture structures. The first structure, which contemplated "closing directly into the tax credit partnership," listed a sales price of $21,000,000. *Id*. The second structure, which contemplated "closing into bridge partnership prior to tax credit partnership," listed a price of $20,370,000. *Id*.

On March 6, 2019, Mark Hess updated the HKM "Investment Committee" regarding the "proposals" "we recently solicited . . . to dilute our equity interests in the 3 Florida deals." In providing this update, Mr. Hess remarked: "Please see the DRAFT Roseview outline pitched below. One nice thing about this structure is that it may appear relatively innocuous to OLCDC . . . ." (*Id.*) Additionally, as reflected in a March 13, 2019 e-mail, LAC wrote to Defendants: "Per our conversation yesterday, enclosed in this email is a LOI from Lincoln Avenue Capital for the "HallKeen Florida assets (Park City Apartments, Aswan Village Apartments, and Palmetto Park Apartments)."

At this time, Defendants did *not* understand OLCDC to have decided to buyout HKA's interests under Section 10 of the ADA Operating Agreement commenting internally on March 14, 2019: "If we pick our timing and go to OLCDC with 10/10 on with 20% we may be able to sell this [LAC] Aswan deal to Willie." This reflected Defendants' understanding on March 4, 2019 that "[Aswan Village] is still the trickiest because we need to meet OLCDC objectives and they, so far, are resisting a sale or fixing up any portion of their interest." The undisputed evidence of record establishes that, on March 18, 2019, OLCDC did not request or otherwise cause Defendants to solicit any proposals. Indeed, the undisputed evidence of record is that Defendants had been working to not only solicit proposals to sell Aswan Village prior to this time, but they were concurrently soliciting proposals to sell Park City and Palmetto as well. There is no dispute that Defendants "disclose[d] having 5 proposals" to sell all three LIHTC properties, which included Aswan Village, and declared that they would "make a final decision on April 3 and then inform [OLCDC] of what the deal is."

It is undisputed that, on April 4, 2019, Defendants requested that the combined LOI for all three properties—that Defendants had solicited on March 12 and received on March 13—"be structured as 3 standalone offers," acknowledging that there were "different parties with different interests invested in each deal." Defendants further requested that LAC confirm that it did "not need the offers to be interdependent." On April 8, 2019, after a self-described "productive call" with LAC, Mark Hess informed the "Investment Committee" that it could "Expect 3 standalone LOIs this week" and also noted that LAC had "increased" the "Park City offer by $850k to $14.35 million."

On April 9, 2019, before Defendants had received the updated LOIs from LAC, Mr. Hess instructed another individual to begin assembling various environmental due diligence documents "[i]n preparation for accepting LOI's on the Florida portfolio." On April 16, 2019, Defendants sent to OLCDC for "partner approval" an LOI from LAC that Defendants had executed, "acknowledged and accepted" on behalf of the Company, as the proclaimed "SELLER" of Aswan Village. In the e-mail forwarding the LOI, Defendants declared: "As you can see from the attached LOI, we have decided to go forward with Lincoln Avenue Capital . . . the pricing came in a bit better than we expected with . . . $21,000,000 for Aswan." (*Id.*) Defendants then described what "will" happen as a result of the sale to LAC.

More specifically, Defendant "outlined the general structure of the transaction should [OLCDC] desire to proceed . . . as stated in the LOI." Defendant also informed Logan that any further discussions with Lincoln were conditioned upon OLCDC agreeing to terminate, or waive, its right of first refusal. Defendants also stated it was "anxious to keep the process moving with LAC," and consequently wanted OLCDC's own "decision" as to whether it would consent to the sale or buyout HKA. There is no dispute that, before sending the LOI to OLCDC on April 16, 2019, Defendants first returned an executed, "acknowledged and accepted" copy of the LOI to LAC.

Additionally, on April 16, 2019, Defendants updated one of the brokers, informing him that Defendants "are looking for partner consent right now to move forward with a J/V ownership/syndication on all 3 deals . . . ." On April 22, 2019, Defendants contacted one of the unsuccessful prospective purchasers from whom Defendants had solicited a proposal. Defendant stated Defendants "executed an LOI with a J/V partner on the 3 properties last week" and "hope[d] to get to a [purchase and sale agreement] over the coming weeks." (Exhibit B to Renewed Motion) Defendants then thanked the prospective purchaser for its interest in the deals and indicated Defendants' "interest[ ] in finding a way to work with" the prospective purchaser "in the future." (*Id.*) That same day, Defendants informed LAC that due diligence documents would be "posted tomorrow."

On April 29, 2019, Defendants provided LAC with a draft purchase and sale agreement ("***PSA***") for Palmetto. Defendants then stated: "Once we have a sense of your comments on the Palmetto PSA, we can use this as a base form to quickly finalize [the Project] and Park. In the meanwhile, we will start on the PSA exhibits." That same day, Defendants executed and returned engagement letters to Novogradac & Company LLP ("***Novogradac***") for the preparation of "sales projections" analyses "for Park and [Aswan Village]," which Defendants requested Novogradac "then forward . . . to our team so that we can help prepare the waterfall for the tiers."

On May 5, 2019, in response to a request for an update regarding apartment staff messaging, Defendants expressed: "Hopefully we will have Palmetto's signed PSA by Friday and the balance over the following week or two." The next day, May 6, 2019, OLCDC conveyed to Defendants the requisite "partner approval" to the LOI, subject to the exercise of OLCDC's ROFR, thus providing full ADA member approval to the sale. OLCDC made it clear that it did not intend to terminate or waive its right of first refusal. On May 7, 2019, after OLCDC provided the requested "partner approval" to the LOI, Defendants told LAC that they "were unable to secure our partner approvals" and "had to let the LOI lapse." Defendants argue that because OLCDC did not agree to terminate its preemptive right, Defendants informed Lincoln that "partner approval" had not been obtained to proceed with the LOI. Defendants take the position that HK Aswan and OLCDC, as the two members of ADA, failed to reach an agreement on how to proceed regarding the joint venture transactions proposed in the LOI.

Defendants refused to permit OLCDC to exercise its ROFR and/or close on the sale of Aswan Village pursuant to resulting option contract that arose when OLCDC exercised its ROFR. On June 5, 2019, OLCDC filed this Complaint. OLCDC alleges the Defendant's actions triggered its right to exercise its ROFR. OLCDC asks this Court to compel Owner to transfer title to the Property pursuant to and in accordance with the Agreement. Defendants argue that because no sale was ever scheduled to occur (nor did a sale in fact occur), Defendant was not obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered and remains unripe.

Legal Standard in Addressing a Motion for Summary Judgment

In accordance with Rule 1.510(c), Florida Rules of Civil Procedure, summary judgment will be ordered if the pleadings, depositions, affidavits, answers to interrogatories, and admissions filed together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. In simple terms, summary judgment is granted when there remains no issue of material fact to litigate. *ARC Foods, Inc. v. MGI Props.*, 724 So. 2d 663 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2739a]. While the moving party has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, the nonmoving party must then counter with evidence sufficient to reveal a genuine issue. *Publix Supermarkets, Inc. v. Austin, et al.*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1531b]; *Golden Hills Golf & Turf Club, Inc. v. Spitzer, et al.*, 475 So. 2d 254 (Fla. 5th DCA 1985).

Conclusions of law

Defendants contend that under Florida law there are two threshold conditions that must be met to trigger a right of first refusal: (i) the existence of a third-party offer to purchase the property at issue, and (ii) an owner's expressed willingness to accept such offer. Because the LOI is nonbinding by its own language, Defendants assert it cannot constitute an "offer" capable of "acceptance" and, therefore, cannot trigger OLCDC's right of first refusal. OLCDC, conversely, argues there is no requirement under Florida law of the existence of a third-party offer and that OLCDC's right is triggered at the moment Defendants manifested an intention to sell Aswan Village.

The parties do not dispute that the language of the Agreement is plain and unambiguous. The interpretation of an unambiguous contract involves a pure question of law. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D462c]; *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985). Florida law clearly recognizes that "[a] right of first refusal is a contractual right." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1287 (Fla. 2008) [33 Fla. L. Weekly S478a] ("*Old Port Cove*"). Therefore, like any contractual right, a court determines whether a right of first refusal was triggered by interpreting and enforcing the specific language of the parties' agreement creating the right. *See Robbinson v. Cent. Props., Inc.*, 468 So. 2d 986, 988 (Fla. 1985) (recognizing that, in interpreting a right of first refusal agreement, "the intention of the parties governs, and such intention will be determined from the language used when it is unambiguous").

The ROFR, at issue in this case, in relevant part, states:

> **Right of First Refusal.** After the end of the Compliance Period, the Company [Owner] will not sell the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to Purchaser . . . at a price (the "Buyout Price") . . . .

OLCDC's interpretation of this language is that, in accordance with Section 42, its right to receive the "first offer[ ]" to purchase Aswan Village is triggered at the moment Defendants manifested an intention to sell Aswan Village. Defendant's interpretation of the ROFR is that it is triggered only after Defendant has entered into a binding contract with a third-party for the sale of Aswan Village "without first offering" it to OLCDC for purchase, at least, 45 days before any sale is to occur. Defendants argue because no sale was ever scheduled to occur (nor did a sale in fact occur), Owner was not obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered.

Defendants contend that the ROFR must be interpreted strictly under Florida common law. Under Florida common law, Defendants argue, OLCDC's ROFR is only triggered if the Company had entered into a binding contract for sale and then failed to comply with the ROFR's 45-day notice provision. At minimum, Defendants further argue, Florida common law requires the receipt of an "enforceable offer" in order to trigger OLCDC's ROFR. Contrary to the position advanced by Defendants, it is the finding of the Court that under Florida law, "all the laws which subsist, at the time and place of the making of a contract . . . enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms . . . ." *Humphreys v. State*, 145 So. 858, 861 (Fla. 1933). Florida courts accordingly hold that the meaning of contractual terms and attendant rights are animated and defined by applicable law integrated into the contract. *See, e.g.*, *Gen. Dev. Corp. v. Catlin*, 139 So. 2d 901, 904 (Fla. 3d DCA 1962); *see also Coast Cities Coaches, Inc. v. Whyte*, 102 So. 2d 848, 852 (Fla. 3d DCA 1958) (stating that courts interpret contracts in accordance with the parties' intentions, considering "not only the words used in the contract but the obvious purpose intended to be accomplished by it").

Given the explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, there can be no dispute that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual "Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing for no less than the Extended Use Period as defined by Section 42. (Compl. ¶31-35 & Ex. A § 14.02, Ex. E § 1) Because the ROFR and the Agreement expressly refer to and incorporate Section 42, they must be interpreted accordingly. *See, e.g.*, *Humphreys*, 145 So. at 861; *Catlin*, 139 So. 2d at 904.

Defendants would have this Court not only read the ROFR isolated from the remainder of the parties' Amended Operating Agreement, which Defendants do not dispute is fashioned entirely around Section 42, but would have this Court ignore the replete references to Section 42 weaved into the ROFR itself. This Court finds this position unpersuasive.

The Court does not ignore and fully understands the common everyday definition of the word "sell" which means to "give or hand over (something) in exchange for money," *Sell*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010), or "to transfer (property) by sale," *Sell*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Defendant argues that the Court is not at liberty to rewrite the Parties' Agreement. *E.g.*, *19650 NE 18th Ave. LLC v. Presidential Estates Homeowners Ass'n, Inc.*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2280a] (the court cannot rewrite a contract "to add language the parties did not contemplate at the time of execution."); *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1756a] ("[A] court is powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties."). This Court accepts that it is unable to rewrite a contract to add language the parties did not contemplate at the time of execution. However, that is not what is occurring in this case.

The explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, commands that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual

"Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing for no less than the Extended Use Period as defined by Section 42. (Compl. ¶ 31-35 & Ex. A § 14.02, Ex. E § 1). Therefore, it is the finding of this Court that the proper "context" in which to interpret a right of first refusal granted in accordance with Section 42 is, "as reflected in the language of the agreements," Section 42. *See Homeowner's Rehab*, 99 N.E.3d at 753, 755.

There is no genuine issue of fact regarding Defendants' intent to sell. First and foremost, Defendants executed the LOI—a document the chief purpose of which is to manifest the signatory's intent. *Midtown Realty, Inc. v. Hussain*, 712 So. 2d 1249, 1252 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1619c] (stating that a letter of intent memorializes the "preliminary understanding of the parties who intend to enter into contract"). Moreover, no other logical conclusion can be reached from Defendants' undisputed actions, such as, *inter alia*: following the execution of the LOI, which Defendants furnished to LAC before seeking partner approval from OLCDC, declaring to OLCDC that they had "decided to go forward" with the sale to LAC on those terms; thereafter requesting "partner approval," believing that such approval was all that was required "to move forward" with the sale and get to an executed PSA with LAC in mere "weeks"; before hearing from OLCDC, spending significant time and money proceeding with due diligence and the preparation of a PSA and sales disposition analysis in order to "quickly finalize" the sale of the Project for "a $21 million sale price"; and, after OLCDC exercised its ROFR, telling LAC they hoped to "reconstitut[e] the agreement." Defendants' manifest intent, willingness, and decision to sell Aswan Village, as a matter of law, triggered OLCDC's right of first refusal to purchase at the Section 42 price.

Defendants' argument is that Andy Burnes—the manager of every asset HKM owns, including HKA, —expressly conditioned Defendants' decision to sell on OLCDC waiving its ROFR rights, and "[a]bsent OLCDC's consent to waiving its ROFR, no desire to sell existed" is unpersuasive and contradicted by the undisputed material facts. Specifically, consistent with Defendants' pleadings, both Defendants' and OLCDC's understanding is that it was the future closing of the contemplated transaction with LAC that "will" cause the ROFR to "go away." (Dep. Ex. 123; Burnes Dep. at 184:17-185:10; 186:3-8); Doc. No. 159 at pp. 10-11 n.12). And, decisively, rather than send an unexecuted LOI to OLCDC and expressly state that its decision to move forward was "conditioned upon" or "subject to" OLCDC's waiver of its ROFR rights, Defendants executed the LOI before they sent it to OLCDC for approval, and also sent an executed copy to LAC. Defendants undisputedly did not add a condition upon the decision they had already made. Therefore, Defendants' arguments fail, and this Court finds that OLCDC's consent provided full authto the LOI sufficient to trigger its ROFR.

Additionally, there is no genuine issue of fact regarding OLCDC's exercise of its ROFR."[O]nce [the Company] manifest[ed] a willingness to [sell]," OLCDC's right of first refusal was triggered, which, once exercised, created an option contract. *McDonald's Corp. v. Roga Enterprises, Inc.*, No. 10-21706-CIV, 2010 WL 4384214, at *2 (S.D. Fla. Oct. 28, 2010) (quoting *Old Port Cove*, 986 So. 2d at 1285). "When there is an exercise of the option, a mutually binding and enforceable contract to purchase is created." *Id.* (quoting *Power v. Power*, 864 So. 2d 523, 524-25 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D188a]. It is undisputed that OLCDC exercised its right of first refusal under the ROFR, thus creating an option contract that the OLCDC is entitled to specifically enforce. Further, it is undisputed that, after OLCDC exercised the ROFR, Defendants have since refused to permit OLCDC to close on the sale of Aswan Village. Thus, the undisputed facts establish that OLCDC's right of first refusal ripened into an option contract, which OLCDC exercised, and which Defendants have consequently breached by refusing to perform thereunder. OLCDC is thus entitled to a summary judgment of specific performance.

Defendants argue that, even if this Court interprets the ROFR in light of Section 42, Section 42 does not support the manifest-intent-to-sell trigger for which OLCDC advocates. This Court disagrees. Section 42 does not merely acknowledge that rights of first refusal can be agreed to by parties in connection with the development of a LIHTC developments, as Defendants suggest. Rather, Section 42 alone makes possible these below-market, "minimum purchase price" rights of first refusal (Section 42 ROFRs) because, in the absence of Section 42's "safe harbor," such below-market rights of first refusal would place the tax credit investors tax credits at risk of recapture. *Homeowner's Rehab*, 99 N.E.3d at 755-56; *Riseboro Cmty. P'ship Inc. v. SunAmerica Hous. Fund No. 682*, 401 F. Supp. 3d 367, 375 (E.D.N.Y. 2019) (noting that Section 42(i)(7) expressly allow[s] [qualified nonprofit] organizations to have a ROFR to purchase projects at below market prices"). Put simply, these below-market, "minimum purchase price" rights of first refusal only exists because Section 42(i)(7) exists. Accordingly, as the *Homeowner's Rehab* court recognized, and this Court agrees, Defendants' argument "fails to acknowledge" that a Section 42 ROFR, such as the ROFR here, "is not purely a creation of the common law" but is granted pursuant to Section 42 and must therefore be interpreted in light of Section 42. Therefore, this Court concludes that, absent language expressly agreed to by the parties to the contrary, all that Section 42 requires as a trigger is a manifest decision to sell by the owner.

Turning to the ROFR here, like Section 42, there is no "binding contract," "enforceable offer" or other express triggering requirements found anywhere upon the face of the document. Rather, the ROFR simply affords OLCDC a "right of first refusal," prohibiting the Company from selling Aswan Village "without first offering" it to OLCDC for a period of 45 days at the Section 42 minimum purchase price. Therefore, interpreting the ROFR here in light of Section 42, as the plain language of the ROFR demands, and in the absence of any express, contractually agreed-to triggering requirements, this Court concludes that the ROFR is triggered, in accordance with Section 42, upon a manifestation of the Company's decision to sell.

Defendants, however, point to the *Homeowner's Rehab* court's affirmance of an "enforceable offer" requirement under the Section 42 ROFR there to argue that an "enforceable offer" requirement should be imposed on the ROFR here. Defendants' argument is misplaced. The ROFR *Homeowner's Rehab*, unlike OLCDC's ROFR, *expressly required a third-party offer,* the "terms of the proposed disposition" to the third party, and "whether the partner was willing to accept that offer." *Id.* at 750, 761-62. Consequently, finding no inconsistency between Section 42 and Congress's "decision to sell" requirement and the offer requirement *expressly agreed to by the parties in their contract,* the *Homeowner's Rehab* court upheld the parties' *agreed-to* offer requirement. The facts of this case command no similar finding.

Additionally, Defendants' reliance upon *Senior Hous. Assistance Group v. AMTAX Holdings 260, LLC* (hereinafter, *SHAG*), C17-1115 RSM, 2019 WL 1417299 (W.D. Wash. Mar. 29, 2019), which held that a bona fide, enforceable offer was required to trigger a Section 42 ROFR, is equally misplaced. The *SHAG* court's decision was rooted solely in what it deemed to be applicable Washington common law, not Section 42 or, at the very minimum, Florida common law. *Id.* at *9-10.

In sum, the Court agrees with OLCDC that the ROFR must be read

and interpreted in light of Section 42. Conducting such analysis under the particular contractual language at issue here, the Court concludes that the plain and unambiguous language, which lacks any other triggering mechanisms requires only a manifest decision to sell to trigger OLCDC's ROFR rights.

Significantly, even if this Court were to read and interpret the ROFR in accordance with Florida common law, or any common law for that matter, the Court would reach the same result. In fact, well-settled common law, including Florida common law, is squarely in accord. As particularly relevant here, in *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, the Florida Supreme Court expressly concurred that, absent other express requirements, "a right of first refusal . . . "ripen[s] into an option depending on whether the owner decides to sell." 986 So. 2d 1279, 1285-87 (Fla. 2008) [33 Fla. L. Weekly S478a]. Florida common law similarly recognizes that, unless the specific language of the right of first refusal at issue requires it, there is "no requirements of a binding contract" to trigger a right of first refusal. *See, e.g.*, *Vietor v. Sill*, 243 So. 2d 198, 199 (Fla. 4th DCA 1971); *accord McDonald's Corp.*, 2010 WL 4384214, at *2 (reciting *Vietor* and holding that the owner's execution and transmittal of a non-binding letter of intent to the plaintiff would, if proven, "constitute a willingness to sell the [property] which triggered [its] right of first refusal," despite the defendant's contention that a non-binding letter of intent did not constitute an enforceable "offer") (emphasis added); *Vorpe v. Key Island, Inc.*, 374 So. 2d 1035, 1036 (Fla. 2d DCA 1979) (citing *Vietor* and concluding that a covenant providing "a right of first refusal for 30 days should [owner] have an opportunity to sell the real property" required a "manifested [ ] intention to sell" in order for the "right of first refusal" to be "activated").

Defendants nevertheless rely on *Old Port Cove* and other Florida cases such as *Central Properties, Inc. v. Robbinson*, 450 So. 2d 277 (Fla. 1st DCA 1984) to argue that this Court should impose a third-party "offer" requirement onto the ROFR here. However, the courts in those cases were discussing a very different type of right of first refusal. At issue in *Old Port Cove*, for example, was a right of first refusal that, by its express terms, only permitted the defendants to purchase the plaintiff's property "upon the same terms and conditions as are proposed for its sale" to a third party (a "***meet-and-match ROFR***"). 986 So. 2d at 1281. In light of the meet-and-match nature of that right, the Florida Supreme Court adopted the following widely accepted definition of such a meet-and-match ROFR:

> A right of first refusal is a right to elect to take specified property ***at the same price and on the same terms and conditions as those contained in a good faith offer*** by a third person if the owner manifests a willingness to accept ***the offer***.

Id. at 1285 (quoting *Pearson v. Fulton*, 497 So. 2d 898, 900 (Fla. 2d DCA 1986)) (emphasis added). Such a meet-and-match ROFR, the Florida Supreme Court continued, therefore "ripens into an option once an owner manifests a willingness to accept a good faith offer." *Id*

Defendants rely upon this language to argue that the receipt of an "enforceable offer" is thus a triggering requirement imposed on all rights of first refusal under Florida common law. But in so arguing Defendants erroneously overlook the Florida Supreme Court's subsequent clarification in *Old Port Cove* that rights of first refusal "vary in form: some require offering the property at a fixed price (or some price below market value), while others . . . simply allow the holder to purchase the property on the same terms as a third party." *Id.* at 1285 (emphasis added). In other words, Defendants' argument entirely disregards *Old Port Cove's* own admonition that meet-and-match ROFRs, which by their express terms require a purchase "on the same terms as a third party" offer, are not the same as rights of first refusal that, as here, proscribe the owner's ability to sell the property "without first offering" the property at a "fixed price" (a "***fixed-price ROFR***"). Defendants' legal theory is thus flawed.

Moreover, transposing this meet-and-match, third-party "offer" requirement onto a fixed-price ROFR, like OLCDC's ROFR, would be nonsensical. Specifically, unlike a fixed-price ROFR, which supplies its own terms of sale, a meet-and-match ROFR necessarily requires the receipt of a third-party offer in order to supply the terms on which the holder of the right is entitled to purchase the property. *Steinberg v. Sachs*, 837 So. 2d 503, 505-06 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D214a]. Put another way, "without knowing the terms of the sale [offered by the third party], the [rightholder] could not meet the offer of [the third party] and thus could not properly exercise their right of first refusal." *E.g.*, *Tribble v. Reely*, 557 P.2d 813, 817 (Mont. 1976).

Conversely, in the context of a fixed-price ROFR (like OLCDC's), requiring such a third party offer would serve absolutely no purpose because a fixed-price ROFR supplies its own definite terms of sale (here, debt plus taxes). Thus, adding an "offer" requirement to OLCDC's ROFR where none is expressly included or supported, as Defendants urge, would only serve to make it nearly impossible for OLCDC to exercise its ROFR. *See Homeowner's Rehab,* 99 N.E.3d at 759, 761-62 & n.16 (refusing to interpret the right of first refusal in such a way that "the nonprofit developer could be denied any meaningful opportunity to acquire the property interest at the § 42 price").

Moreover, common law across the nation undermines Defendants' interpretation and supports OLCDC's interpretation. Universally consistent common law on rights of first refusal recognizes that the defining characteristic of the right is that its "binding effect" turns on whether "the offeror decides to sell." *Winberg v. Cimfel*, 532 N.W.2d 35, 39 (Neb. 1995) (quoting 11 Samuel Williston, A Treatise on the Law of Contracts § 1441A at 948-50 (3d ed. 1968)); *Barling v. Horn*, 296 S.W.2d 94, 98 (Mo. 1956) (a right of first refusal "requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price") (quoting Vol. VI, American Law of Property, § 26.64, p. 507)) (emphasis added).

Lastly, Defendants' interpretation that the ROFR's 45-day notice period constitutes the ROFR's trigger fails. Contrary to Defendants' assertion, this notice period is a procedural safeguard providing the minimum amount of time that Defendants must afford OLCDC to consider whether to exercise its right; it cannot serve as the simultaneous trigger and breach of the ROFR, as Defendants urge. *See Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 807, 812 (Tenn. Ct. App. 2005).

Defendants' affirmative defenses are insufficient as a matter of law. For a plaintiff "to obtain a summary judgment when the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish the legal insufficiency of the defenses." *Bunner v. Florida Coast Bank of Coral Springs, N.A.*, 390 So. 2d 126, 127 (Fla. 4th DCA 1980). Here, OLCDC has carried its burden of disproving each of Defendants' affirmative defenses in both respects. The undisputed material facts conclusively establish that OLCDC did not force a sale of Aswan Village upon Defendants, did not engage in any wrongdoing, and did not trick Defendants. Quite the opposite, Defendants were aware at all times of the applicable rights and obligations, unilaterally solicited proposals for the sale of Aswan Village, and OLCDC merely sought to lawfully protect its interests and exercise its contractual rights. There is no material evidence of record to support Defendants' assertion that OLCDC's request for more information on March 18, 2019 caused Defendants to solicit proposals (Defendants, indeed, already had them) and/or coerced Defendants to "decide[ ] to move forward" with LAC's LOI. Defen-

dants' affirmative defenses thus fail as a matter of fact.

In addition, Defendants' affirmative defenses fail as a matter of law. First, Defendants' equity-based affirmative defenses, such as unclean hands, are insufficient as a matter of law because they do not apply to a claim for specific performance of a contract for real estate under Florida law. *E.g.*, *Florida Kelly Plantation v. Gilliam, Ltd.,* No. 3:11CV159/EMT, 2012 WL 13032897 at * 8-9 (N.D. Fla. Sept. 18, 2012) (quoting *Henry v. Ecker*, 415 So. 2d 137, 140 (Fla. 5th DCA 1982)). Second, there is no evidence in this record to suggest Plaintiff failed to satisfy any conditions precedent. (Aff. Defense II). Third, Defendants' recoupment defense is actually predicated on OLCDC obtaining specific performance; thus, it cannot serve to bar it. (Aff. Defense X) And fourth, Defendants' defense of breach of the implied covenant of good faith and fair dealing fails because the conduct about which Defendants complain—OLCDC's alleged acquiescence to Defendants' unilateral sales efforts—has no basis in the ROFR or in the Amended Operating Agreement. Instead, it is premised on an entirely separate contract—the ADA Agreement. (Aff. Defense XI). Defendants' assertion that OLCDC breached an implied covenant under a different contract cannot be used to bar OLCDC's claim for specific performance under the ROFR. *See Focus Mgmt. Group USA, Inc. v. King*, 171 F. Supp. 3d 1291, 1300 (M.D. Fla. 2016); *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 149 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D679a].

OLCDC is also entitled to summary judgment on each of Defendants' Counterclaims. First, Count I fails based on the undisputed failure to satisfy conditions precedent. *See, e.g.*, *Garcia v. Cosicher*, 504 So. 2d 462, 462 (Fla. 3d DCA 1987). Here, Defendants concede that OLCDC never "directed" HKA to cause the Company to place Aswan Village "on the market for sale." (Burnes Dep. at 80:21-23; 85:1-18; Hess Dep. at 50:1-52:8; 66:15:67:8; 68:10-15.) Defendants, moreover, assert that they never even offered to sell Aswan Village to OLCDC. (Hess Depo. at 71:7-15; Compl., Ex. H). However, *all* of these things are ***express conditions precedent*** to HKA's rights under Section 10 of the ADA Agreement, which is the premise of its claim under Count I. Thus, Count I fails as a matter of law. *See Garcia*, 504 So. 2d at 462.

Count II (unjust enrichment) similarly fails based on (1) the undisputed existence of express contracts governing the same subject matter, and (2) the fact that HKA received exactly what it bargained for under those contracts.

Defendants do not dispute that a valid contract governs. Rather, they claim that OLCDC's ability to exercise the ROFR it bargained-for would confer an unjust windfall on OLCDC, thus overriding the ROFR. Defendants' argument fails. =. First, it is contrary to the settled foregoing Florida law. Second, it is undisputed that HKA attempted to obtain OLCDC's agreement to give up its ROFR in 2014. But OLCDC refused, and the ROFR remained. The compromise struck was the addition of a "distinct" forced sale right. HKA's attempt to now renege on its choice to allow the distinct ROFR to remain, after freely triggering it, and nevertheless force OLCDC to buyout HKA, would be anything but just. *See Mercer v. Lemmens*, 40 Cal. Rptr. 803, 806 (Cal. Ct. App. 1964) (refusing defendant's "bad faith" attempt to circumvent the agreed-upon ROFR due to the foreseeable appreciation of the at-issue property); *Schroeder v. Gemeinder*, 10 Nev. 355, 369 (1875) (same).

Accordingly, for the reasons set forth above,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Summary Judgment against OLCDC is DENIED, and OLCDC's Renewed Motion for Partial Summary Judgment against Defendants is **GRANTED**;

2. Defendant HallKeen Management's Motion for Summary Judgment on Count I against OLCDC is DENIED;

3. OLCDC's Motion for Judgment on the Pleadings is **DENIED AS MOOT**;

* * *

Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Award of section 57.105 fees against respondent in domestic violence case is appropriate based on respondent's having filed a claim for damages against petitioner six weeks after court had entered final judgment in favor of petitioner, a claim which was not supported by law

ERIK AGGFELT, Petitioner, v. DERRICK MCGHIE, Respondent. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-16833 FC 04, Domestic Violence Division. May 29, 2020. Ramiro C. Areces, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Petitioner. Lawrence Shoot, Miami, for Respondent.

ORDER GRANTING ENTITLEMENT TO ATTORNEY'S FEES PURSUANT TO § 57.105 FLA. STAT.

THIS MATTER having come before the Court on Petitioner's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes (the "Motion"), and this Court, having read the Motion, examined the case file, held two hearings, reviewed the multiple briefs filed by both Parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Petitioner's Motion is GRANTED.

Petitioner contends, among other things, that Respondent filed a claim for damages that was not supported by law. This Court agrees.

Section 57.105 provides, in part, that a court shall award a reasonable attorney's fee to the prevailing party on any claim presented by the losing party if the losing party's attorney knew or should have known that a claim or defense would not be supported by the application of law to the material facts. *See* § 57.105 Fla. Stat. (2018). Specifically, the statute reads as follows,

> 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 of the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at anytime before trial. . .[w]ould not be supported by the application of then-existing law to those material facts.

Id. In this case, Respondent, through counsel, filed a claim for damages titled, Respondent's Sworn Motion for Contempt, Clarification of Amended Final Judgment; Complaint for Damages (Respondent's "Sworn Motion"). Respondent's Sworn Motion was filed on December 4, 2018, or approximately six weeks *after* this Court entered Final Judgment in favor of the Petitioner. Among other relief, Respondent's Sworn Motion sought an order compelling Petitioner to build, or rebuild, a wall between the Parties' respective residences, restore electricity and water, monetary damages of $100.00 per day and a payment of an additional $5,000.00 from the Petitioner to the Respondent. *See* Respondent's Sworn Motion at 6. In addition to this relief, Respondent included a purported "Complaint for Damages" within the same document. *Id.* Under the "Complaint for Damages" heading, Respondent incorporated the allegations contained within the Sworn Motion's previous 16 paragraphs and stated "[t]his is an action for damages in excess of $15,000.00." *Id.* at ¶ 18. Respondent then alleged Petitioner has caused him to suffer damages of $47,953.00 and requested an exception to the "American rule" on attorney's fees. *Id.* at 22-23.

Petitioner filed the Motion on June 7, 2019, approximately six months after having served it on Respondent. Petitioner also filed a letter dated January 15, 2019 that appears to have given Respondent

the requisite notice under section 57.105's safe harbor provision. Respondent does not, in any event, argue that he was not provided the proper notice or that there was some deficiency in the manner in which said notice was served.

There is no dispute concerning the date on which Respondent withdrew his Sworn Motion and the Complaint for Damages contained therein. The docket reflects that, on May 13, 2019, Respondent's counsel filed a document titled Notice of Withdrawal of Respondent's Sworn Motion for Contempt, Clarification of Final Judgment; Complaint for Damages. In said Notice, Respondent's counsel states, in part, "Lawrence M. Shoot appeared in this case representing Derrick McGhie and hereby withdraws the above-captioned pleading that was filed on December 4, 2018." *See* Notice of Withdrawal dated May 13, 2019 at ¶ 1. Respondent, moreover, concedes he withdrew his Sworn Motion, and the Complaint for Damages contained therein, in May 2019.[1] *See* Respondent's Reply to Petitioner's Motion for Sanctions at ¶ 3. The Complaint for Damages was not withdrawn, therefore, until well after the statute's twenty-one-day safe harbor provision had expired.

Respondent, nevertheless, contends this Court should deny Petitioner's Motion because, had Respondent's Sworn Motion and Complaint for Damages ultimately been heard, this Court would have entered a contempt order or "would know with certainty Respondent's [Claim] was a good faith argument to extend, modify, or reverse the Amended Final Judgment of Injunction entered on October 23, 2018." *Id.* at ¶ 4.[2] Respondent, moreover, concedes that Petitioner makes a "plausible argument" that his "Complaint for Damages should have been filed as a separate lawsuit." *Id.* at ¶ 11. However, Respondent contends this error "could have been dismissed by Petitioner moving to dismiss." *Id.* Finally, Respondent argues the statute precludes attorney's fees against a losing party's attorney "if he or she has acted in good faith, based on the representation of his or her client as to the existence of those material facts." *Id.* at ¶ 14.[3]

This Court need not reach the issue of whether a post-Judgment motion for contempt, standing alone, is sanctionable under section 57.105(1) Fla. Stat. *See supra* footnote 3. This Court also does not need to address whether a clarification, or modification, of the Final Judgment would, or could, have been appropriate.[4] Finally, this Court does not need to determine whether Respondent's Claim was filed in good faith and on the representations of his client. Instead, this Court finds Respondent is subject section 57.105, because he filed a complaint—the aforementioned "Complaint for Damages"—that he should have known was not "supported by the application of then-existing law to those material facts." Fla. Stat. § 57.105(1)(b) (2019).

This case, despite having gone up on appeal, was effectively over. A Final Judgment was entered on October 23, 2018. Approximately six weeks *after* the Final Judgment was entered, and by Respondent's own admission, Respondent filed a "Complaint for Damages" *within the same domestic violence case* seeking approximately $47,000.00 in damages from Petitioner. The crux of Respondent's Complaint for Damages is that Petitioner deprived Respondent of the full use and enjoyment of his property, and otherwise stole Respondent's "passport, personal papers, jewelry, and cash." Respondent's Sworn Motion at ¶ 21.

Respondent should have known that filing a complaint for damages within a domestic violence action—particularly, a domestic violence action where a Final Judgment had been entered six weeks prior—was, irrespective of the veracity of the allegations contained therein, improper and unsupported by the application of then-existing law. Respondent should have known that this Court could not have awarded him the relief he was seeking. Respondent, nevertheless, contends the filing of his Complaint for Damages is not sanctionable, because it *could have been* disposed of on a motion to dismiss. Respondent's argument misses the point of section 57.105.

The Third District Court of Appeal has stated "[t]he general policy behind awarding attorney's fees for bringing a frivolous action is to discourage baseless claims, stonewall defenses and sham appeals by sanctioning those responsible for unnecessary litigation costs." *Visoly v. Security Pacific Credit Corp.,* 768 So. 2d 482, 492 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2003a]; *Mullins v. Kennelly,* 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1507b] ("any interpretation of the statute must give effect to its central goal of deterrence"). Respondent's suggestion that Petitioner should have to move to dismiss a complaint filed *after* a Final Judgment has been entered, *and* that the judge assigned to the Domestic Violence Division should have to rule on whether, or not, a Respondent can sue a Petitioner for civil damages arising out of an alleged real property dispute and/or conversion of personal property is incorrect. "Having the parties police themselves, instead of requiring judicial intervention on section 57.105 issues, promotes judicial economy and minimizes litigation costs." *Maxwell Bldg. Corp. v. Euro Concepts, LLC,* 874 So. 2d 709 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1327a]; *see also Mullins,* 847 So. 2d at 1154 ("[t]he central purpose of section 57.105 is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts."). Respondent's counsel should have known Respondent's claims were not cognizable in the Domestic Violence Division—particularly, where he was already representing Respondent in a separate civil lawsuit concerning the same real property. To the extent Respondent did not know his post-Judgment Complaint for Damages was inappropriate and unsupported by law, the statute allowed him twenty-one days to withdraw the filing. Respondent did not withdraw his Complaint for Damages until approximately six months later.

This Court does not take lightly, nor derive any pleasure from, an order awarding attorney's fees pursuant to section 57.105. This is especially true where, as here, Respondent's counsel appears to have genuinely cared about his client. Section 57.105(1), however, clearly and unambiguously provides the Court "*shall* award a reasonable attorney's fee" when it finds the attorney should have known the claim it presented to the Court was unsupported by the application of existing law.

While this Court understands Respondent is frustrated with Petitioner's expenditure of time and energy on a case where the Permanent Injunction, but for Petitioner's Notice of Appeal, would have expired some seven months ago, *and* where it appears undisputed that Respondent is no longer residing at the property he once shared with Petitioner, these considerations do not factor into the Court's determination of whether Petitioner is entitled to a reasonable attorney's fee under section 57.105.

Accordingly, this Court finds Petitioner is entitled to attorney's fees under section 57.105, Florida Statutes. Petitioner's Motion is GRANTED.

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[1]The Reply says "May 2018." However, the Sworn Motion, and Complaint for Damages contained therein, was filed in December 2018 and could not, therefore, have been withdrawn in May 2018. Moreover, May 2019 is consistent with Respondent's Notice of Filing dated May 13, 2019. This Court assumes Respondent meant to say it was withdrawn in May 2019.

[2]Although the Court does not base its ruling on these grounds, the Court notes there is no provision of the Final Judgment that requires the Petitioner to do anything. The Final Judgment was a Permanent Injunction that prohibited the Respondent from going near the Petitioner. Although the Final Judgment was structured in such a way as to allow the Parties to continue to live in their respective units, this Court made no finding, nor entered any ruling, that would give Respondent possessory rights over the property. The Final Judgment merely made clear Respondent was *permitted* to live at the property. It is unclear how the Petitioner could be found to have been in contempt of a Final Judgment that did not require him to do anything.

[3]In his Reply, Respondent also states as follows, "Nor was the Respondent the losing party." *See* Reply at ¶ 14. This Court took Respondent's statement to mean that

Petitioner was not a "prevailing party" as required by section 57.105. This Court thought that Respondent had raised an interesting issue concerning whether a post-Judgment motion for contempt could fall under section 57.105(1) in light of its language concerning "any claim or defense" known to be unsupported by the facts or existing law "when initially presented to the court or at any time *before trial*." *See* Fla. Stat. § 57.105 (2019). However, when asked to brief section 57.105(1)'s applicability to post-Judgment motions, Respondent argued that (1) *Respondent* was the prevailing party, and (2) that there was "no prevailing party." *See* Respondent's Brief filed May 18, 2020 at 5. This Court disagrees with Respondent.

[4]Respondent did not file a motion for modification of the permanent injunction. Respondent's Claim, moreover, does not read like a motion for modification. In any event, the portion of Respondent's Claim titled "Complaint for Damages" certainly does not seek a modification of the injunction.

* * *

Insurance—MedPay—Subrogation—Declaratory action brought by insureds against whom insurer is asserting claim of subrogation for repayment of MedPay benefits from proceeds of settlement with tortfeasor—Where contractual subrogation language does not expressly, clearly, and unequivocally address priority of reimbursement between insurer and insureds, common law made whole doctrine applies and preserves insureds' right of priority over insurer—Insurer may not recover MedPay benefits paid on insureds' behalf from settlement proceeds until insureds are made whole—Insureds are not entitled to final summary judgment where they have not proven that they have not been made whole —No merit to claim that claimants in third-party insurance case can never be made whole as matter of law

JOHN DANYLAK and BARBARA DANYLAK, Plaintiffs, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2018-CA-5874-NC, Division E. June 25, 2020. Rehearing denied July 10, 2020. Hunter W. Carroll, Judge. Counsel: Joseph Bryant, Morgan & Morgan, Tampa, P.A., Tampa, for Plaintiffs. John W. Bustard, Shutts & Bowen, LLP, Miami; and Emily Silver and Benjamin S. Thomas, Martinez Denbo, LLC, St. Petersburg, for Defendant.

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT in this declaratory judgment action are competing motions for summary judgment and responses in opposition [DINs 34, 38, and 43]. At their core, those motions address the viability of the common law "made whole doctrine" to Allstate's contractual subrogation claim against Plaintiffs (its insureds, the Danylaks) relating to MedPay benefits Allstate paid on the Danylaks' behalf. After oral argument, the Court requested the parties submit any judgments from other courts addressing the issue and invited the parties to comment on any analysis contained in those judgments [DIN 47]. The parties responded, which the Court appreciates [DINs 48-52]. There were, however, no judgments actually entered that directly addressed the issue.

Allstate has a clear contractual right of subrogation for those MedPay benefits from the Danylaks, and Danylaks have a contractual duty to protect Allstate's subrogation right. Allstate's subrogation contractual language, however, does not expressly, clearly, and unequivocally address the priority of reimbursement between it and the Danylaks. Therefore, the common law made whole doctrine continues to apply to this policy which preserves the Danylaks' common law right of priority over Allstate. Allstate may not recover under its contractual subrogation right the MedPay benefits it paid on Plaintiffs' behalf from the settlement proceeds the Danylaks received from the tortfeasor ***until*** the Danylaks are made whole.

Because the Danylaks did not meet their initial burden on summary judgment to demonstrate the nonexistence of Allstate's affirmative defenses, the Court cannot grant them final summary judgment at this time but can award them partial summary judgment. The Court also denies Allstate's summary judgment motion.

Facts

The relevant material facts are few, and they are uncontested.

The Plaintiffs are John Danylak and Barbara Danylak. The Danylaks' automobile insurance company is Defendant Allstate. A third-party tortfeasor caused an automobile crash, injuring the Danylaks. The Danylaks made a claim with Progress insurance, the tortfeasor's insurance carrier. The Danylaks settled their claim against the tortfeasor without the need of filing a lawsuit against the tortfeasor.

The Danylaks purchased optional MedPay coverage from Allstate for an additional premium at the same time they purchased their Allstate automobile policy. Following the crash, Allstate paid more than $4,000 in MedPay due to the injuries the Danylaks sustained in the crash. PIP benefits were not exhausted. During the Danylaks' medical treatment—and certainly before any settlement—Allstate sent the Danylaks' attorney letters invoking its contractual right of subrogation and demanding repayment of MedPay benefits provided by Allstate on the Danylaks' behalf. Separately, Allstate sent Progressive a notice of intent to assert subrogation against Progressive's insured, the tortfeasor.

The Danylaks responded in writing months before they settled with the tortfeasor, rejecting outright Allstate's claim of subrogation as being in contravention of Florida common law and public policy. In that correspondence, the Danylaks affirmatively advised Allstate that an insured "can never be made whole where one has incurred costs and attorney fees to secure the settlement." As such the Danylaks announced that they would not protect Allstate's subrogation right.

The Danylaks settled their tort claim against the third-party tortfeasor for less than the tortfeasor's policy limits. From the tortfeasor's settlement, the Danylaks repaid a health insurance lien, paid costs advanced by their attorney, and paid their attorney a contingent attorney fee. The Danylaks did not advise Allstate of the settlement prior to disbursing the settlement proceeds. The Danylaks did not tender any settlement proceeds to Allstate for repayment of MedPay benefits Allstate paid pursuant to the MedPay policy. Allstate never advised the Danylaks that Allstate waived its contractual right of subrogation under the Danylaks' policy.

After Allstate learned of the settlement, it continued to assert that it is entitled to recover the MedPay benefits it paid on behalf of the Danylaks—from the Danylaks, its insureds. Allstate reminded that MedPay benefits constitute a collateral source pursuant to section 768.76(2)(a)2., Florida Statutes. Allstate further contended that it provided notice of its claimed subrogation right pursuant to section 768.76(7); as such, Allstate contended it has a statutory right of subrogation under section 768.76.

The Allstate policy has language that purports to grant it a contractual right of subrogation for the MedPay benefits it paid. Florida's Office of Insurance Regulation approved the applicable policy language.

The parties report this MedPay subrogation issue continues to percolate throughout Florida's court system without resolution. The Danylaks filed this declaratory judgment to resolve this issue.

Analysis

The Court applies the summary judgment standard to these cross motions for summary judgment. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Center, Inc.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1482a]. The Court reminds the parties that the movant is required to come forward ***in the first instance*** with admissible summary judgment evidence showing there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. The Court must view every possible inference in favor of the party against whom summary judgment is sought. The movant must demonstrate the

nonexistence of any genuine issue of material fact—which, in the case of the Danylaks, includes Allstate's affirmative defenses.

The main issue the parties seek resolution is whether the made whole doctrine applies to Allstate's contractual right of subrogation for MedPay benefits. While the Court can—and does—resolve that main legal issue, the Court may not grant summary judgment at this time because neither party met their initial burden on summary judgment showing that they are entitled to judgment as a matter of law. Please note, though, the denial of summary judgment is because neither party met the initial burden, and it is ***not*** based on a disputed issue of material fact.

Without question, the Allstate MedPay policy contains standard subrogation language: "When **we** pay, an **insured person's** rights of recovery from anyone else becomes **ours** up to the amount **we** have paid. The **insured person** must protect these rights and help **us** enforce them." (Emphasis in original). The policy, however, is silent concerning Allstate's priority vis-à-vis its insured where its insured is not made whole following the insured's injury. As will be explained, this omission controls the continued viability of the made whole doctrine as against this Allstate policy. A brief review of the common law collateral source rule and made whole doctrine is necessary to understand why.

The common law recognized the "collateral source rule," which was ***both*** a rule of damages as well as a rule of evidence. *Smith v. Geico Casualty Co.*, 127 So. 3d 808, 813 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2477a]. As an evidentiary rule, collateral source payments under the collateral source rule are not admissible before a jury "because such evidence may confuse the jury with respect to both liability and damages." *Joerg v. State Farm Mutual Auto. Ins. Co.*, 176 So. 3d 1247, 1249 (Fla. 2015) [40 Fla. L. Weekly S553a]. The evidentiary collateral source rule remains largely intact. *Id.* at 1250. The evidentiary rule, though, is not the focus of this case and no further reference is made to it.

Under the damages portion of the collateral source rule, the common law prohibited a set-off of collateral source benefits. *Hurtado v. Desouza*, 166 So. 3d 831, 836 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D891a]. The Legislature abrogated the damages portion of the collateral source rule by its adoption of section 768.76, Florida Statutes. *Joerg*, 176 So. 3d at 1249. The Legislature's change to the collateral source damage rule was intended to reduce insurance costs and prevent plaintiffs from receiving windfalls. *Id.* The Legislature has not substantively amended section 768.76 in nearly three decades.

Generally speaking, section 768.76(1) requires courts post-trial to reduce awards "by the total amount of all amounts which have been paid for the benefits of the claimant, or which are otherwise available to the claimant, from all collateral sources." *Id.* quoting § 768.76(1), Fla. Stat. This subsection, though, contains an exception that provides that "there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists." § 768.76(1), Fla. Stat.

The Florida Supreme Court previously held that MedPay benefits are considered a collateral source under section 768.76(1). *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 291 (Fla. 2000) [25 Fla. L. Weekly S329d]. In another decision released the same day as *Rudnick*, the court discussed the nature of MedPay benefits, explaining that MedPay benefits are "first-party benefits for which the insured has paid a separate premium." *Rollins v. Pizzarelli*, 761 So. 2d 294, 300 (Fla. 2000) [25 Fla. L. Weekly S331a] (opinion on rehearing).

Besides historical context, *Rudnick* and *Pizzarelli* offer little guidance to the current situation except this: assuming the validity of the contractual subrogation provision, the set-off exception of section 768.76(1) would apply to MedPay benefits. In other words, had the Danylaks sued the tortfeasor, gone to trial, and prevailed, in entering judgment the Court would not set-off MedPay benefits paid because of the existence of Allstate's contractual right of subrogation—assuming, of course, that such right of subrogation were valid.

In the post-trial situation just described, Allstate would have had at least two rights in that trial to allow Allstate the ability to protect its contractual subrogation right: (1) a limited right to intervene in that lawsuit; and (2) the right to be heard prior to the distribution of any judgment or settlement proceeds. *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 508 (Fla. 1992). As the Second District has recognized, an insurance carrier with a right of subrogation has a "direct and immediate interest" to protect its subrogation right. *Houston Specialty Ins. Co. v. Vaughn*, 261 So. 3d 607, 611 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1828a].

Here, of course, there was no lawsuit; instead, this was a claim settled pretrial. Allstate's ability to protect its subrogation interest, though, is not be impacted just because the Danylaks settled before they filed a lawsuit against the tortfeasor. It still has a direct and immediate interest in protecting its contractual subrogation right.

It is correct to assert that under another tenant of common law an insurance company had no right of subrogation against its own insured for medical expenses recovered by the insured from the tortfeasor ***unless the insured collected all of the insured's damages***. *Humana Health Plans v. Lawton*, 675 So. 2d 1382, 1384 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1299g] (emphasis added). Equity, however, also provided that where an insured is made whole by full recovery, any payments to the insured over and above the insured's actual damages may be viewed as a "double recovery" that equitably entitles the carrier to subrogation against its insured's recovery. *Id.* This is the "made whole doctrine." The Florida Supreme Court just a few years ago explained the made whole doctrine thusly:

> Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. Florida recognizes two types of subrogation: conventional subrogation and equitable or legal subrogation. Conventional subrogation arises or flows from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor. ***Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from a tortfeasor.***
>
> ***The "made whole doctrine" provides, absent a controlling contractual provision that states otherwise, that the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available.*** *Martin* and the subsequent cases involving the "made whole doctrine" all deal with the insured's primary right to recover before the insurance carrier. We have acknowledged the application of the made whole doctrine in Florida.

Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co., 133 So. 3d 494, 504 (Fla. 2014) [39 Fla. L. Weekly S75a] (quotations, citations, and parentheticals omitted; bolded italics emphasis added). Without a doubt, then, the Florida Supreme Court reminded that the common law made whole doctrine continues to apply in Florida.

In reliance on *Intervest Construction* and the Eleventh Circuit Court of Appeals' decision in *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997), Judge Kovachevich writing for the Middle District of Florida succinctly explained the correct application of the made whole doctrine: "The made-whole doctrine is a default rule that is read into insurance contracts, except where it is explicitly excluded." *Summit Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 76 F. Supp. 3d 1381, 1386 (M.D. Fla. 2015) (internal quotation omitted), *aff'd sub*

nom. Summit Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 633 F. App'x 785 (11th Cir. 2016).

The Danylaks take a legally incorrect position when it contends that the subrogation portion of the Allstate MedPay policy contravenes the common law. It does not. The parties retain the ability to contract for a different rule. The true issue is whether the Allstate subrogation contract language alters the default, common law made whole doctrine. Applying the analysis of *Intervest Construction*, the answer to that question for this Allstate MedPay policy is in the negative.

The *Intervest Construction* court's roadmap requires an analysis of the contact language used to determine if such language expressly, clearly, and unequivocally addresses the priority issue. In *Intervest Construction*, the court explained that the subrogation provision was "clear" but then noted that the contractual language gave "no guidance as to the priority to recover when the indemnity amount is insufficient to 'make whole' both parties." 133 So. 3d at 503. As such, the court held that the absence of express language addressing the priority of reimbursement meant that insurance policy "[did] not abrogate the made whole doctrine, thereby preserving [the insured's] right of priority." *Id.* at 506. Stating the *Intervest Construction* rule of law directly in the context of this case—and consistent with Judge Kovachevich's articulation—unless the express text of the policy states otherwise, the made whole doctrine continues to apply in Florida to preclude an insurance carrier from proceeding against its own insured on the carrier's contractual subrogation right to recover the MedPay benefits it paid on its insured's behalf until its insured is made whole.

The Allstate policy language here is functionally the same as the contract language in *Intervest Construction*. Comparison those provisions confirms this. The *Intervest Construction* policy language provided:

> 8. Transfer Of Rights Of Recovery Against Others To Us
>
> If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them.

133 So. 3d at 503. The provision here provided:

> **Subrogation Rights**
>
> When **we** pay, an **insured person's** rights of recovery from anyone else becomes **ours** up to the amount **we** have paid. The **insured person** must protect these rights and help **us** enforce them.

(Emphasis in original).

Like the contractual subrogation language in *Intervest Construction*, here, the contractual subrogation provision is clear. Like the absence of contract language addressing the priority of reimbursement in *Intervest Construction*, here, there is no contractual provision expressly addressing the priority of reimbursement. Thus, the conclusion here must be the same as it was in *Intervest Construction*—the made whole doctrine continues to apply that suppresses Allstate's ability to recover under its contractual subrogation provision from the Danylaks until they have been made whole.

Allstate's contention that the approval by Florida's Office of Insurance Regulation—an executive branch agency—somehow alters the common law is meritless. Even before statehood, the then legislative authority—the Legislative Council of the Territory of Florida—adopted the common law as the law of Florida. *See* §1 of Act of Nov. 6, 1829. To this day, the Florida Legislature continues to direct the applicability of the common law. § 2.01, Fla. Stat. Allstate has cited no case where an executive branch agency may alter the common law by executive action. Given Florida's separation of powers provision, *see* art. II, § 3, Fla. Const., and the constitutional vesting of the legislative power of the state in the Legislature, *see* art. III, § 1, Fla. Const., the Court would not expect to see such a case.

Even with the continued viability of the made whole doctrine as a default rule, the Court does ***not*** rule that the Allstate policy language violated the common law. It does not. The Florida Supreme Court in *Intervest Construction* teaches that the parties may contract for a different priority rule than the common law supplied made whole doctrine. The Court here simply holds that the common law made whole doctrine continues to apply to this Allstate MedPay policy to require the Danylaks be made whole ***before*** Allstate may attempt to recover under its contractual right of subrogation. This is critical because Allstate still retains the contractual right of subrogation, and the Danylaks still undertook the contractual duty to protect that subrogation right.

The Danylaks' also suggests that the Allstate contractual subrogation policy language somehow is contrary to "Public Policy." Although difficult to follow, the Danylaks public policy argument seems to be constructed on two premises: a violation of section 768.76 and a violation of the uninsured motorist statute. These positions are wholly meritless here.

First, as it relates to MedPay benefits, the Florida Supreme Court two decades ago held that MedPay benefits are subject to section 768.76 as collateral source benefits. The question of set-off is controlled in part by the contractual right of subrogation, which exists in this Allstate policy. Nothing in the Allstate subrogation language violates section 768.76. The Danylaks' position that Allstate may historically have argued in other cases following bodily injury trials that Allstate should receive an offset for MedPay benefits is of no moment. Perhaps those policies did not have a subrogation right. Perhaps Allstate was legally incorrect in those arguments in those cases. Regardless, those historical arguments are irrelevant here and certainly do not rise to making a mockery of the judicial system such that judicial estoppel would apply here. *See Blumberg v. USAA Casualty Ins. Co.*, 790 So. 2d 1061 (Fla. 2001) [26 Fla. L. Weekly S473a].

Second, the Danylaks continue its violation of section 768.76 argument by pointing to a separate provision in the policy that involves uninsured motorist coverage. The Danylaks argue that the text of the uninsured motorist policy suggests that Allstate seeks to reduce uninsured motorist benefits it pays by the amount Allstate paid in MedPay benefits. Of course, the Danylaks did not seek any uninsured benefits from Allstate due to the tortfeasor's negligent action, and Allstate neither denied nor paid any uninsured benefits. There is no moment for the Court to address uninsured motorist coverage. The Danylaks failed to demonstrate that the contractual subrogation language in its policy violates any public policy.

Having now determined the common law made whole doctrine applies and there is no violation of public policy, the Court addresses the Danylaks' "confession of judgment" argument. That portion of the Danylaks' argument that other insurance carriers have not pursued MedPay subrogation against their insured or that the Morgan & Morgan law firm has some type of "truce" with other carriers is of no legal moment. What one party does in a different case has no relationship to the legal issue under Allstate's MedPay contract language. For that same reason, even if Allstate has not sought subrogation against other Allstate insureds in prior cases does not constitute a legal waiver in the Danylaks' case. This argument is meritless.

Before leaving the made whole doctrine, the Court needs to address an argument by Allstate. Allstate contends that the attorney fees and costs the Danylaks' paid their attorney is really a nonissue because Allstate would be obligated to reduce the subrogated amount due by a pro rata share of attorney fees and costs by the Danylaks in

recovering the settlement funds from the tortfeasor. Allstate, though, points to nothing in its policy suggesting a pro rata reduction is appropriate or permitted. Contracting parties are bound by the terms of their contract, "and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties." *Suess v. Suess*, 289 So. 3d 525, 529-30 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D3028b]. Further, Allstate points to no statute authorizing this, either. Allstate's pro rata reduction contention does not avoid the common law made whole doctrine.

The Court now turns to Allstate's seven affirmative defenses. In order for the Danylaks to be entitled to summary judgment, they must demonstrate that none of those affirmative defenses preclude summary judgment. The first four defenses—comparative negligence, permanency, set-off for other collateral sources, and failure to mitigate damages—simply are inapplicable to this declaratory judgment action. The Court grants partial summary judgment in the Danylaks' favor on these affirmative defenses. Affirmative defense six, which provides in total "Defendant would state, pursuant to the Doctrine of Waiver and Estoppel, that Plaintiff is not entitled to recover under the contract" is legally insufficient as it includes no ultimate facts. The Court also grants partial summary judgment as to that defense.

Affirmative defense five alleges that the Danylaks were made whole and therefore are entitled to subrogation. Affirmative defense seven alleges that the Danylaks failed to protect Allstate's contractual right of subrogation. On these two affirmative defenses, the Court rules that the Danylaks did not meet their initial burden to demonstrate the non-existence of these affirmative defenses. The Court hastens to note, however, that it is ***not*** denying summary judgment on the basis of a disputed issue of material fact.

The Danylaks seek to avoid these affirmative defenses by contending, with citation to *Travelers Indemnity Ins. Co. of Illinois v. Meadows MRI, LLP*, 900 So. 2d 676, 679 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D962c], that an insured can never be made whole as a matter of law. The Danylaks misread that case.

The *Meadows MRI* case involved whether section 627.428(1), Florida Statutes (2003), permitting an award of attorney fees against insurance companies, should be "extended" to a first party claim for appraisal. That case was a first-party insurance claim for property damage due to a malfunctioning MRI machine. In finding that the statute did apply in that context, the court stated: "Were this court to rule otherwise, Meadows would not be made whole as it would have to apply a portion of the policy proceeds to compensate its attorneys." 900 So. 2d at 679.

The Danylaks conversion of that dicta statement into an inflexible rule of law that a tort claimant can never be made whole in a claim against the tortfeasor's insurance carrier simply is, putting it mildly, an overly aggressively reading. Nothing in *Meadows MRI* holds that a tort claimant cannot be made whole as a matter of law.

Because the Danylaks' thesis that they, as tort claimants, can never be made whole is erroneous, there is no valid legal theory entitling them to judgment as a matter of law. It was incumbent on the Danylaks to submit summary judgment evidence that they contend entitle them to judgment as a matter of law despite Allstate's affirmative defenses five and seven. This, they did not attempt to do. The evidence before the Court indicates that the Danylaks settled their claim for less than the tortfeasor's policy limits, which could suggest that they were made whole. The Danylaks are not entitled to summary judgment as to those affirmative defenses. Similarly, Allstate's existing summary judgment evidence does not demonstrate that it is entitled to judgment as a matter of law. The Court must deny its summary judgment motion.

The Court hastens to note, the Court's denial of summary judgment to Allstate and partial denial to the Danylaks was based on their failure to bring forth evidence demonstrating an entitlement to summary judgment. It was not based on a disputed issue of material fact. Thus, the parties remain free to seek summary judgment again with the proper summary judgment evidence.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. The Court denies Allstate's motion for summary judgment.

2. The Court grants in part and denies in part the Danylaks' motion for summary judgment.

3. The Court declares that the common law made whole doctrine applies to this Allstate MedPay contract for insurance because the Allstate MedPay subrogation language does not expressly, clearly, and unequivocally address the priority of reimbursement between itself and its insured. Notwithstanding that declaration, Allstate does have a valid contractual right of subrogation that the Danylaks must protect; the Danylaks' right to recover simply takes priority over Allstate's contractual subrogation right due to the made whole doctrine. Thus, Allstate may recover under its subrogation right only after the Danylaks are made whole.

4. The Court grants the Danylaks partial summary judgment on Allstate's affirmative defenses 1, 2, 3, 4, and 6.

5. The Court denies the Danylaks partial summary judgment on affirmative defenses 5 and 7.

6. None of the denials of summary judgment in this order are based on a disputed issue of material fact; instead, they are based on the movant's failure in the first instance to bring forth summary judgment evidence demonstrating as a matter of law movant is entitled to final summary judgment.

ORDER DENYING THE DANYLAKS' MOTION FOR REHEARING AND RECONSIDERATION OF THE SUMMARY JUDGMENT ORDER ON MEDPAY

BEFORE THE COURT without hearing is Plaintiffs' Motion for Rehearing and Reconsideration of this Court's Order Rendered 6/25/2020 [DIN 54]. The Court denies the motion.

Background

This is a declaratory judgment action brought by the Danylaks against Allstate concerning the applicability of a contractual subrogation provision regarding MedPay benefits in Allstate's policy. The parties filed competing cross-motions for summary judgment. The Court recently released its Order (1) Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment; and (2) Denying Defendant's Motion for Summary Judgment [DIN 53] ("the MedPay Order"). *See Danylak v. Allstate Fire and Casualty Ins. Co.*, Case No. 2018-CA-005874-NC, 2020 WL 3477354 (Fla. 12th Cir. Ct. Sarasota June 25, 2020) [28 Fla. L. Weekly Supp. 398a]. The ultimate ruling was:

> [T]he common law made whole doctrine applies to this Allstate MedPay contract for insurance because the Allstate MedPay subrogation language does not expressly, clearly, and unequivocally address the priority of reimbursement between itself and its insured. Notwithstanding that declaration, Allstate does have a valid contractual right of subrogation that the Danylaks must protect: the Danylaks' right to recover simply takes priority over Allstate's contractual subrogation right due to the made whole doctrine. Thus, Allstate may recover under its subrogation right only after the Danylaks are made whole.

Id. at *7. The Danylaks assert four general areas of disagreement with the Court's ruling, attempting to couch them in terms of the Court allegedly overlooking an argument or case law. The reality is the Danylaks simply disagree with the Court's reading of *Travelers Indemnity Ins. Co. of Illinois v. Meadows MRI, LLP*, 900 So. 2d 676, 679 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D962c], and the

summary judgment standard the Court must apply.

Analysis

Primarily, the Danylaks argue that the Court misconstrued *Meadows MRI*. They continue to assert that the Fourth District in *Meadows MRI* expressly held that where a claimant expends attorney fees to secure a settlement against a carrier, the claimant cannot as a matter of law be made whole. Those words—including synonyms of those words—do not appear in the *Meadows MRI* case. At all.

The actual holding from *Meadows MRI* was that section 627.428(1), Florida Statutes, could be extended in a first-party lawsuit seeking to confirm an appraisal where there was an expensive and drawn out appraisal due to the insurance carrier's disputed valuation estimation involving destroyed property. The property in that case was damaged MRI equipment due to the explosion of a magnet and resulting loss of the magnetic field.

The Danylaks gloss-over the fact that the *Meadows MRI* case involved a first-party claim for property damage. In contrast, the underlying facts of this case involve a third-party claim for bodily injury where the Danylaks made a claim against a third-party tortfeasor who had Progressive insurance. This claim did not implicate section 627.428(1) at all. Besides paying MedPay benefits for the benefit of the Danylaks, Allstate was not involved in the adjusting of this case—it was Progressive. To be clear, the instant case does not challenge Allstate's adjusting of those MedPay benefits.

The Court understands the Danylaks' practical argument that paying attorney fees out of a fixed sum which purportedly is capped at 100% of an individual's damages means the made whole doctrine will always apply. That practical argument, however, rests on the proposition that—as a matter of law—a tort claimant can ***never*** be made whole in a third-party tort claim in any situation. The *Meadows MRI* decision simply cannot be stretched as far and as aggressively as the Danylaks suggest to manufacture a nonexistence express holding. And the Court is not aware of any case that says what the Danylaks profess that *Meadows MRI* says. The Court suspects that if such a case existed, it would have been cited here. After all, insurance has been around since prior to Florida's statehood.

The Court must apply the law and cannot discount the summary judgment standard the Danylaks must meet based on a practical argument. The reality remains that without case law support for the Danylaks' argument that a tort claimant can never be made whole as a matter of law, to obtain summary judgment, they will need to demonstrate factually in the first instance that they were not made whole. Here, the Danylaks did not attempt to do so on a factual basis because they rested on their erroneous view of *Meadows MRI*.

Second, the Danylaks contend that the Court did not consider *Magsipoc v. Larsen*, 639 So. 2d 1038 (Fla. 5th DCA 1994), which case allowed for undifferentiated settlements. That case, though, does not address the issue in this case. Certainly, *Magsipoc* permits undifferentiated settlements. That is beside the point. Ironically, that case discussed an insurance carrier's right to a hearing on its subrogation claim. Here, the summary judgment evidence suggests the Danylaks purposefully avoided advising Allstate of the settlement or providing it an opportunity to address its claim of lien. *Magsipoc* does not apply.

From *Magsipoc*, the Danylaks suggest having to pay a medical lien somehow can equate to never being made whole. That implication is not appropriate here, as there is no fact in this case suggesting the Danylaks paid the health insurance carrier ***more than*** what that carrier expended on the Danylaks' behalf. *Magsipoc's* undifferentiated settlement authorization simply is inapplicable here.

Third, the Danylaks object to the Court's denial of their summary judgment motion as to Allstate's affirmative defenses 5 and 7. Recall the Court's earlier ruling, Allstate may recover under its subrogation right ***only after*** the Danylaks are made whole. *Danylak*, 2020 WL 3477354, *7. In its Fifth Affirmative Defense, Allstate affirmatively alleged that the Danylaks' actually were made whole through the settlement with the tortfeasor, which entitled it to recover on its contractual subrogation right. In its Seventh Affirmative Defense, Allstate alleged that the Danylaks failed to protect Allstate's contractual subrogation right. The Court concludes these are affirmative defenses.

Whether one views Allstate's affirmative defenses 5 and 7 as true affirmative defenses or simply a denial of the Danylaks' claim, though, the result is the same: the Danylaks did not attempt to come forward with summary judgment evidence demonstrating that that the Danylaks were not made whole. This failure to bring forward evidence is fatal to the Danylaks request for summary judgment as that was their initial burden. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Center, Inc.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1482a] (setting forth the standard); *Board of Trustees of Internal Improvement Trust Fund v. Schindler*, 604 So. 2d 569, 570 (Fla. 2d DCA 1992) (once an affirmative defense has been raised by a defendant, for a plaintiff to prevail on summary judgment the plaintiff also has the additional burden of either disproving or establishing the legal insufficiency of the affirmative defense).

The Court further notes that within the Danylaks' summary judgment evidence are the Danylaks' letters advising Allstate that "we do not honor your purported claim[.]" The Danylaks also told Allstate that "it is not for [Allstate] to decide whether [the Danylaks have] been made whole; hence any request for settlement details will be ignored." These letters were written on the legally incorrect premise that "one can never be made whole where one has incurred costs and attorney fees to secure the settlement. *See Travelers v. Meadows MRI*, 900 So. 2d 676 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D962c]." This evidence, of course, implicates these two affirmative defenses. While at trial Allstate will have the burden to demonstrate its affirmative defenses, the Danylaks in their summary judgment have the additional burden of either disproving the affirmative defenses or establishing that they are legally insufficient. *E.g. Schindler*, 604 So. 2d at 570.

Fourth and finally, the Danylaks contend that the Court did not read the uninsured motorist sections *in pari materia* with the MedPay section The Court agrees that a contract should be read as a whole. The Court also notes that it must apply the plain meaning of the contract. The MedPay subrogation language provides:

> **Subrogation Rights**
>
> When **we** pay, an **insured person's** rights of recovery from anyone else becomes **ours** up to the amount **we** have paid. The **insured person** must protect these rights and help **us** enforce them.

(Emphasis in original). That language is unambiguous. The Court respectfully declines the Danylaks' invitation for the Court to travel to another portion of the Allstate policy that is not implicated by the facts of this case, construe that other language, and use that construction to change or eliminate the plain meaning of the controlling words here.

Conclusion

The Danylaks rhetorical question and flourish best sums up their position:

> Clearly, [the Danylaks] herein received an undifferentiated recovery from the tortfeasor, with no allocation as to past or future medical bills, or to intangible damages for pain and suffering. Plaintiffs had to pay their attorneys' fees, costs, and a valid health care lien from their settlement. How then, as a matter of law and common sense, can the instant Plaintiffs be made whole from the settlement, and how can it be said med pay benefits constitute a double recovery?"

Rehearing motion, p.3, ¶4

The Court understands that the Danylaks disagree with the Court's

construction of the *Meadows MRI* case. Upon reconsideration, though, the Court continues its view that *Meadows MRI* ***does not stand*** for the proposition that a claimant in a third-party insurance case can never be made whole as a matter of law. Without that legal support providing a foundation for its summary judgment motion, the Danylaks are left with having to demonstrate factually that they were not made whole in their settlement with the third-party tortfeasor/Progressive. They did not attempt to do so in their motion.

As it relates to their expressed disdain for the summary judgment standard, the Court cannot read into the summary judgment standard a "common sense" element; and the Court suspects upon reflection the Danylaks would not suggest a change to the summary judgment standard. Regardless of whether the Danylaks are or are not seeking a change to the summary judgment standard, the Court is duty-bound by apply the standard established by higher courts. *Estate of Githens*, 928 So. 2d at 1274; *Schindler*, 604 So. 2d at 570. Like the Court, the Danylaks must comply with that standard if they wish to obtain summary judgment.

Certainly, should the parties wish to expedite this matter to the Second District Court of Appeal, they can enter into a factual stipulation that would permit the Court to enter a final summary judgment allowing for a quick appeal. Without such a stipulation, this case will proceed before this Court in normal fashion.

The Court denies Plaintiffs' Motion for Rehearing and Reconsideration of this Court's Order Rendered 6/25/2020 [DIN 54].

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Omission of household member—Insurer violated PIP statute by failing to pay or deny claim within 30 days and failed to invoke additional time limitation under section 627.736(4)(i)—Rescission of policy was improper

DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. JAMES HARRIS, Defendant/Counter-Plaintiff. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 18-CA-009312. JAMES HARRIS, Plaintiff/Counter-Defendant, v. DIRECT GENERAL INSURANCE COMPANY, Defendant/Counter-Plaintiff. Case No. 18-CC-057973. July 14, 2020. Ralph C. Stoddard, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant/Counter-Plaintiff, James Harris.

ORDER GRANTING HARRIS' AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on July 13, 2020 on Defendant/ Counter-Plaintiff Harris' Amended Motion for Final Summary Judgment. The court having listened to argument by counsel, having reviewed the Motion, file, applicable law, and being otherwise fully advised, finds,

1. This is a consolidated Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's rescission of the subject policy. Defendant's rescission was based upon an alleged material misrepresentation for an alleged failure to list household members on the insurance application by the named insured, James Harris.

2. Plaintiff's motion for summary judgment seeks entry of summary judgment arguing that Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract and Defendant's rescission of the policy was improper.

3. The Court bases its ruling on the filed deposition transcript of Marcy Sessions, Defendant's Claims Corporate Representative, conducted on June 3, 2019. Ms. Sessions testified that Defendant received notice of the loss on July 30, 2018, the first medical bills were received on August 13, 2018, Defendant rescinded the policy on September 13, 2018 and mailed premium refund payments to its insured on September 17, 2018.

4. Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract and Defendant's rescission of the policy was improper. As such, Plaintiff's Amended Motion for Final Summary Judgment is **HEREBY GRANTED**.

5. The Court reserves jurisdiction over attorney's fees and costs.

* * *

Insurance—Personal injury protection—Coverage—Denial of coverage and rescission of policy based upon insured's alleged failure to list correct garaging address—Insurer was in breach of contract and insurer's rescission of the policy was improper because insurer violated PIP statute by failing to pay or deny claim within 30 days and did not invoke the additional time limitation under section 627.736(4)(i)

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DWAYNE MUNGIN, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CA-007710. August 2, 2020. Martha J. Cook, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT MUNGIN'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on July , 2020 on Defendant/ MUNGIN'S Motion for Final Summary Judgment and Plaintiff/DIRECT'S Motion for Final Summary Judgment. The court having listened to argument by counsel, having reviewed the Motion, file, applicable law, and being otherwise fully advised, finds,

1. This is a consolidated Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon DIRECT'S rescission of the subject policy. DIRECT'S rescission was based upon an alleged material misrepresentation for an alleged failure to list the correct garaging address by the named insured, Dwayne Mungin (MUNGIN).

2. MUNGIN'S motion for summary judgment seeks entry of summary judgment arguing that DIRECT violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and, as such, DIRECT was in breach of contract and DIRECT'S rescission of the policy was improper.

3. MUNGIN filed the deposition transcript of Lynn Wills, DIRECT'S Claims Corporate Representative, conducted on February 5, 2020. Ms. Wills testified that DIRECT took the recorded statement of MUNGIN on April 29, 2019. DIRECT submitted a reservation of rights (ROR) letter to MUNGIN on May 10, 2019, although said letter did not reference Fla. Stat. 627.736(4)(i). DIRECT'S denial letter was mailed on July 2, 2019 and DIRECT mailed premium refund payments to MUNGIN on August 13, 2019.

4. This Court agrees with Judge Stoddard's analysis in *Direct General Ins. Co. v. James Harris*, (Fla. 13th Jud. Cir. Ct., Hillsborough Cty., Case No. 18-CA-009312, July 14, 2020, Ralph C. Stoddard, Judge) [28 Fla. L. Weekly Supp. 403a] whereby the Court granted summary judgment for the Defendant/HARRIS and ruled that DIRECT violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i); As such, DIRECT was in breach of contract and DIRECT'S rescission of the policy was improper. As such, Defendant/MUNGIN'S Motion for Final Summary Judgment is **HEREBY GRANTED**.

5. The Court reserves jurisdiction over attorney's fees and costs.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Notice of loss—Claim form that omits medical provider's professional license number is substantially complete and provided insurer notice of covered loss—Insurer that made payment on claim without objecting to missing license number cannot argue that number was material element of claim

HECTOR C. PAGAN, M.D., P.A. as assignee for Clifford Barron , Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-SC-010541, Division CC-G. June 10, 2020. Scott Mitchell, Judge. Counsel: Adam Saben, Shuster & Saben, LLC, Jacksonville, for Plaintiff. Eric Shubow, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO BOX 31

THIS MATTER comes before this Court for hearing on June 4, 2020 on Cross-Motions for Summary Judgment. This Court, having reviewed the Court file and having heard argument of counsel and being otherwise advised in the premises GRANTS the Plaintiff's Motion for Summary Judgment and DENIES the Defendant's Motion for Summary Judgment and finds as follows:

The facts are not in dispute. Plaintiff, PAGAN, treated assignor, Clifford Barron, for injuries sustained in a motor vehicle accident on March 8, 2015. Plaintiff submitted its bill to Defendant, STATE FARM, for one date of service, July 10, 2015. Although the date of service was paid, STATE FARM now alleges that PAGAN's failure place the treating physician's license number in Box 31 of the submitted CMS-1500 form fails to place the insurer on written notice of a covered loss, pursuant to Florida Statute 627.736(5)(d)(2016).

Based on the binding precedent of three District Courts of Appeal in *United Automobile Ins. Co. v. Professional Medical Group, Inc.,* 26 So.3d 21 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a] ("*Professional Medical*"), *USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc.,* 31 So.3d 234 (Fla 4th DCA 2010) [35 Fla. L. Weekly D613b], and *Geico General Ins. Co. v. Tarpon Total Health Care,* 86 So.3d 585 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1027a], this Court finds that the Plaintiff substantially complied with the requirements to submit a "properly completed" CMS-1500 form and, therefore, STATE FARM was placed on written notice of a covered loss of the bill at issue in this case.[1]

All three Districts focused on the words "properly completed", referencing the pip statutes definition of same in section 627.732(13), Florida Statutes (2004):

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

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

[1]Also see, *Hyde Park Medical Center a/a/o Kimberly Coleman v. State Farm Mut. Auto. Ins. Co.,* Duval Cty. Ct. Case No.: 16-2019-SC-012313-MA-L (Order of Duval County Court Judge Michelle Kalil of March 30, 2020) [28 Fla. L. Weekly Supp. 142a] on the exact same issue.

* * *

Landlord-tenant—Eviction count dismissed as moot in light of tenants' voluntarily relinquishment of all claims to any possessory interest in the premises—Jurisdiction reserved over count seeking money damages

BUSINESS SOLUTIONS OF HILLSBOROUGH, LLC, Plaintiff, v. DYLAN AND TINA PELCHER, Defendants. County Court, 6th Judicial Circuit in and for Pasco County. Case No. 2020-CC-1299-WS. May 27, 2020. Paul E. Firmani, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., for Plaintiff.

ORDER

Count I- Possession

THIS ACTION came to be heard on May 18, 2020 on Defendants Motion for Rent Determination and Motion to Remove Defendant Dylan Pelcher from the lawsuit. Present were Plaintiff Business Solutions of Hillsborough, LLC and counsel for Plaintiff, Steven C Fraser Esquire of Steven C Fraser, P.A.and Defendant Tina Pelcher. The Court having taken testimony of Tina Pelcher and the representative from Plaintiff and heard arguments from both sides, WHEREUPON, the Court makes the following findings of fact and conclusions of law:

Based on the sworn testimony of Defendant, Tina Pelcher, the Court finds that on May 15, 2020 both Defendants voluntarily vacated the premises located at [Editor's note: address redacted] in Hudson, Florida 34669. Defendant, Tina Pelcher, testified that the keys to the residence had been left behind inside the property. Therefore, this Court rules that Defendants have voluntarily relinquished all claims to any possessory interest that they have in the premises. Pursuant to Fla. Stat. § 83.59 (3)(b) (2019), the Plaintiff is now in sole possession of the premises because the Defendants have surrendered possession and otherwise disclaimed any interest. As Defendants no longer have possession of the premises, Count I for Tenant Eviction is dismissed as *moot.* "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State,* 593 So.2d 211, 212 (Fla. 1992). In the context of eviction proceedings, if Defendants surrender possession before a final hearing, the case becomes moot. *See Gonzalez v. Murphy*, 24 Fla. L. Weekly Supp. 768a (Collier Cty. August 25, 2016); *Gold King Apartments, LLC v. Celestin,* 21 Fla. L. Weekly Supp. 693b (Miami-Dade Cty. Mar. 19, 2014). In the instant case, the matter has not yet been set for a final hearing; therefore, any further proceedings on the issue for possession will have no effect as the events related to vacating the premises have placed Count 1 of the Eviction Complaint beyond the reach of the law.

Furthermore, Defendants Motion to Remove Defendant Dylan Pelcher from the lawsuit is DENIED, without prejudice. Defendants provided no documentary evidence in the form of an updated drivers license bearing an official address. As well, the record lacks any proof that Dylan Pelcher resides in a location other than the subject tenancy before this Court.

Finally, this Court reserves jurisdiction as to Count II for Money Damages for a determination of any back rent, damages to the

dwelling, costs and attorney fees.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Review of video recordings and officer's general testimony regarding how he normally handles observations leads to conclusion that 20-minute observation was not in substantial compliance with administrative rules—Motion to suppress breath test results granted

STATE OF FLORIDA, v. MICHAEL POVEY, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019 CT 766. December 6, 2019. D. Melissa Distler, Judge. Counsel: Raymond Dailey, Assistant State Attorney, Office of the State Attorney, for State. Jessica Damoth, for Defendant.

ORDER ON DEFENDANT TO SUPPRESS EVIDENCE

THIS MATTER came to be heard on the Defendant's Motion to Suppress Evidence, requesting exclusion of the Breath Test results as a result of violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2). The Court, having heard testimony from Trooper Ken Montgomery, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

The Defendant MICHAEL POVEY was arrested for DUI arising from a traffic stop that occurred in Flagler Beach, Florida, The Defendant MICHAEL POVEY alleged that there was no basis to sustain the traffic stop for speeding, After submission of documents maintained by the Trooper, counsel for the Defendant withdrew that portion of the motion. Separately, the Defendant MICHAEL POVEY submitted to a breath test contained inside the trooper's vehicle administered by the trooper. The validity of this breath test due to alleged violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2) are the subject of this motion and Order.

The Defendant's interaction with law enforcement on the night in question is recorded on the trooper's in car video cameras, wh ch were admitted into evidence at the hearing. There are multiple cameras and vantage points for the body camera, some of which involved a reflection off a window, making it difficult to follow without explanation.

During examination of the sole witness, Trooper Montgomery, the State asked questions about the twenty-minute observation. There was no testimony whatsoever of a time when the observation began. There was no testimony whatsoever as to the time when the Defendant actually submitted and blew into the breath testing machine. The Breath Alcohol Test Affidavit was not admitted into evidence. The only documents admitted pertaining to the breath test was a Composite Exhibit with Agency Inspection Reports. The State told the Court to rely on the video recordings, which are also not timestamped in any fashion whatsoever.

In response to the question, "when did you start the twenty-minute observation?" the Trooper gave the following answer:

"What I do is uh, it's going to be a long explanation, sir. What I do with the twenty-minute observation is I use any uninterrupted time observed with him, so I generally back up my time. We are required to observe for 20 minutes prior to the breath test, so normally what I do is as soon they get out of the vehicle, as I get them out of the vehicle and start my investigation, they are under observation at that point. I usually make note of when I give them Miranda. I use that time, I usually back that time up, that time I will check his mouth and stuff like that in anticipation of a breath test. Of course we don't always get there. . . I always try to get everything and you know check their mouth and all that stuff when I start talking to them on the side of the road about the time when I do Miranda; so if they do agree to do the breath test, then I back up that time, any uninterrupted observation time to that point."

The Trooper did testify that the Defendant MICHAEL POVEY was always within his sight and sound. The Trooper did testify that the Defendant MICHAEL POVEY did not ingest or regurgitate. The Trooper did acknowledge that, at times, he did turn away from the Defendant, to type or interact with the machine. He testified that he would have been able to hear "burps or pukes." The Trooper insisted that the Defendant MICHAEL POVEY was "right there" next to him on the other side of the passenger door.

On cross-examination, the Trooper was asked again, what time did he start the twenty-minute observation; and he responded the time he "did Miranda . . . for technical purposes for times." Of note, on the video recording, at no time did the Trooper check the Defendant's mouth, as testified is his general practice.

The Court reviewed the videos at length. Without any timestamp, the Court used the length of time into the video to attempt to reconstruct the observation time. The Defendant MICHAEL POVEY blows for the first time into the breath testing machine at 35:37 into the video. The Court worked back from there in an attempt to extrapolate when the twenty-minute observation started or should have started. The Defendant MICHAEL POVEY was placed under arrest at 21:28 of the video. The request to submit to the breath test occurred at 22:50. The Trooper read the Defendant his Miranda warnings at 6:05 into the video. Working back twenty minutes from the time the first breath sample was actually given, the observation period began during a portion of the walk and turn exercise.

The Defendant's Motion in Limine to exclude admission of the Breath Test alleges an improper administration of the breath test under Florida Administrative Code 11D-008.007(3) due to a violation of the twenty (20) minute observation requirement. The Defendant cited and argued several county court cases, including *State v. Kozlak,* 22 Fla. L. Weekly Supp. 607b (Fla. 7th Cir. Volusia 2013); *State v. Miller*, 19 Fla. L. Weekly Supp. 593a (Fla. 12th Cir. Sarasota 2010); *State v. Verdin,* 22 Fla. L. Weekly Supp. 371a (Fla. 7th Cir. Volusia 2014); *State v. Jones,* 20 Fla. L. Weekly Supp. 525a (Fla. 16th Cir. Monroe 2013). The State cited *Kaiser v. State,* 609 So. 2d 768 (Fla. 2d DCA 1992).

Conclusions of Law:

The Court took best efforts to review the video recordings and determine whether or not a proper twenty-minute observation was conducted, since the State did not elicit any direct testimony about the actual observation period in this case. The Court finds that, based upon the video recordings in this case and the Trooper's general testimony of how he normally handles observations, the observation period in this case was NOT in substantial compliance with Florida Administrative Code 11D-008.007(3) and Florida Statute 316.1932(1)(b)(2).

The Defendant's Motion to Suppress the breath test result is GRANTED. The State is precluded from admitting any evidence related to the breath test conducted on the Defendant MICHAEL POVEY in this matter.

* * *

Civil procedure—Discovery—Failure to comply—Sanctions

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. SUMMER REGER, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2020-SC-338. June 25, 2020. Gabrielle N. Sanders-Morency, Judge. Counsel: Daniela Muir, Pollack and Rosen, P.A., for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS

THIS CAUSE came before the Courts on June 15, 2020, upon Defendant's Motion to Compel Responses to Discovery Requests, and the Court, having reviewed the Motion, together with the record, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED that Defendant's Motion to Compel is **GRANTED**, for the following reasons:

On March 9, 2020, Defendant propounded Plaintiff with its First Request for Production of Documents ("Defendant's Discovery"). Plaintiff's responses or objections to said discovery were due on or before April 8, 2020. Plaintiff did not respond or object before this deadline. On April 24, 2020, sixteen (16) days following Plaintiff's original deadline to respond to Defendant's discovery, Defendant reached out to Plaintiff in a good faith attempt to obtain responses to its discovery requests without judicial intervention, giving Plaintiff until May 4, 2020 to provide responses. Plaintiff again failed to respond before the deadline. Defendant waited an additional nine (9) days before moving to compel Plaintiff's responses on May 13, 2020 ("Motion to Compel").

Importantly, Plaintiff did furnish responses to Defendant's discovery the morning of the hearing on this matter, but failed to include certain documents, including but not limited to, account purchase agreements and all periodic account statements, that were part and parcel of Defendant's requests.

All objections to Defendant's discovery requests, other than valid and applicable privilege, have been waived by virtue of the Plaintiff's failure to lodge timely objections. *Insurance Co. of North America v. Nova,* 398 So.2d 836 (Fla. 5th DCA 1981); *LVNV Funding, LLC v. Hiram Rivera,* 27 Fla. L. Weekly Supp. 181a (Fla. 9th Cir. 2019); *Portfolio Recovery Assoc., LLC v. Ricelle Felix,* 27 Fla. L. Weekly Supp. 1052a (Fla. 18th Cir. 2020).

Accordingly, Plaintiff is ordered to produce the remaining documents responsive to Defendant's discovery requests, including all purchase agreements and periodic account statements, without asserting objections, within twenty (20) days from the date of this Order.

It is **FURTHER ORDERED** that Defendant's request attorney's fees incurred because of Plaintiff's failure to furnish responses is **GRANTED**. *See Fla. R. Civ.P. 1.380(a)(4).* After having reviewed the affidavit submitted by Bryan A. Dangler, Esq., counsel for Defendant, this Court awards Defendant $1,000.00, which must be tendered by Plaintiff to counsel for Defendant within ten (10) days from date of this Order.

* * *

Insurance—Automobile—Windshield replacement— Appraisal—Clear and unambiguous policy provision that provides simple and informal appraisal process for windshield replacement is enforceable against assignee of insured—There is no basis for claim that insurer waived right to appraisal where insurer invoked appraisal provision at start of litigation—Prohibitive cost doctrine is inapplicable to breach of contract action—Further, affidavits submitted by plaintiff are insufficient to satisfy burden to show that cost of appraisal is prohibitively expensive as compared to cost of litigation—If insurer's appraiser is found to be partial, correct course of action is to appoint another appraiser, not to invalidate appraisal provision—No merit to argument that appraisal provision violates right of access to courts where agreement to appraisal provision relinquished that right—Where plaintiff failed to satisfy condition precedent of appraisal, dismissal is required

SPRINGBOK COLLECTIONS, LLC, a/a/o CHWR, LLC, d/b/a SMART RIDE WINDSHIELD REPAIR, a/a/o Clara Guzman, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, PROGRESSIVE EXPRESS INSURANCE COMPANY AND PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2017-SC-000128-0000-LK. November 14, 2019. Mary Catherine Green, Judge. Counsel: Sean M. Amorginos, Amorginos, PLLC., Altamonte Springs, for Plaintiff. Daniel Montgomery, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR COMPEL APPRAISAL

THIS CAUSE having come before the Court on October 28, 2019, on **DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY MOTION TO STAY AND COMPEL APPRAISAL** and the Court, having heard argument from the attorneys for the respective parties, having reviewed Defendant's Motion To Dismiss, Plaintiff's Memorandum in Opposition, Defendant's Memorandum in Support of Appraisal, and the case law presented, and being otherwise fully advised in the premises, the Court finds as follows:

1. Plaintiff, as an assignee of Progressive's Insured, brings a complaint for breach of contract against Defendant. Defendant argues, in pertinent part, that the complaint should be dismissed because Plaintiff failed to satisfy a condition precedent to bringing this lawsuit by failing to participate in the appraisal process as expressly required by the applicable Florida Automobile Insurance Policy ("Policy").

2. Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal argues as follows: 1) the invocation of appraisal is improper as it is permissive and not binding due to the retention of rights provision of the policy; 2) appraisal is invalid due to Defendant's failure to select an impartial appraiser; 3) Defendant waived its right to appraisal 4) under the retention of rights provision, Plaintiff is exercising its right to decline appraisal; 5) Defendant's Notice of Confession of Judgment in a different matter precludes Defendant from challenging that there is a valid dispute as to the value of loss;

BACKGROUND

3. Defendant insured CLARA GUZMAN ("Insured") and the policy included comprehensive coverage for damage to the vehicle.

4. SmartRide Windshield Repair ("SmartRide") repaired Insured's windshield and submitted an invoice to Defendant for windshield repairs that are covered under the comprehensive coverage policy. Defendant in turn, made a payment to SmartRide Windshield Repair and invoked appraisal.

5. SmartRide subsequently assigned their benefits as an assignee of the Insured to Plaintiff. Plaintiff in turn filed suit.

OPINION

6. To the extent the Plaintiff seeks to attack or requests the Court to rewrite any contractual provisions in the Policy, this Court is powerless to rewrite the contract or interfere with the freedom of contract. If the insured had not assigned this claim to the auto glass vendor, then the insured would have been bound by the appraisal provision contained within the Policy. As an assignee of the insured, the auto glass vendor is subject to all equities and defenses that could have been asserted against the assignor (i.e. the right to appraisal).

7. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.,* 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America,* 704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), *citing King v. Progressive Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also*

Foster v. Jones, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977). In this case, Plaintiff does not point to any statute or public policy considerations that are violated by this "retained rights" provision.

"Moreover, controlling Florida law permits 'retained rights' provisions, and these provisions do not render the appraisal clause unenforceable." *Cincinnati Ins.,* 162 So.3d at 143 ("Hence, the trial court erred to the extent it found that Cincinnati Insurance could not demand an appraisal due to the language of the appraisal clause being unenforceable as inconsistent or violative of public policy.")

8. Upon review of the appraisal language at issue, this Court finds that such language is clear, unambiguous, and provides a simple and informal appraisal process, which, if followed, would provide both parties an easy, fair, efficient, and inexpensive means of determining the value of the loss. Not only is informal appraisal an appropriate alternative to ligation in determining the reasonable cost of replacing a windshield in the instant case, an informal appraisal clause is the best course of action. *See e.g., Johnson v. Nationwide Mut. Ins., Co.*, 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] and *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.,* 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a].

9. In contrast to Plaintiff's argument that Progressive waived its right to appraisal, there are numerous Florida cases standing for the proposition that there is no basis for a claim of waiver where an appraisal provision is invoked at the start of litigation. *See Gonzalez v. State Farm Fire & Cas. Co.,* 805 So. 2d 814, 817 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D390a] (holding that insurer did not waive right to appraisal by participating in the litigation where it "promptly answered and in the answer, demanded appraisal"); *Fla. Ins. Guar. Ass'n v. Castilla,* 18 So. 3d 703, 705 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2000a] ("[I]n this case FIGA has never acted inconsistently with its right to an appraisal, having raised that right at the earliest opportunity in this suit and continu[ing] to claim it through its subsequent pleadings."); *U.S. Fire Ins. Co. v. Franko,* 443 So. 2d 170, 172 (Fla. 1st DCA 1983) (holding that petitioner's motion to dismiss constituted a demand for arbitration sufficient to trigger arbitration clause); *Balboa Insurance Co. v. W.G. Mills, Inc.,* 403 So.2d 1149 (Fla. 2d DCA 1981) (holding that where the allegations of a motion to dismiss are based on a contractual right to arbitration, the motion to dismiss is, in substance, also a motion to compel arbitration)

10. Defendant and Insured freely contracted for the right to appraisal. Arbitration is a remedial mechanism that is binding on an assignee of a contract containing an arbitration clause, and thus, even an assignment only of contract rights not entailing any duty of performance must be deemed to include the bargained-for remedial procedure. *Kong v. Allied Professional Ins. Co.*, 750 F.3d 1295 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1330a]. A party cannot attempt to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause, as allowing such would "fly in the face of fairness." *Marcus v. Florida Bagels, LLC,* 112 So.3d 631 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D896b] *citing Grigson v. Creative Artists Agency L.L.C.,* 210 F.3d 524 (5th Cir. 2000).

11. This Court rejects Plaintiff's argument that the subject appraisal is invalid as prohibitively costly and in violation of the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine is inapplicable to matters where a party has filed a breach of contract action and wishes to void an appraisal provision in the underlying contract they are purportedly seeking enforcement of, as no statutory rights are inherently implicated therein. The Prohibitive Cost Doctrine is intended to apply only in actions that seek to vindicate a statutory right. Plaintiff's reliance on the statutory rights enumerated under F.S. 627.428 is unavailing, as the right to obtain attorney's fees should Plaintiff ultimately prevail in this action is only an ancillary right. Plaintiff's legal cause of action is seeks to enforce a contract, not to vindicate a statutory right. Further, in matters where it is applicable, the Prohibitive Cost Doctrine must be proven by evidence, put forth by the party contesting the alternative dispute resolution mechanism, that the cost of the contested alternative dispute resolution mechanism is prohibitively expensive as compared against the cost of litigation, and the affidavits submitted by Plaintiff are insufficient to satisfy Plaintiff's evidentiary burden.[1]

12. Moreover, this Court is unable to find any binding precedent in Florida supporting the application of the Prohibitive Cost doctrine to an informal appraisal provision contained within a contract.

13. While Plaintiff asserts that their challenge to the application of the limits of liability to the payment issued by Defendant presents a coverage question, when an insurer admits that there is a covered loss, any dispute is appropriate for appraisal. *Cincinnati Ins.* at 143; *see also Midwest Mut. Ins. Co. v. Santiesteban,* 287 So.2d 665, 667 (Fla. 1973). In *Cincinnati Ins.,* the Second DCA explains:

> Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the extent of covered damage and the amount to be paid for repairs. *Id*. Thus, the question of what repairs are needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those repairs would depend on the repair methods to be utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any coverage question. Because there is no dispute between the parties that the cause of the damage to Cannon Ranch's property is covered under the insurance policy, the remaining dispute concerning the scope of the necessary repairs is not exclusively a judicial decision. Instead, this dispute falls squarely within the scope of the appraisal process—a function of the insurance policy and not the judicial system. Therefore, Cincinnati Insurance acted within its rights when it demanded an appraisal, and the trial court erred in denying the motion on this basis.

14. Further, a party cannot refuse to participate in appraisal once an insurer has admitted to liability. *New Amsterdam Cas. Co. v. J.H. Blackshear, Inc.* 156 So. 695 (Fla. 1934)

15. It is clear that the issue in this dispute is one regarding the value of the loss, not one of coverage. Defendant has admitted that there is a covered loss, thus this issue should go to appraisal to determine the value of the loss. Defendant properly invoked the appraisal provision and has acted consistently with that invocation. Plaintiff ignored this demand for appraisal and filed a lawsuit instead of complying with mandatory language from the policy regarding appraisal.

16. While Plaintiff asserts that the appraisal provision is invalid due to the allegation of a partial appraiser, in the event that an appraiser is found partial the correct course of action is to permit the party to appoint another appraiser, not invalidate the appraisal provision. *Travelers of Fla. v. Stormont,* 43 So. 3d 941, 945 (3d DCA 2010) [35 Fla. L. Weekly D2059a].

17. The Policy further contains express language requiring that Plaintiff comply with all the terms of the Policy before Plaintiff may sue Defendant. Thus, the amount of loss should be determined by appraisal and the proper action at this time is dismissal. *United Community Insurance Company v. Lewis,* 642 So. 2d 59 (Fla. 3d DCA 1994); *see also U.S. Fire Ins. Co. v. Franko,* 443 So.2d 170 (Fla. 1st DCA 1983).

18. Plaintiff has further alleged that their right of access to courts, to a jury trial, and due process are violated by compliance with the appraisal clause. However, by contractually agreeing to arbitration, a party relinquishes the right of access to courts. *See Kaplan v. Kimball*

Hill Homes Fla., Inc., 915 So.2d 755, 761 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2787a], *review denied,* 929 So. 2d 1053 (Fla. 2006); *see also Infinity Design Builders, Inc. v. Hutchinson,* 964 So. 2d 752 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2032a]. Parties that agree to arbitration [appraisal in this instance] clauses waive the right of access to courts and the right to jury trial. *Terminix Intern. Co., LP v. Ponzio,* 693 So. 2d 104 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1184a].

19. While Plaintiff is not a signatory to the Policy, the appraisal clause is not limited to the contracting party, nor just their claim, but also to non-signing plaintiffs who hold third party beneficiary status to the contract, which were intended to benefit from the contract. *See Technicable Video Systems v. Americable of Greater Miami, Ltd.,* 479 So.2d 810 (Fla. 3d DCA 1985). As third party beneficiaries, these additional plaintiffs are bound by the arbitration provision. *See Raffa Assoc.,* at 1096 (Fla. 4th DCA 1993); *Zac Smith & Co., Inc.*, at 1324. Contractual arbitration, [appraisal], of a specific controversy is mandatory "where the subject matter of the controversy falls within what the parties have agreed will be submitted to [appraisal]". *Hirshenson v. Spaccio*, 800 So.2d 670, 673 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2828a] (quoting *Ocwen Federal Bank FSB v. LVWD, Ltd.*, 766 So.2d 248, 249 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D379a]). If an insurer admits to liability, an insured may not refuse to submit to appraisal. *New Amsterdam Cas. Co.,* at 696.

20. This Court is bound by the ruling in *Progressive Am. Ins. Co. v. SHL Enters., LLC,* 264 So. 3d 1013 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2434a] (concluding that the circuit court departed from the essential requirements of law by failing to properly analyze and interpret § 627.7288 and because that error resulted in a manifest injustice, granting Progressive's second-tier certiorari petition and quashing circuit court's order denying the petitions filed below.). The Second DCA found no merit in allegations that costs of appraisal violate F.S. 627.7288. More specifically the Second District Court of Appeals held:

> If the legislature intends for insurers to solely bear the costs of appraisal in windshield damage claims, it knows how to express that intention. But the statute as currently written, only forbids the imposition of a deductible as applied to a windshield damage claim. It does not forbid a requirement for each party to bear its own appraisal costs in an insurance payment dispute. Thus, where the contracting parties have freely contracted for such a requirement, such as in this case, they or their assignees may not rely on section 627.7288 to avoid their responsibility to pay such costs.

Id. at 1018.

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

1. Defendant's Motion to Dismiss, or Alternatively Motion to Compel Appraisal and Stay Discovery is Granted.

2. This case is Dismissed without prejudice for the parties to comply with the appraisal clause of the policy.

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[1]See *Zephyr Haven Health & Rehab Center, Inc. v. Hardin* 122 So. 3d 916 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D2070a]; *Fi-Evergreen Woods, LLC v. Estate of Vrastil,* 118 So. 3d 859 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1710g]; *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)

* * *

Insurance—Homeowners—Coverage—Exhaustion of policy limits—Insurer that paid mold remediation claim up to policy limit of $10,000 fully satisfied its obligation under policy—Summary judgment is entered in favor of insurer

PRIDE CLEAN RESTORATION INC. (a/a/o Salvador and Camille Lopez), Plaintiff, v. FEDNAT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-014964-CC-05, Section: CC06. April 30, 2020. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came before the Court on March 05, 2020, on Plaintiff's Amended Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment, and the Court having heard the argument of counsel, having reviewed the Motions and Responses, 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 Final Summary Judgment is GRANTED. Plaintiff's Motion for Partial Summary Judgment is DENIED. This matter is hereby dismissed, and Defendant shall go hence without day.

STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits conclusively show that there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510; *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

The burden is on the moving party to establish the non-existence of any genuine issue of material fact. *Romero v. All Claims Ins. Repairs, Inc.*, 698 So. 2d 605, 606 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1919b]. Once the movant offers competent evidence to support the motion, the party against whom judgment is sought must present contrary evidence to reveal a genuine issue. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). It is not enough for the party opposing summary judgment merely to assert that an issue exists. *Id.*

"In reviewing a summary judgment, the Court must consider evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party." *Tropical Glass & Const. Co. v. Gitlin*, 13 So. 3d 156, 158 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1163a]. If the slightest doubt exists as to a genuine issue of material fact, summary judgment is not appropriate. *Gidwani v. Roberts*, 248 So. 3d 203, 207 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a].

STATEMENT OF UNDISPUTED FACTS

Plaintiff, Pride Clean Restoration, Inc., filed suit for breach of contract to recover insurance benefits stemming from a mold remediation loss under an assignment of insurance benefits. FedNat Insurance Company issued a property insurance Policy to Salvador and Camille Lopez, the Insureds. On September 18, 2018, the Insureds reported a claim for water damage to the "dining and bedroom walls" of their property as well as "water stains on the ceiling." *Deposition of Tayxha Gonzalez*, at 17. The damage to the interior of the residence was caused by wind driven rain entering through the roof which was damaged by Hurricane Irma. *Plaintiff's Amended Motion for Partial Summary Judgment*, Exhibit A.

As a result of the water damage, the dining and bedroom walls as well as the ceiling developed mold or fungi which required removal. On January 7, 2019, Plaintiff commenced services for mold remediation to the Insureds' property. *Deposition of Jaritza Butler*, at 40. The mold remediation consisted of testing for mold, setting up a containment area, using dehumidifiers and air scrubbers, demolishing the area that tested positive for mold, spraying anti-microbial, and retesting the residence to make sure all existing mold was removed. *Id.* at 16, 45. According to Ms. Butler, who was Plaintiff's project manager, Plaintiff "[did] not do any repairs to the property." *Id.* at 33, 43. The only work done by Plaintiff was for "mold remediation." *Id.* at 42.

On January 14, 2019, Defendant received an invoice from Plaintiff for $21,603.83 for the mold remediation, removal, and cleaning. *Deposition of Tayxha Gonzalez*, at 27-28. Defendant paid $10,000, representing the Policy limit for mold remediation. *Id.* at 29. Plaintiff filed suit to collect the balance of the invoice which amounted to $11,603.83.

SUMMARY OF ARGUMENT

Defendant moved for final summary judgment arguing that Plaintiff was paid $10,000 which was the maximum allowed under the Policy for mold remediation measures. Plaintiff countered that since the mold remediation services arose from a covered loss, which was not subject to an exclusion under the Policy, the mold remediation was a necessary repair expense under Coverage A, which insured against the risk of direct physical loss to the property. *See Plaintiff's Motion for Partial Summary Judgment*, at 3.

POLICY LANGUAGE

Defendant's Policy insures "against risk of sudden and accidental direct physical loss to property described in Coverage A and B only if that loss is a physical loss to property." *FedNat Homeowners Insurance Policy, FNIC DP3 SP 11 16*, at 4. The Policy excludes coverage for " 'Fungi", Mold, Wet or Dry Rot, Or Bacteria". However, the exclusion does not apply:

a. When "fungi", mold, wet or dry rot, or bacteria results from fire or lightning; or

b. To the extent coverage is provided for in the "Fungi", Mold Wet or Dry Rot, Or Bacteria **Other Coverage** under Coverages with respect to loss caused by a Peril Insured Against other than fire and lightning.

Id. at 6. (emphasis added). Under "**Other Coverages**", limited coverage is provided as follows:

"Fungi", Mold, Wet Or Dry Rot, Or Bacteria

(1) We will pay up to $10,000, or the amount shown in the Declarations if different, for:

a. The total of all loss payable under Coverages caused by or resulting directly or indirectly from "fungi", mold, wet or dry rot, or bacteria.

b. The cost to remove "fungi", mold, wet or dry rot, or bacteria from property covered under Coverage.

c. The cost to tear out and replace any part of the building or other covered property as needed to gain access to the "fungi", mold, wet or dry rot, or bacteria; and

d. The cost of testing of air or property to confirm the absence, presence or level of "fungi", mold, wet or dry rot, or bacteria; whether performed prior to, during or after removal, repair, restoration or replacement.

The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of "fungi", wet or dry rot, yeast or bacteria.

(2) The coverage described in **a.** only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred.

(3) $10,000, or the amount shown in the Declarations if different, is the most we will pay for the total of all loss or cost payable under this Other Coverage regardless of the:

(1) Number of locations; or

(2) Number of claims made.

If there is covered loss or damage to covered property, not caused, in whole or in part, by "fungi", mold wet or dry rot, or bacteria, loss payment will not be limited by the terms of this Other Coverage, except to the extent that "fungi", mold, wet or dry rot, or bacteria causes an increase in the loss. Any such increase in the loss will be subject to the terms of this Other Coverage.

This coverage does not increase the limit of liability applying to the damaged covered property.

Id., at 4. The Insureds' Declarations page provides for "Limited Fungi, Wet or Dry Rot, or Bacteria" coverage in the amount of $10,000. *FedNat Homeowners Insurance Policy, FNIC DP3 DEC 04 16*, at 2.

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." *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a].

When applying the language of an all-risk policy to the facts of a particular case, the insured bears the initial burden of proving that the loss falls within the terms of the policy. *W. Best Inc. v. Underwriters at Lloyds, London*, 655 So. 2d 1213, 1214 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1238a]. Once it is established that a loss falls within the terms of the policy, the burden shifts to the insurer to prove that the loss falls "within an exclusionary provision." *Id.* Finally, "[i]f there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *E. Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a] (citation omitted); *see also Fla. Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within the policy").

In the present case, Defendant's Policy clearly excludes damage to the Insureds' property caused by " 'fungi', mold, wet or dry rot, or bacteria." However, there are two exceptions to this exclusion. The first exception applies when the " 'fungi', mold, wet or dry rot, or bacteria" results from a "fire or lighting" loss. Since there is no evidence proving that the mold damage resulted from a fire or lightning loss, the mold loss does not qualify under the first exception. The second exception to the exclusion is provided under the "Other Coverage" provisions of the Policy which pays for " 'fungi', mold, wet or dry rot, or bacteria" remediation if the loss is caused by a "Peril Insured Against". Payment is capped at $10,000, unless a higher amount is found in the Declarations page of the Policy. Payment under "Other Coverage" applies to all losses caused by or resulting directly or indirectly from " 'fungi', mold, wet or dry rot, or bacteria". The payment includes the cost to "tear out and replace any part of the building", the cost to "remove", and the cost to test for " 'fungi', mold, wet or dry rot, or bacteria". The $10,000 limit is the most Defendant is required to pay for the total of all losses or costs "regardless of the (1) number of locations; or (2) the number of claims made". *Id*.

Based on the clear Policy language cited *supra,* this Court finds that the mold remediation claim was covered under the Other Coverage clause of the Policy up to the Policy limit of $10,000, which was the maximum amount shown on the Declaration's page of Insureds' Policy. Defendant paid Plaintiff $10,000 which fully satisfied its obligation under the Policy. Accordingly, Plaintiff failed to prove that Defendant breached the insurance contract.

Therefore, it is ORDERED and ADJUDGED that:

1. Defendant's Motion for Final Summary Judgment is GRANTED.

2. Plaintiff's Motion for Partial Summary Judgment is DENIED.

3. Plaintiff, Pride Clean Restoration Inc., shall take nothing, and Defendant, FedNat Insurance Company, shall go hence without day.

4. This Court reserves jurisdiction to award reasonable attorney's fees.

* * *

Insurance—Automobile—Windshield replacement— Appraisal—Clear and unambiguous policy provision that provides simple and informal appraisal process for windshield replacement and was not waived by insurer is enforceable against assignee of insured—Prohibitive cost doctrine—Appraisal process is not invalid under prohibitive cost doctrine where process is not prohibitively costly and it has not been shown that any statutory right would not be vindicated by going through process—Motion to compel appraisal is granted

BROWARD INS RECOVERY CENTER (LLC) a/a/o Antonio Pecorelli, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-026441-SP-23, Section ND01. March 9, 2020. Myriam Lehr, Judge. Counsel: Emilio Stillo, Emilio Stillo, P.A., Davie; and Joseph Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Plaintiff. Daniel Montgomery, Cole, Scott & Kissane, PA., Jacksonville, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY MOTION TO STAY AND COMPEL APPRAISAL AND DENYING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING

THIS CAUSE having come before the Court on December 5, 2019 on Defendant's Motion To Dismiss Or Alternatively Motion To Stay And Compel Appraisal and Plaintiff's Motion for Evidentiary Hearing. Upon review of the pleadings, argument of counsel, and being otherwise fully advised in the premises, the Court rules as follows:

Pursuant to the facts, policy, and law the Court GRANTS Defendant's Motion to Dismiss or Alternatively Motion to Stay and Compel Appraisal in part and DENIES Plaintiff's Motion for Evidentiary Hearing.

This Court has considered the three necessary factors when ruling on a motion to compel appraisal: (1) whether a valid written agreement to appraisal exists; (2) whether an appraisal issue exists; and (3) whether the right to appraisal was waived. *Heller v. Blue Aerospace, LLC*, 112 So.3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a].

The Court finds there is a valid and enforceable contractual agreement for appraisal. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. See *The Cincinnati Insurance Company v. Cannon Ranch Partners Inc*., 162 So. 3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a].

Upon a review of the appraisal language at issue, this Court finds that such language is clear and unambiguous and provides a simple and informal appraisal process, which if followed, would provide both parties a fair and efficient means of determining the reasonable costs of replacing a windshield.

The Court determines that the subject appraisal is not invalid as prohibitively costly in violation of the Prohibitive Cost Doctrine. Plaintiff argues that the Court is bound by *Green Tree Financial Corp. Alabama v. Randolph*, 531 U.S. 79 (2000), which Plaintiff contends would invalidate the subject appraisal provision as argued. In *Green Tree*, the Supreme Court acknowledged that an arbitration clause could be rendered unenforceable where the existence of substantial arbitration costs would otherwise prohibit a litigant from effectively vindicating his or her federal statutory rights. However, Plaintiff has failed to demonstrate a statutory right that would not be vindicated by going through appraisal, instead simply arguing that Plaintiff would be entitled to an ancillary right to attorney's fees pursuant to Florida Statute 627.428 should it prevail in litigation. While Attorney's fees are a substantive right, the right to attorney's fees is not a statutory cause of action as required for the invocation of the prohibitive cost doctrine, but a right derived upon judgment in favor of the Plaintiff. *Green Tree*, at 90.

Additionally, Federal arbitration is far more expensive and time consuming than the appraisal process provided in the subject Policy. Accordingly, this Court finds that an evidentiary hearing is unnecessary and denies Plaintiff's request for an evidentiary hearing.

The Court further finds the issues at hand are appropriate for appraisal and Defendant has not waived its right to appraisal. Progressive did not engage in conduct inconsistent with its rights of appraisal. The Court is not persuaded by the other arguments asserted by Plaintiff in its Complaint and espoused by Plaintiff at the hearing in opposition of appraisal. Plaintiff's claims that it is entitled to discovery regarding the policy's limitations of liability provision or that this is a coverage dispute regarding the limits of liability provision are without merit. The appraisal provision of the policy is not subject to the limits of liability provisions of the policy. Once Defendant invoked appraisal, Plaintiff was required to comply with appraisal, as it was the agreed to mechanism for resolution of disputes regarding the value of loss. See *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b].

Based on the foregoing, the Court finds compliance with the subject policy's appraisal provision is a mandatory condition precedent to the filing and maintaining of the subject lawsuit. See *U.S. Fire Ins. Co. v. Franko*, 443 So.2d 170, 172 (Fla. 1st DCA 1983); *United Community Insurance Company v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994).

IT IS THEREFORE

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Evidentiary Hearing is hereby DENIED;

2. Defendant's Motion to Abate and Motion to Compel Appraisal is hereby GRANTED;

3. Within ten (10) days of this Order, Plaintiff must provide Progressive with the name, address, email address, and phone number of its selected appraiser;

4. The appraisal process shall occur within forty-five (45) days of this Order;

5. If the appraisal award is in excess of the benefits already paid, Progressive shall send payment for the additional amounts within twenty (20) days of the appraisal award;

This matter is hereby abated until the parties comply with the appraisal provision set forth in the subject policy.

* * *

Insurance—Travel—Attorney's fees—Amount—Requested award of $402,495 in attorney's fees for fraud in inducement claim and breach of contract claim on travel insurance policy that cost plaintiff $146.94 and provided maximum coverage of $2,260.86 is clearly unreasonable where case was neither novel nor complex and did not carry any far-reaching jurisprudential significance—Claimed hours that are unnecessary, excessive and duplicative are not compensable—Costs, expert witness fee, and prejudgment interest are awarded

REUVEN T. HERSSEIN, Plaintiff, v. AGA SERVICE COMPANY d/b/a ALLIANZ GLOBAL ASSISTANCE, a Foreign Profit Corporation, JEFFERSON INSURANCE COMPANY, a Foreign Profit Corporation, and AMERICAN AIRLINES, INC., a Foreign Profit Corporation, Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-018892-CC-05, Section CC06. March 11, 2020. Luis Perez-Medina, Judge.

ORDER ON PLAINTIFF'S MOTION TO TAX ATTORNEY'S FEES AND COSTS

THIS CAUSE, came before the Court on November 19, 2019 on Plaintiff's Motion to Tax Attorney's Fees and Costs against Defendants, AGA Service Company d/b/a Allianz Global Assistance ("Allianz") and Jefferson Insurance Company ("Jefferson") (collectively, "Defendants"). The Court having carefully considered the motion and the full court record; having heard testimony from Plaintiff's counsel and the expert witnesses for all parties[1]; having reviewed Plaintiff's time records; having reviewed the defense

expert's objections and proposed reductions to Plaintiff's claimed hours; having heard argument of counsel; having utilized the criteria set forth in *section 627.428(1), Florida Statute*; *Rule 4-1.5 of the Rules Regulating the Florida Bar*; and articulated by the Florida Supreme Court in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985); and being otherwise fully advised in the premises,

ORDERS and **ADJUDGES** as follows:

FINDING OF FACTS

As Hurricane Irma[2] was tracking towards the Southern United States, Plaintiff, Reuven Herssein ("Mr. Herssein"), a South Florida attorney, sought to take his family out of harm's way. Mr. Herssein purchased six round-trip airline tickets with American Airlines ("American") for himself and his immediate family for travel to Las Vegas. The tickets were purchased online on September 5, 2017. The Herssein family was scheduled to depart from Miami International Airport two days later, on Thursday, September 7, and return on Tuesday, September 12. When Mr. Herssein purchased the airline tickets, he also bought travel insurance. The policy was offered by American with the purchase of any online trip/airline ticket purchase. It was advertised and sold by Allianz and underwritten by Jefferson.

On September 4, 2017, the day before Mr. Herssein purchased his tickets, then Florida Governor Rick Scott signed *Executive Order 17-235*, declaring a state of emergency in every county in the State of Florida. According to the Order, the forecast from the National Hurricane Center had Hurricane Irma making "landfall somewhere in South Florida or Southwestern Florida as a major hurricane" and traveling "up the entire spine of Florida." *Id.* The five-day forecast predicted that on Saturday, September 9, 2017, Hurricane Irma would be "located somewhere north of Cuba and south of Andros Island in the Bahamas." *Id.*

A Hurricane Watch was issued by the National Hurricane Center for the South Florida area on Thursday, September 7, 2017 at 11 AM. *Hurricane Irma Local Report/Summary, National Weather Service, September 10, 2017.* At 11 PM, the Watch was upgraded to a Hurricane Warning. *Id.* From Friday, September 8 through Saturday, September 9, Irma moved along the northern coast of Cuba and weakened to a Category 3 before accelerating towards the Florida Keys. *Id.*

On September 7, four hours before the scheduled flight was to depart, American cancelled the flight. When Mr. Herssein contacted American, he was told that no alternative flights were available because American cancelled all flights departing from Florida. Unable to book another flight out of South Florida, the Herssein family drove out of Florida to escape the Hurricane.

On the morning of Sunday, September 10, the center of Hurricane Irma made landfall at Cudjoe Key as a 130 mph Category 4 hurricane. *Hurricane Irma Local Report/Summary, National Weather Service, September 10, 2017.* In the afternoon, Irma made a second landfall at Marco Island as a Category 3 with 115 mph winds. *Id.* The center of Irma moved into central Florida overnight and up the Florida peninsula on Monday. *Id.*

Pursuant to Plaintiff's allegations in the Complaint, the travel insurance policy, purchased along with the airline tickets, was intended to insure the Herssein family for trip cancellation "when the airline cancels the trip before the trip begins." *Complaint*, 3. Specifically, the policy provided "trip interruption coverage" when the airline "stops offering all services . . . because of a natural disaster, or severe weather." *Id.* at 23. However, the General Exclusions section of the policy contained a clause denying coverage for "any loss that results directly or indirectly from . . . any problem or event that could have reasonably been foreseen" when the plan was purchased, or "natural disasters like hurricanes, earthquakes, fires and floods." *Id.* at 28. The policy cost the Herssein family $146.94 in total and provided a maximum coverage for "Trip Cancellation Protection" of $2,260.86.[3] *Id.* at 17.

On September 17, 2017, Plaintiff filed an insurance claim with Defendants. The Claim was denied on October 14, 2017, citing the language in the General Exclusion section of the policy which would deny coverage for "any problem or event that could have been reasonably foreseen." *Id.* at 5, 45.

On November 2, 2017, Mr. Herssein, acting as his own attorney, filed a six-count Complaint against Defendants. The allegations against Jefferson were for breach of contract, violating Florida's Deceptive and Unfair Trade Practices Act ("FDUPTA"), and fraud in the inducement. The allegations against Allianz were for breach of contract, violating FDUPTA, declaratory relief under FDUPTA, fraud in the inducement, and violating section 817.41, Florida Statutes, dealing with misleading advertising. The Complaint sought consequential damages, totaling $11,554.48, for hotel accommodations, fuel, food, and mileage, to "drive the Herssein Family out of Florida," as well as the return of the $146.94 premium for the travel insurance policy. Apart from these consequential damages, Plaintiff also sought attorney's fees and costs. Notably, nowhere in any of the Complaint's allegations did Plaintiff seek a refund for the tickets.

On January 10, 2018, two months after the initial Complaint was filed, Mr. Herssein amended the Complaint against both Defendants removing all counts alleging violations of FDUPTA and section 817.41, Florida Statutes dealing with misleading advertising.[4] The Amended Complaint also added American as a new Defendant, alleging one count of breach of contract and one count for breach of an implied covenant of good faith and fair dealing.

On February 28, 2018, American filed a Motion to Dismiss the Amended Complaint. The motion indicated that "American's contractual Condition of Carriage expressly disclaim[ed] Plaintiff's claim for special, incidental, and consequential damages, and, in any event, Plaintiff's flight was cancelled because of a force majeure. (i.e. Hurricane Irma)." *American Airlines, Inc.'s Motion to Dismiss Amended Complaint*, p.1. The Motion further alleged that Plaintiff's claims were "expressly preempted by the Airline Deregulation Act, 49 U.S.C. section 41713." *Id.* On June 18, 2018, Plaintiff filed a Response in Opposition to American Airlines, Inc.'s Motion to Dismiss Amended Complaint. Before the Motion to Dismiss could be heard, Plaintiff settled with American for an undisclosed amount.

Even though the case against American was settled early in the litigation, Plaintiff billed Allianz and Jefferson for matters involving American. For example, Plaintiff spent 21 hours amending the Complaint to add American as a Defendant. Plaintiff spent 34.9 hours responding to American's Motion to Dismiss. After the case against American settled, Plaintiff's spent an additional 43.2 hours seeking documents and looking to depose American's corporate representatives. All told, Plaintiff billed Defendants 99.1 hours for work which should have been billed to American, 55.9 hours for pre-settlement work and 43.2 hours for work done after the case against American was settled.

Throughout the litigation against Defendants, Plaintiff filed numerous motions for sanctions that were never set for a hearing. At one point in the litigation, Plaintiff filed seven Motions for Summary Judgment. Each motion addressed an affirmative defense raised by Defendants. On the same day that the Motions for Summary Judgments were filed, Plaintiff filed nine motions seeking 57.105 sanctions. The motions for sanctions focused on those same affirmative defenses. Plaintiff billed 37 hours for the seven Motions for Summary Judgments and 23.2 hours for the nine motions seeking 57.105 sanctions. While the motions for sanctions were never set for a hearing, Plaintiff did schedule a hearing on the seven Motions for

Summary Judgement. Plaintiff then billed 49 hours preparing for that one hearing. Ultimately, only one Motion for Summary Judgment was heard and ruled on by the Court. The ruling was in Plaintiffs favor. The others six Motions for Summary Judgment where never heard by the Court.

Eighteen months after the case was filed, before a single deposition could be taken or trial commenced, Allianz and Jefferson settled with Plaintiff for an undisclosed amount plus an entitlement to attorney's fees and costs. The settlement was for the breach of contract and the fraud in the inducement claims. An Order dismissing the suit was entered on May 3, 2019. A fee hearing was held on November 19, 2019 with Plaintiff submitting his final argument on December 3, 2019. Defendants did not submit any final argument after the hearing.

Plaintiff is seeking attorney's fees under section 627.428(1), Florida Statutes, applicable after a judgment favoring a named insured is rendered against an insurer under an insurance policy or contract. Pursuant to a Court Order dated May 3, 2019, Plaintiff submitted two timesheets evidencing the services provided for the fees sought by each attorney within the Herssein Law Group. The first timesheet was for services prior to May 3, 2019. A supplemental timesheet was submitted for services from May 3, 2019 through July 16, 2019. In the first timesheet, Mr. Herssein billed for 288.3 hours at $650.00 per hour while Erik Fritz ("Mr. Fritz"), Mr. Herssein's associate, billed 412.4 hours at $400.00 per hour. In the supplemental timesheet, Mr. Herssein billed an additional 50 hours while Mr. Fritz billed an additional 44.1 hours. Combined, Mr. Herssein billed 338.3 hours at $650.00 per hour while Mr. Fritz billed 456.5 hours at $400.00 per hour. In total, the Herssein Law Group is seeking 794.8 hours, totaling $402,495.00.

Pursuant to the same May 3, 2019 Court Order, Defendants challenged Plaintiff's timesheet submissions. Defendants argued that the number of hours Mr. Herssein and Mr. Fritz spent on this case as well as the hourly rates they charged were unreasonable. Defendants argued that $34,805.00 was a reasonable fee for a simple breach of contract and fraud in the inducement case. Broken down, Mr. Herssein could bill 35.9 hours on the first timesheet and an additional 15 hours on the supplemental timesheet, both at a rate of $450.00 per hour, while Mr. Fritz could bill 31.3 hours on the first timesheet and 2.7 hours on the supplemental timesheet, at a rate of $350.00 per hour. During the fee hearing, Defendants' expert conceded that Mr. Herssein should be awarded $500.00 rather than $450.00 per hour. Based on the new hourly rate, the Herssein Law Group would be entitled to $37,350.00.

Pursuant to this Court's Order dated May 3, 2019, Plaintiff was required to file a response "in writing to each objection" raised by Defendants. Failure "to timely respond to the objections [would] result in the objection being sustained by the Court." While Plaintiff responded to Defendants' objections on the first timesheet, he never responded to Defendants' objections on the supplemental timesheet. As such, Plaintiff waived any objections to Defendants' adjustments of the supplemental timesheets.

ANALYSIS

Section 627.428(1), Florida Statute governs the shifting of attorneys' fees in cases where an insured prevails against an insurance company. In pertinent part, the statute provides:

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

(Emphasis added).

To determine what is "a reasonable sum as fees or compensation", this Court must first determine the number of hours reasonably expended by Plaintiff in "prosecuting the suit" and then multiply that figure by a reasonable hourly rate. *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150-51 (Fla. 1985). The resulting amount is "the lodestar, which is an objective basis for the award of attorney fees." *Id.* at 1151. That said, Rule 4-1.5(c) of the Rules Regulating the Florida Bar, states:

> In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in the rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from the application of only the time and rate factors.

The following factors are set forth in Rule 4-1.5(b) and were considered by this Court in evaluating Plaintiff's request for reasonable attorney's fees.

> (A) The time and labor required, the novelty, complexity, difficulty of the question involved, and the skill requisite to perform the legal service properly;
>
> (B) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (C) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (D) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (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;
>
> (F) The nature and length of the professional relationship with the client;
>
> (G) The experience, reputation, diligence, and ability of the lawyer or lawyers performing the services and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (H) Whether the fee is fixed or contingent, and, if fixed as to the amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Rule 4-1.5(b) of the Rules Regulating the Florida Bar.

When deciding what constitutes a reasonable sum as compensation, Judges are not required to abandon their common sense or what they learned as lawyers. *Ziontz v. Ocean Trail Unit Owners Ass'n, Inc.*, 663 So. 2d 1334, 1335 (Fla. 4th DCA 1993). Irrespective of the expert opinions presented at a fee hearing, Courts will "closely scrutinize attorney fee awards to ensure their reasonableness" and will not abandon their own experience or common sense. *Seminole Cty. v. Clayton*, 665 So. 2d 363, 364 (Fla. 5th DCA 1995) [21 Fla. L. Weekly D62a]. Even when there is evidence supporting the award of attorney's fees, "[n]o court is obliged to approve a judgment which is so obviously contrary to the manifest justice of the case" and would "obviously offends even the most hardened appellate conscience." *Nunez v. Allen*, 2019 WL 5089715 (Fla. 5th DCA Oct. 11, 2019) [44 Fla. L. Weekly D2511a] (citing *Fla. Nat'l Bank of Gainesville v. Sherouse*, 86 So. 279, 279 (1920)).

In *Nunez*, the appellate court held that an award of $343,590.00 in attorney's fee to an attorney who represented himself in a civil dispute resulting in a judgment of $29,785.00 for the diminution in the value of his six-year-old truck, the cost to repair the truck, and the loss of use of the truck while it was being repaired, "was clearly unreasonable." *Id.* The Court held that even when the testimony at a fee hearing supports both the hourly rate and the number of hours claimed, a Court must look to the complexity, novelty, or the "far-reaching jurisprudential significance" of the case in determining whether a final

fee award is reasonable. *Id.*; *see also In re Estate of Platt*, 586 So. 2d 328, 333-34 (Fla. 1991) (in determining the number of hours that have been reasonably expended, a court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue); *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras*, 633 So. 2d 1103, 1110-11 (Fla. 3d DCA 1994) (under the "hour setting" portion of a fee award it is important to distinguish between the "hours actually worked" and the "hours reasonably expended," because the hours actually worked is not the issue); *Mercy Hospital, Inc. v. Johnson*, 431 So. 2d 687, 688-89 (Fla. 3d DCA 1983) ("In deciding upon amounts to be awarded as attorney's fees, a trial court must consider not only reasonableness of the fees charged but the appropriateness of the number of hours counsel engaged in performing his services as well."); *Ziontz*, 663 So. 2d at 1335 (Fla. 4th DCA 1993) (finding $60,000.00 in fees awarded in connection with litigation regarding an outstanding $100.00 assessment was manifestly unjust, refusing to abandon as Judges what was learned as lawyers or common sense). In *Mercy Hospital*, 431 So. 2d at 689, the Court concluded that an attorney's claim of 5563 hours negotiating three loans was "inherently incredible.".

Applying the reasoning of *Ziontz*, *Nunez*, and *Mercy Hospital*, this Court finds that an award of $402,495.00 in attorney's fee for a fraud in the inducement claim and a breach of an insurance contract claim, on a policy which cost Plaintiff $146.94 and provided a maximum coverage of $2,260.86 is clearly unreasonable. This Court finds that this case was neither novel nor complex, nor did this case carry any far-reaching jurisprudential significance. The travel insurance policy, which is the subject of this case, was purchased by Plaintiff as Hurricane Irma was nearing the State of Florida and after a state of emergency had been declared. When his flight was cancelled, Plaintiff filed a claim for coverage. The claim was denied based on an exclusion for losses which Defendants claimed were reasonably foreseeable when the policy was purchased. Plaintiff filed suit for breach of contract and fraud in the inducement which was eventually settled without a trial or depositions. During the fee hearing, Mr. Herssein testified that the bulk of his prior experience was spent defending insurance companies on PIP cases. He is therefore familiar with the complexity of litigating the breach of an insurance contract claim. In this case, Mr. Herssein billed for 794.8 hours which equates to 19.2 weeks or 4.6 months, all spent litigating a case that never went to trial, that was never appealed, and where no depositions were taken.[5] Accordingly, this Court finds that billing 794.8 hours on this type of case is clearly unreasonable. The Court would make the same findings even if the undisclosed settlement was for a larger amount than the damages claimed in the Complaint.

While this Court finds that the 794.8 hours spent by Plaintiff litigating this case is unreasonable, the Court is still tasked with determining what constitutes a reasonable number of hours and a reasonable hourly rate for Plaintiff's counsel.

A. The Number of Hours Expended by Plaintiff's Counsel

The first step in considering the number of hours expended is whether there is adequate documentation to support the number of hours claimed by Plaintiff's counsel. *Rowe*, 472 So. 2d at 1150. "Florida Courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id.* When determining a reasonable hourly rate, the Court must look to the documentation presented supporting the number of hours claimed. *Id.* Counsel is expected to claim only those hours that could be properly billed to his client. *Id.* "Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the Court finds to be excessive or unnecessary." *Id.* The "novelty and difficulty of the question involved" is to be reflected in "the number of hours reasonably expended on the litigation." *Id.*

While providing adequate and current records supporting the number of hours claimed is the first step in the inquiry, judges should reduce the hours claimed when they are: (a) excessive or too thorough; (b) duplicative of time spent by other lawyers for the same party; or (c) were simple ministerial tasks that were more appropriately handled by support staff. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary"); *North Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b] ("Duplicative time charged by multiple attorneys working on the case are generally not compensable . . . [nor is] excessive time spent on simple ministerial tasks such as reviewing documents or filing notices of appearance.").

The Court may also reduce fees on claims for which the moving party was unsuccessful. *Baratta v. Valley Oak Homeowners' Ass'n, Inc.*, 928 So. 2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c]. A trial Court "may take into account [. . .] that the [party] has not prevailed on all issues and the degree to which this has extended the litigation or increased costs." *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994). When unsuccessful work is intertwined with work on successful issues, reasonable fees should be awarded. *Warshall v. Price*, 629 So. 2d 905, 907 (Fla. 4th DCA 1993). However, if the winning issue could have been researched, litigated and billed without the losing issue being addressed, then the work was not intertwined. *Id.* at 908.

After reviewing the Court record and the timesheets summitted by the Herssein Law Group, this Court finds that the request for 794.8 hours included unnecessary, excessive and duplicative claims. Mr. Herssein expended an inordinate amount of time on issues and claims that ultimately proved unsuccessful or were abandoned. Not only did Mr. Herssein bill for the time spent initially researching and drafting these claims, but when challenged on the merits, he abandoned those claims. This Court also finds that many of the hours claimed by Plaintiff are not supported by the timesheets provided or the testimony of his fee expert. *Fla. Birth-Related Neurological Injury Comp.*, 633 So. 2d at 1110-11 (under the "hour setting" portion of a fee award it is important to distinguish between the "hours actually worked" and the "hours reasonably expended.").

The drafting of the initial Complaint and the filing of an Amended Complaint are examples of Plaintiff's excessive billing. Mr. Herssein billed 21.9 hours for researching and drafting the Complaint against Jefferson and Allianz; 35.3 hours reviewing, researching, and drafting a response to Defendants' Motion to Dismiss the Complaint; and 2.2 hours researching Defendants' threat of section 57.105 sanctions for the FDUPTA and the misleading advertising counts in the Complaint. In response to the section 57.105 threat, Plaintiff amended the Complaint, removed the sanctionable counts, and billed an additional 21 hours for the time spent drafting the Amended Complaint. The language in the remaining counts on the Amended Complaint was nearly identical to the language in the initial Complaint, except for the removal of the sanctionable language and the addition of American as a new Defendant in the case.[6] This Court has therefore determined to reduce the 21.9 hours spent drafting the Complaint by 11.9 hours and reduce the time Mr. Herssein spent drafting the response to the Motion to Dismiss by 29.6 hours.[7] This Court declines to award the 2.2 hours researching the section 57.105 notice and the 21 hours spent drafting the Amended Complaint simply to correct Mr. Herssein's initial error. Defendants are also not required to pay for the time Mr. Herssein spent litigating his case against American. Altogether, Plaintiff billed

Defendants 80.4 hours from the moment the Complaint was drafted to the time the Amended Complaint was filed with this Court. Of those 80.4 hours billed, only 15.7 hours are compensable.

After Defendants and American filed new Motions to Dismiss the Amended Complaint, Mr. Herssein billed for his time researching and drafting a response. While, Plaintiff's response to Defendants' Motion to Dismiss the Amended Complaint was nearly identical to his first response, Plaintiff still billed Defendants for 22 hours. Mr. Herssein also billed Defendants 34.9 hours responding to American's Motion to Dismiss. Finally, Plaintiff billed 13.6 hours preparing for and attending a scheduled one-hour hearing on Defendants' and American's Motions to Dismiss the Amended Complaint. This Court has determined Plaintiff is entitled to 3 hours responding to Defendants' Motion to Dismiss the Amended Complaint and 5 hours preparing for and attending the hearing on the Motions to Dismiss. This Court declines to award the 34.9 hours Plaintiff billed responding to American's Motion to Dismiss the Amended Complaint. Therefore, out of the 70.5 hours billed, only 8 hours are compensable.

Plaintiff's excessive billing can also be seen in his response to Defendants' affirmative defenses. Mr. Herssein billed 6.2 hours on a Motion to Strike Jefferson's first affirmative defense while Mr. Fritz billed 2.45 hours for the same work. Mr. Herssein used the almost identical language in Jefferson's Motion to Strike to prepare a motion striking Allianz's first affirmative defense. Mr. Herssein then billed 4 hours for himself and 3.75 hours for Mr. Fritz. In total, the Herssein Law Firm billed a combined 16.4 hours on the two Motions to Strike Defendants' first affirmative defense filings. After Defendants filed amended affirmative defenses, the Herssein Law Firm billed another 13.4 hours on responses which were almost identical to the first Motions to Strike. The Herssein Law Firm repeated the same pattern in filing a response to Defendants' third affirmative defenses, billing a total of 7.1 hours. Altogether, the Herssein Law Firm billed a total of 36.9 hours. The Court has determined that only 11.9 hours are compensable.

Plaintiff also filed multiple and substantially similar motions seeking section 57.105 sanctions against each Defendant for their affirmative defense filings. These motions were never heard by the Court. Yet, Mr. Herssein billed an additional 23.2 hours for the section 57.105 motions on top of the 34.9 hours for the Motions to Strike and 37 hours for seven Motions for Summary Judgment on Defendants affirmative defenses. Altogether, Mr. Herssein billed 95.1 hours responding to Defendants' affirmative defenses. This Court has determined that 10 hours is a reasonable amount to bill for Plaintiff's various Motions to Strike. This Court has determined not to compensate Plaintiff on his section 57.105 motion practice, which the Court finds was unnecessary, excessive, and ultimately unsuccessful.

Another example of excessive billing was, 18.7 hours billed for the time spent determining the amount of attorney's fees the Herssein Law Firm was entitled to receive. While Plaintiff claimed that these billings were appropriate since there was a dispute finalizing the terms of the settlement agreement, the Court finds that entitlement to attorney's fees was never at issue. As such, Plaintiff is not entitled to receive the 18.7 hours billed litigating the amount of attorney's fees. *North Dade Church of God*, 851 So. 2d at 196 ("[I]n litigating over attorney' [sic] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees.").

These 261 hours (306.6 hours less 45.6 hours determined to be reasonable) are just a sample of the excesses identified by Defendants' expert and confirmed by this Court. In contrast, Plaintiff's expert subtracted just 6 hours, from the 794.8 hours claimed by the Herssein Law Group. It is therefore incumbent on this Court to assess the totality of the evidence and make determinations in accordance with the legal authorities. *See Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957) ("It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a case has no evidential value.").

Based on the guiding authorities, arguments of counsel and the testimony of Plaintiff's counsel and both expert witnesses, this Court finds the Defendant's expert reductions for Plaintiff's timesheet are reasonable and persuasive except for the following changes:

1. This Court modifies the number of hours for entries #1-8 to allow for an additional 8 hours for Mr. Herssein.

2. This Court modifies the number of hours for entries #13-20, 55, 64, & 65-66 to allow for an additional 4.8 hours for Mr. Herssein.

3. This Court modifies the number of hours for entries #33-52 to allow for an additional 8 hours for Mr. Fritz.

4. This Court modifies the number of hours for entries #67-69, 75, & 76 to allow for an additional 1.5 hours for Mr. Herssein

5. This Court modifies the number of hours for entries #103-108 to allow for an additional 3 hours for Mr. Herssein.

6. This Court modifies the number of hours for entries #138-154, 256, 257, 275, 277-287, 459-462, and 465-471 to allow for an additional 4.9 hours for Mr. Herssein and an additional 4 hours for Mr. Fritz.

7. This Court modifies the number of hours for entries # 109, 110-118, 134, 157, 166, 185, 196, 199-201, 218, 222-23, 233, 234, 251, 253, 254, 295, 301, 305, 326-330, 377, 373, 386, 392, 430, 431, 457, 507, 511-535, 536-541, 640, 655, and 661-665 to allow for an additional 9.5 hours for Mr. Herssein and an additional 18.6 hours for Mr. Fritz.

B. The Hourly Rate

This Court finds that a reasonable hourly rate for Reuven T. Herssein is $525.00 per hour. Evidence was presented at the hearing in the form of depositions and elicited testimony that this was a reasonable hourly rate. This Court, based on the same evidence produced and presented at the hearing, finds that a reasonable hourly rate for Erik Fritz is $375.00 per hour.

This Court finds and adopts the stipulation of the parties that Maury Udell, the Plaintiff's expert, expended 46 hours reviewing the timesheets and testifying in this case. Based on the evidence presented at the fee hearing, this Court finds that Maury Udell is entitled to an hourly rate of $550.00 per hour.

After reviewing the entire file, hearing testimony from witnesses on the issues involved in the case and the rates customarily charged in this particular locality for similar legal services, this Court finds the following number of hours and reasonable rates for the lawyers who worked on the case:

Attorney	# of Hours	Hourly Rate	Lodestar
REUVEN T. HERSSEIN	82.6	$525.00	$43,365.00
ERIK FRITZ	64.6	$375.00	$24,225.00

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

1. The Court awards Plaintiff a lodestar of $67,590.00

2. The Court awards $ 355.00 for stipulated taxable cost.

3. Plaintiff shall recover his fee expert Maury Udell, Esq.'s cost at the loadstar of 46 hours of time, as stipulated by Defendants, at the hourly rate of $ 550.00 per hour for a total of $25,300.00

4. Plaintiff shall also be entitled to pre-judgment interest on Plaintiff's attorney's fees and costs from May 3, 2019 through the date of this order at the statutory rate as per section 55.03(1), Florida Statute, for a total amount of $3,948.96, calculated as follows:

a. May 3, 2019 through June 30, 2019 at 6.57% times 58 days totaling $709.34.

b. July 1, 2019 through September 30, 2019 at 6.77% times 92 days totaling $1,159.42.

c. October 1, 2019 through December 31, 2019 at 6.89% times 92 days totaling $1,179.97.

d. January 1, 2020 through February 21, 2019 at 6.83% times 71 days totaling $900.23.

5. Plaintiff shall recover the total attorney's fees, costs, expert costs, and prejudgment interest in the amount of $97,193.96 from Defendants, AGA Service Company d/b/a/ Alliance Global Assistance and Jefferson Insurance Company, whose address is 9950 Maryland Drive Richmond, VA 23233, for which let execution issue.

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[1]Maury Udell, Esq. testified as Plaintiff's expert and Mac Phillips, Esq. testified as Defendant's expert. Both have previously testified as fee experts in insurance cases.

[2]Hurricane Irma formed from an African Easterly Wave and became a tropical storm on August 30, 2017. Irma quickly strengthened, attaining hurricane status on August 31. By the time Irma struck Bermuda on Wednesday September 6, it was a Category 5 hurricane with 185 mph winds. *Hurricane Irma Local Report/Summary, National Weather Service, September 10, 2017.*

[3]The maximum coverage was $376.81 per traveler and the Herssein family had six travelers covered under the policy.

[4]Plaintiff's Amended Complaint, removing the FDUPTA and the misleading advertising counts against Jefferson and Allianz, was prompted by Defendants' Notice of Intent to Seek 57.105 Sanctions against Mr. Herssein, based on Defendants' exempt status as insurance companies. *Affidavit of Maury L Udell, billing records from 12/26/2017, 7-8.*

[5]While depositions were taken as part of Mr. Herssein's attorney's fee claim, no depositions were ever taken as part of the underlying substantive case.

[6]The American Airlines claims were not a part of the fee hearing.

[7]Defendants' expert allowed a total of 2 hours for the drafting of the Complaint and no hours for the response to Defendant's Motion to Dismiss the Complaint. This Count finds that the allowance advanced by Defendants' expert was too low.

* * *

Consumer law—Debt collection—Counterclaims in debt collection action alleging violation of Fair Debt Collection Practices Act and usury—Motion for summary disposition is granted as to counterclaim alleging that assignee of bank that originated defendant's credit card account violated FDCPA by filing debt collection suit that it lacked capacity to prove and intention to litigate—Assignee established predicate for admission of bank's records proving existence of debt and assignment under business records exception to hearsay rule, and counterclaim lacked specificity as to any actions of assignee in attempting to collect debt or litigate case—Usury counterclaim is dismissed—Originating bank is national bank that is not subject to state law usury claims, and assignee has not sought prejudgment interest

LVNV FUNDING, LLC, Plaintiff, v. ELVIRA DUENAS, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-022107-SP-05, Section CC06. May 19, 2020. Luis Perez-Medina, Judge.

ORDER ON PLAINTIFF/COUNTER DEFENDANT LVNV FUNDING, LLC'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE, having come before the Court on May 4, 2020 upon Plaintiff/Counter-Defendant's Motion for Summary Disposition as to Defendant/Counter-Plaintiff's Counterclaim and the Court, having heard argument of counsel, and being otherwise fully advised in its premises, make the following findings:

Facts:

Defendant/Counter-Plaintiff, Elvira Duenas (hereinafter "Duenas") filed a two count Counterclaim in this action. Count I of the Counterclaim alleges violation of 15 U.S.C. § 1692e of the Fair Debt Collection Practices Act ("FDCPA") and Count II alleges violation of 15 U.S.C. § 1692e(2)(a) of the FDCPA. Count I alleges that the Plaintiff/Counter-Defendant, LVNV Funding, LLC (hereinafter "LVNV") made a false representation as to the character, amount, or legal status of the subject debt and that it used false or deceptive means in an attempt to collect upon the subject debt due to the fact that Duenas is not indebted to LVNV and because it sought to collect money composed of unauthorized interest, penalty fees, finance charges and/or penalty fees. Count II alleges that LVNV made a false representation as to the character, amount, or legal status of the subject debt and used false or deceptive means in attempting to collect interest at a rate greater than 18% in contravention of Fla. Stat. §687.03(1).

In support of its Motion for Summary Disposition, LVNV presented its Affidavit in Support of its Motion for Summary Judgment (as to its underlying claim) dated February 10, 2017. Said Affidavit (hereinafter "Affidavit") was executed by Katie Alkinburgh ("the Affiant") on behalf of LVNV and included as exhibits, the chain of title evidencing the assignment of Elvira Duenas' subject credit card account from Credit One Bank, N.A. to LVNV, statements of account from zero balance through charge off (the life of the account), and the applicable card agreement containing the terms governing the subject account. The statements of account include all charges, payments, and applicable fees or interest which were included in the account balance being sought in this action.

Count I of Duenas' Counterclaim in essence claims that LVNV violated the FDCPA by filing a lawsuit for which it was aware that it lacked both the capacity to prove and intention to litigate should the Defendant retain counsel and that therefore any attempts to collect upon the subject debt constitute a false representation and deceptive means in violation of the FDCPA.

Application of the Law to the Facts:

At issue is whether LVNV has established a sufficient predicate for evidence in the form of business records offered in support of its Motion for Summary Disposition. This determination turns on whether LVNV has established that the records it wishes to rely upon are admissible despite Duenas' hearsay objection. *Fla. Stat.* § *90.803(6)* provides a hearsay exception for the introduction into evidence for records of a regularly conducted business. In order to admit evidence under this exception, the proponent must demonstrate: 1) that the record was made at or near the time of the event, 2) that it was made by or from information transmitted by a person with knowledge, 3) that it was kept in the ordinary course of a regularly conducted business activity and 4), that it was a regular practice of that business to make such a record. See *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008) [33 Fla. L. Weekly S577a].

The Affiant's February 10, 2017 Affidavit in Support of Motion for Summary Judgment meets each one of the above criteria as the Affiant assents to the fact that:

1. ". . . such records were made at or near the time of the events they record"
2. "were made by or from information transmitted by a person with knowledge of the events they record"
3. "such records are kept in the ordinary course of business"
4. "it is the regular practice of LVNV Funding, LLC to make such records"

LVNV takes the position in this action that it is the assignee and holder of Defendant's subject Credit One Bank, N.A. credit card account. In support of this allegation, it attached as Exhibit A to the Affidavit, documents which evidence the assignment of the account from Credit One Bank, N.A. to LVNV. Said documents include the applicable transfer and assignment and bill of sale as well as the data string including specific account level and demographic information in regards to the subject credit card account. Florida law has no formal language requirement in order to constitute an assignment. The operative question in construing whether an assignment exists is predicated on the intent of the parties. *Boulevard National Bank of Miami v. Air Metal Industries, Inc.*, 176 So. 2d 97 (Fla. 1965).

In that Duenas has proffered no evidence to refute LVNV's position that it is the assignee and holder of her subject account, the Court finds that LVNV has meet its burden of proof in regards to this issue.

LVNV seeks to offer for the Court's consideration an affidavit, chain of assignment documents evidencing the assignment of Duenas'

subject account (Exhibit "A"), a letter sent to Duenas advising her of the assignment of her account pursuant to *Fla. Stat.* § *559.715* (Exhibit "B"), statements of account for the subject credit card account (Exhibit "C"), and the applicable card agreement for the subject account ("Exhibit "D").

Pursuant to the Second District Court of Appeal's ruling in *WAMCO XXVII, Ltd v. Integrated Electronic Environments, Inc.*, 903 So. 2d 230 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D957a], business records acquired from a prior business are admissible based upon the testimony of the successor business under *Fla. Stat.* § *90.803(6)* when they are relied upon by the successor business who establishes that it independently verified the accuracy of the records and its verification procedures demonstrate that the records are trustworthy. In *WAMCO*, the Second District Court of Appeal held that WAMCO's records custodian's testimony was not hearsay because he was involved in overseeing the collection of loans that WAMCO purchases, had knowledge of bank acceptable accounting systems, had knowledge of the process WAMCO used to verify the accuracy of the information it received in connection with loan purchases, and he had reviewed the subject loan payment histories. It was not relevant that the witness did not know the identity of the individual who imputed the loan information into its predecessor's accounting system.

The ruling in *WAMCO*, was later clarified in *Bank of N.Y. v. Calloway,* 157 So.3d 1064 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D173b]. The Fourth District Court of Appeal in *Calloway* held that, 1) the rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records, 2) businesses rely upon their records in the conduct of their daily affairs and customarily check the records for correctness during the course of their business activities, 3) where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been made by the successor business such that both records constitute the successor business's singular business record , 4) since records crafted by a separate lack the hallmarks of reliability inherent in a business's self-generated records, proponents must demonstrate not only that the other requirements of the business records exception rule are met, but also that the successor business relies upon those records and that the circumstances indicate that the records are trustworthy, 5) a record created by a third party and integrated into another entity's records are admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of *Fla. Stat.* § *90.803(6)* are met, 6) the trial court has the ability to exclude documents that would otherwise fit the business records exception where the sources of information or other circumstances show a lack of trustworthiness, 7) in most instances a proponent will clear its hurdle by providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy, 8) business records are admissible into evidence if the witness testifies that said records are integrated into a company's records and relied upon on its day-to-day operations which creates an indicia of trustworthiness in the documents, 9) in the alternative, the successor business itself may establish the trustworthiness of the records by independently confirming the accuracy of the business's records generated by the first business. The Court notes that the Third District Court of Appeal has not spoken on the issues raised in *WAMCO* and *Calloway*. Accordingly, this court is bound to follow *WAMCO* and *Calloway* in the instant case (See *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985) finding that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."

LVNV's Affidavit meets the above criteria to allow for the admissibility of the business records attested within it. The Affidavit states that 1) both Credit One Bank, N.A. and LVNV are required to generate and maintain accurate records in compliance with state and federal laws and regulations, 2) LVNV relies upon the accuracy of said records in the normal course of its business and has rigid protections in place to ensure the integrity of said data, 3) Credit One Bank. N.A. (or its successor in interest) provided LVNV with electronic records pertaining to the account at issue and LVNV took possession of said records, 4) each requirement of *Fla. Stat.* § *90.803(6)* was further addressed and met in the Affidavit, 5) The Affiant has personally reviewed the subject records and has personal knowledge of their contents (and that LVNV relies upon the accuracy of said records), 6) Duenas has proffered no evidence to show a lack of trustworthiness in the records, 7) LVNV regularly relies upon the accuracy of said records, 8) the records are maintained in electronic format by LVNV which thereby integrates them into its records of which it regularly relies upon, 9) the statements of account (Exhibit "C") attested to in Paragraph 7 of the Affidavit include all activity for the life of the subject account which the Affiant has personally reviewed and has personal knowledge of their contents thereby independently verifying the accuracy of the information provided by its predecessor in interest.

Count I of Duenas' Counterclaim fails to state a cause of action and while it uses terminology such as "false representation" and "deceptive", it lacks the specificity to support said claims providing nothing specific in its allegations in regards to any activity taken by LVNV in its attempts to collect upon the subject debt or the litigation of this case (See *Hackett v. Midland Funding LLC*, Case # 18-CV-6421 FPG (W.D.N.Y. Apr. 29, 2019)

In regards to Count II of Duenas' Counterclaim (alleging usury in violation of *15 U.S.C.* § *1692e(2)(a)*) due to the seeking of interest in excess of 18% as permitted by *Fla. Stat.* § *687.03(1)*), the Court finds that Credit One Bank, N.A. is a national bank and, pursuant to the National Banking Act, is permitted to charge interest at the highest rate allowable under the state where it is located. See *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) [16 Fla. L. Weekly Fed. S325a] holding that because §§ 85 and 86 of the National Bank Act ("NBA") provided an exclusive federal remedy for state law claims against nationally chartered banks, there was "no such thing as a state-law claim of usury against a national bank." LVNV has not sought the recovery of any prejudgment interest on the subject account. A note which is free from usury in its origin cannot subsequently become usurious by way of a subsequent transaction. Please see *Gaither v. Farmers & Mechanics Bank of Georgetown*, 26 U.S. 37 (1828).

1. LVNV's Motion for Summary Disposition is granted as to Count I of Duenas' Counterclaim.

2. Pursuant to the Court's ruling on May 4, 2020 at the hearing on LVNV's Motion for Summary Disposition as to Duenas' Counterclaim, LVNV's Motion for Summary Disposition is granted as to Count II of Duenas' Counterclaim.

* * *

Insurance—Personal injury protection—Attorney's fees—Proposal for settlement—Nominal offer—Insurer that alleged that insured had willfully failed to attend examination under oath, and obtained judgment in its favor on that ground, had reasonable basis to conclude that it had limited risk—Nominal offer was made in good faith

PANAMERICAN HEALTH CENTER, INC., Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-003623-CC-24, Section MB01. June 25, 2020. Stephanie Silver, Judge. Counsel: DePrimo Fleites, P.A., for Plaintiff. Beighley, Myrick, Udell & Lynne, P.A., Miami, for Defendant.

[Editor's note: Paragraph numbers are as they appear on court document.]

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on the Defendant's Motion to Tax Attorney's Fees and Costs, and this Court having reviewed the excellent pleadings filed by the parties, having heard an extensive oral argument, and having been provided with subsequent memorandum of law, this Court hereby GRANTS the Defendant's Motion for Attorney's Fees and Costs. The Court finds as follows:

1) This lawsuit was a PIP lawsuit in which the Defendant refused to pay the Plaintiff medical provider because it believed the insured had not properly complied with the condition precedent of attending the Examination Under Oath (EUO).

2) Geico maintained this position from its response to the demand letter, after the lawsuit was filed, and filed a Motion for Summary Judgment.

3) Very close to the beginning of the formal litigation in this case, the Defendant made a nominal proposal for settlement (PFS) in the amount of $500. The Plaintiff rejected this offer.

4) At the Defendant's Motion for Final Summary Judgment on January 29, 2018, this Court's predecessor granted the Defendant's Motion finding that the insured failed to attend the two EUOs set despite the Plaintiff's argument that the insured may not have received the formal requests to attend the EUO. Final Judgment was issued on January 31, 2018. This Motion followed.

5. The Defendant asks this Court to award attorneys' fees and costs in this case based on the Plaintiff's rejection of its PFS. Plaintiff argues that the PFS was not made in good faith because it was not only nominal but because the offer was not made in good faith.

6. In order to find a PFS was not made in good faith, the offeror must have had no reasonable basis to believe the exposure was nominal. The offeror must solely have had a reasonable basis to make the offer. *Miccosukee Tribe of Indians of Florida v. Lewis Tein P.L.*, 277 So.3d 299 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2094a]; *Dep't of Highway Safety v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2799b].

7. An offeror only has to believe the exposure was nominal and not in bad faith. *State Farm Fla. Ins. Co. v. Laughlin,* 118 So.3d 314 (Fla. 3d DCA 2013) [35 Fla. L. Weekly D1934a] (holding that when an insured fails to comply with the condition precedent to filing a lawsuit against an insurance company, a nominal PFS is made in good faith).

8. In the instant case, the Defendant obtained a Final Judgment in its favor holding that the insured had failed to comply with the EUO. This fact supports the argument that it had a reasonable basis to conclude that the Defendant had limited risk in this case. *Downs v. Coastal Systems Intern., Inc.* 972 So.2d 258 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D107a].

Therefore, this Court, when presented with the facts before it as they currently stand and having reviewed the law in this Circuit, believes that the offer was made in good faith. The prior Court ruled that the insured had willfully failed to appear at the EUO. The Defendant's Motion is GRANTED.

* * *

Insurance—Personal injury protection—Demand letter that did not account for application of fee schedules elected in policy and included services for which payment was not yet due is invalid—Case abated to allow medical provider to submit compliant demand letter

MIAMI MEDICAL GROUP, INC., a/a/o Sabrina Drago, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-027999-SP-05 (06), Section CC06. June 19, 2020. Luis Perez-Medina, Judge. Counsel: Gregg Pessin, Law Office of Gregg Pessin, P.A., Miami, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND AND ABATING CASE

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment Regarding Pre-suit Demand and Plaintiff's Motion for Summary Judgment re Second Affirmative Defense (Demand); and the Court, having reviewed the Motions, having heard argument of Counsel, and being sufficiently advised in the premises, finds as follows:

Facts and Procedural History

Plaintiff rendered medical services to the claimant from April 4, 2019 through August 8, 2019. Defendant generated Explanations of Benefits, itemizing how it adjusted the Current Procedural Terminology ("CPT") Codes billed by the Plaintiff. The Explanations of Benefits set forth that the services were paid in accordance with the terms of the policy and the fee schedules incorporated therein via Section 627.736(5)(a)(1), Fla. Stat. (2019)—with the exception of CPT Code 76140, which was denied twice as being unbundled from office visit codes.

On September 6, 2019, Plaintiff sent a Notice of Intent to Initiate Litigation for PIP Benefits pursuant to Section 627.736(10), Fla. Stat. (2019) ("Section 10"). Plaintiff's demand sought payment of $5,011, representing $10,000 policy limits minus what Allstate had previously paid. The demand included dates of service (August 8, 2019), for which payment was not yet due and which had not yet been processed by the Defendant.[1] The demand did not indicate what amount Plaintiff was claiming was overdue for each code, but rather provided the total amount previously billed ($17,639.23) and the total amount previously paid ($4,989) for all codes together. The ledger attached to the demand listed only the amounts previously billed for each code.

Plaintiff initiated this lawsuit on October 30, 2019, seeking $1,185.60. Allstate moved to dismiss. Plaintiff filed an Amended Complaint claiming that $64.00 was owed because Allstate denied CPT Code 76140 billed on April 12, 2019 and August 8, 2019.

Conclusions of Law

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] (*quoting State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a]). Section 10 effectuates this purpose by providing insurers one last chance to pay any overdue benefits and avoid a lawsuit and exposure for fees. *MRI Assoc. of America, LLC a/a/o Ebba Register v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. In describing the obligation on the provider to set forth the overdue payment in its Demand, Section 10 uses the words "specificity," "itemized," "specifying" and "exact." *See* Section 627.736(10)(b)(3), Fla. Stat. (2019).

In this case, Plaintiff's demand did not satisfy the plain language of Section 10. More than a year and a half prior, the Florida Supreme Court ruled that Allstate's policy was sufficient to elect the fee schedule payment methodology at Section (5)(a) of the PIP Statute. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a]. Yet, Plaintiff's demand did not account for application of the fee schedules. The end result was Plaintiff demanding that Allstate breach the contract and the PIP statute by paying $5,011.

Second, the presuit demand violated the plain language of Section 10 and failed to provide Allstate notice and an opportunity to avoid this litigation.

Lastly, the presuit demand included services (August 8, 2019), for which payment was not yet due, much less overdue, as required by Section 10. *See* Section 627.736(10)(a), Fla. Stat. 2019) ("Such notice

may not be sent until the claim is overdue.") For this reason alone, the demand must fail. *See Lake Worth Emergency Chiropractic Center, P. A., (a/a/o Ryan Garter), v. State Farm Mut. Auto. Ins. Co*, 22 Fla. L. Weekly Supp. 65a (Fla. 15th Cir. (App.) July 14, 2014) (invalidating demand that included services, which were not previously billed and were therefore neither due nor overdue).

For the foregoing reasons and consistent with case law binding on this Court, this Court finds that the Plaintiff's presuit demand is invalid for failure to comply with Section 10. *See MRI Assoc. of America, LLC a/a/o Ebba Register, supra*; *Venus Health Center (Joaly Rojas) v. State Farm*, 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. (App.) March 12, 2014) ("It makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the court's and the parties' time and resources"); *Government Employees Ins. Co. v. Open MRI of Miami-Dade, Ltd.*, 18 Fla. L. Weekly Supp. 337a (Fla. 11th Cir. (App.) February 16, 2011); *Luis A. Hernandez v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 232c (Fla. 11th Cir. (App.) January 17, 2007); *see also Alliance Spine & Joint I, Inc. (Paul Volcy) v. USAA Cas. Ins. Co.*, 24 Fla. L. Weekly Supp. 555c (Fla. 11th Cir. Cty. Sept. 13, 2016) (invalidating demand that failed to account for application of the fee schedules).

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is GRANTED and this case is abated for 90 days for Plaintiff to submit a compliant presuit demand.

2. Plaintiff shall have thirty (30) days to submit a new demand and copy Allstate's undersigned counsel. Allstate shall have thirty (30) days to respond to the demand.

3. Payment in response to the demand will not be deemed a confession of judgment in this case and will not subject Allstate to attorneys' fees or costs.

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[1]The August 8, 2019 bills were received September 4, 2019 and processed September 11, 2019, five days after Plaintiff sent out its Notice of Intent to Initiate Litigation.

* * *

Insurance—Discovery—Failure to comply—Sanctions

MANUEL V. FEIJOO, M.D. et al., a/a/o Joaquin Estrada, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-004946-SP-25, Section CG02. July 2, 2020. Elijah A. Levitt, Judge. Counsel: Maylin Castaneda and Kenneth B. Schurr, for Plaintiff. Jordan Berman and Susan Steakley, for Defendant.

ORDER FINDING PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES FOR VIOLATION OF MULTIPLE COURT ORDERS

This cause came before the Court on June 29, 2020, on Plaintiff's Motion for Sanctions for violation of the Court's April 3, 2020, Order, and the Court being advised in the premises, it is hereby ORDERED that, pursuant to the April 3, 2020, Order and Florida Rule of Civil Procedure 1.380, Plaintiff is entitled to recover its reasonable attorney's fees for all violations of court orders necessitating the May 20, 2020, Motion Sanctions for Violation of the April 3, 2020, Order. In support of this Order, the Court provides the following:

1. On April 3, 2020, the parties entered into an Agreed Order whereby the parties agreed to the following:

Defendant shall produce the responsive documents to Plaintiff's First Request for Production and provide a better response to item #2b, and provide better verified answers to Plaintiff's Second Set of Interrogatories on or by April 30, 2020. If Defendant fails to comply with the foregoing, then this Court shall conduct an evidentiary hearing as to the amount of sanctions to be awarded to the Plaintiff.

2. Defendant did not comply with this Order. Defendant provided no discovery by the April 30, 2020, deadline. On May 1, 2020, the record reflects that Defendant only responded to the court ordered discovery, in part, because Plaintiff filed another Motion to Compel compliance with another court order. By the terms of the April 3, 2020, Order, the Court "shall conduct an evidentiary hearing" as to the amount of reasonable attorney's fees to be paid to Plaintiff.

3. The Court also finds entitlement to reasonable attorney's fees under Florida Rule of Civil Procedure 1.380. For each order that Defendant violated that is connected to the May 20, 2020, Motion, the Court will award Plaintiff's reasonable attorney's fees. The Court finds that the interests of justice are served by this Order and the failure to respond to the discovery was unjustified. This case is now four years old and discovery remains outstanding due to Defendant's unreasonable delay in providing discovery. Defendant's actions have negatively impacted the proper administration of justice through Defendant's failure to provide discovery as required by the Court and the Florida Rules of Civil Procedure. Sanctions in the form of Plaintiff's reasonable attorney's fees are appropriate in this case.

4. Defendant is advised that future violations of Court orders may result in further sanctions, including the striking of Defendant's pleadings and entry of judgment for Plaintiff. *See Kozel v. Ostendorf,* 629 So. 2d 817 (Fla. 1993).

5. Any other judgment awarding fees to Plaintiff at the conclusion of, or during, this case will not include the amount resulting from this Order. Plaintiff will not obtain a duplicate recovery of its fees under section 627.428, Florida Statutes, or other applicable rule or statute.

* * *

Insurance—Personal injury protection—Demand letter—Validity—Plaintiff's pre-suit demand did not satisfy plain language of section 627.736(10) where policy was sufficient to elect the fee schedule payment methodology of section 627.736(5)(a) but demand letter did not account for application of the fee schedules; demand letter failed to provide insurer notice and an opportunity to avoid litigation; and demand included services for which payment was not yet due

MIAMI MEDICAL GROUP, INC., Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-027999-SP-05, Section CC06. June 19, 2020. Luis Perez-Medina, Judge.

ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND AND ABATING CASE

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment Regarding Pre-suit Demand and Plaintiff's Motion for Summary Judgment re Second Affirmative Defense (Demand); and the Court, having reviewed the Motions, having heard argument of Counsel, and being sufficiently advised in the premises, finds as follows:

Facts and Procedural History

Plaintiff rendered medical services to the claimant from April 4, 2019 through August 8, 2019. Defendant generated Explanations of Benefits, itemizing how it adjusted the Current Procedural Terminology ("CPT") Codes billed by the Plaintiff. The Explanations of Benefits set forth that the services were paid in accordance with the terms of the policy and the fee schedules incorporated therein via Section 627.736(5)(a)(1), Fla. Stat. (2019)—with the exception of CPT Code 76140, which was denied twice as being unbundled from office visit codes.

On September 6, 2019, Plaintiff sent a Notice of Intent to Initiate Litigation for PIP Benefits pursuant to Section 627.736(10), Fla. Stat. (2019) ("Section 10"). Plaintiff's demand sought payment of $5,011, representing $10,000 policy limits minus what Allstate had previously paid. The demand included dates of service (August 8, 2019), for

which payment was not yet due and which had not yet been processed by the Defendant.[1] The demand did not indicate what amount Plaintiff was claiming was overdue for each code, but rather provided the total amount previously billed ($17,639.23) and the total amount previously paid ($4,989) for all codes together. The ledger attached to the demand listed only the amounts previously billed for each code.

Plaintiff initiated this lawsuit on October 30, 2019, seeking $1,185.60. Allstate moved to dismiss. Plaintiff filed an Amended Complaint claiming that $64.00 was owed because Allstate denied CPT Code 76140 billed on April 12, 2019 and August 8, 2019.

Conclusions of Law

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] (*quoting State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a]). Section 10 effectuates this purpose by providing insurers one last chance to pay any overdue benefits and avoid a lawsuit and exposure for fees. *MRI Assoc. of America, LLC a/a/o Ebba Register v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. In describing the obligation on the provider to set forth the overdue payment in its Demand, Section 10 uses the words "specificity," "itemized," "specifying" and "exact." *See* Section 627.736(10)(b)(3), Fla. Stat. (2019).

In this case, Plaintiff's demand did not satisfy the plain language of Section 10. More than a year and a half prior, the Florida Supreme Court ruled that Allstate's policy was sufficient to elect the fee schedule payment methodology at Section (5)(a) of the PIP Statute. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a]. Yet, Plaintiff's demand did not account for application of the fee schedules. The end result was Plaintiff demanding that Allstate breach the contract and the PIP statute by paying $5,011.

Second, the presuit demand violated the plain language of Section 10 and failed to provide Allstate notice and an opportunity to avoid this litigation.

Lastly, the presuit demand included services (August 8, 2019), for which payment was not yet due, much less overdue, as required by Section 10. *See* Section 627.736(10)(a), Fla. Stat. 2019) ("Such notice may not be sent until the claim is overdue.") For this reason alone, the demand must fail. *See Lake Worth Emergency Chiropractic Center, P. A., (a/a/o Ryan Garter), v. State Farm Mut. Auto. Ins. Co*, 22 Fla. L. Weekly Supp. 65a (Fla. 15th Cir. (App.) July 14, 2014) (invalidating demand that included services, which were not previously billed and were therefore neither due nor overdue).

For the foregoing reasons and consistent with case law binding on this Court, this Court finds that the Plaintiff's presuit demand is invalid for failure to comply with Section 10. *See MRI Assoc. of America, LLC a/a/o Ebba Register, supra*; *Venus Health Center (Joaly Rojas) v. State Farm*, 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. (App.) March 12, 2014) ("It makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the court's and the parties' time and resources"); *Government Employees Ins. Co. v. Open MRI of Miami-Dade, Ltd.*, 18 Fla. L. Weekly Supp. 337a (Fla. 11th Cir. (App.) February 16, 2011); *Luis A. Hernandez v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 232c (Fla. 11th Cir. (App.) January 17, 2007); *see also Alliance Spine & Joint I, Inc. (Paul Volcy) v. USAA Cas. Ins. Co.*, 24 Fla. L. Weekly Supp. 555c (Fla. 11th Cir. Cty. Sept. 13, 2016) (invalidating demand that failed to account for application of the fee schedules).

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is GRANTED and this case is abated for 90 days for Plaintiff to submit a compliant presuit demand.

2. Plaintiff shall have thirty (30) days to submit a new demand and copy Allstate's undersigned counsel. Allstate shall have thirty (30) days to respond to the demand.

3. Payment in response to the demand will not be deemed a confession of judgment in this case and will not subject Allstate to attorneys' fees or costs.

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[1]The August 8, 2019 bills were received September 4, 2019 and processed September 11, 2019, five days after Plaintiff sent out its Notice of Intent to Initiate Litigation.

* * *

Insurance—Automobile—Coverage—Conditions precedent—Examination under oath—Obligation to attend EUO as condition precedent to recovery of benefits remains with insured despite fact that she assigned benefits to windshield repair shop—No merit to argument that assignee should be allowed to attend EUO in lieu of insured

SHAZAM AUTO GLASS, LLC, a/a/o Nicole Cannon, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, PROGRESSIVE EXPRESS INSURANCE COMPANY, AND PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-055520, Division L. June 22, 2020. Michael Bagge-Hernandez, Judge. Counsel: Ronald S. Haynes and Frank Menendez, Christopher Ligori & Associates, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendants.

ORDER ON DEFENDANT'S RENEWED MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on **Defendant's Renewed Motion for Final Summary Judgment**; however, the Court is ruling on this Motion as **Defendant's Motion for Summary Disposition** and the Court having heard argument of counsel, and being otherwise advised in the Premises, the Court hereby finds as follows:

FACTUAL BACKGROUND

This is a suit that arises from a dispute between Plaintiff, Shazam Auto Glass, LLC (Shazam) and Progressive American Insurance Company (Progressive) regarding an alleged loss stemming from purported damage sustained to a windshield of the insured, Nicole Cannon. The loss is alleged to have occurred on March 24, 2018, with a replacement windshield being installed by Shazam on August 25, 2018. Shazam submitted an invoice to Progressive on August 30, 2018, which was Progressive's first notice of the loss. It is undisputed that the Progressive was not provided with an opportunity to inspect the alleged damaged windshield of Nicole Cannon's vehicle prior to its repair or disposal. Progressive subsequently requested Nicole Cannon submit to an Examination Under Oath. Proper notice was given to Nicole Cannon scheduling the Examination Under Oath for October 12, 2018. Nicole Cannon failed to attend this Examination Under Oath. Progressive sent a denial letter to Nicole Cannon and Shazam, advising that there was no coverage for this alleged loss. Shazam subsequently brought this suit on behalf of Nicole Cannon, pursuant to an assignment of benefits.

ANALYSIS

Shazam alleges that proper notice was provided to Progressive as a result of this alleged loss. Shazam asserts that it is the assignee of Nicole Cannon and stands in her shoes, acquiring all the benefits and obligations of the subject policy. Shazam further contends that as an obligation under the policy, Plaintiff's corporate representative should be allowed to serve as the witness in lieu of the insured for the

examination under oath.

Progressive contends that notice was not prompt, as required by the terms of the policy, thus proper notice of the alleged loss was not given. In addition, Progressive asserts that the failure to submit to an Examination Under Oath when requested is a material breach of the terms of the policy. In addition, sitting for an Examination Under Oath is a non-delegable duty that cannot be assigned to someone else. That would be similar to hold that because a treating physician was assigned the Personal Injury Protection (PIP) benefits from an insured, that the treating physician can sit for an Independent Medical Examination. This would lead to an absurd result, just as it would here.

The relevant portion of the policy states, "[a] person seeking coverage must allow **us** to take signed and recorded statements, including sworn statements and examinations under oath. . ." (Policy page 33). The policy further goes on to state that "**[w]e** may not be sued unless there is full compliance with the terms of this policy." (Policy page 39). The Court is not persuaded by Plaintiff's argument. Pursuant to the terms and conditions of the policy, Plaintiff is precluded from bringing an action against Progressive for breach of contract since the subject policy of insurance specifically requires the insured to submit to an Examination Under Oath as a condition precedent to bringing suit. An insured sitting for an Examination Under Oath is a condition precedent to brining suit. "[T]he obligation to attend an EUO remains with the insured, and the insurer has a good defense to the. . .claim if the *insured* refuses to attend an EUO." *Marlin Diagnostics v. State Farm Mut. Automobile Ins. Co.*, 87 So.2d 469 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2828b] (quoting *Advanced Diagnostic Testing Inc. v. State Farm Ins. Co.*, 11 Fla. L. Weekly Supp. 964c (Fla. 11th Cir. Ct. 2004). When an insured assigns his or her benefits, the obligation to attend an Examination Under Oath remains with the insured and the insured is precluded from recovery under the policy due to his or her own material breach. It would be impractical to have someone else sit for an Examination Under Oath in these circumstances, as it would lead to an absurd result. Progressive requested Nicole Cannon, with whom it entered into a contract for insurance benefits, sit for an Examination Under Oath, and her failure to comply with that request is a willful and material breach of the insurance policy. *Amica Mut. Ins. Co. v. Drummond*, 970 So.2d 456 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2907a]; *see also Goldman v. State Farm Fire Gen Ins. Co.* 660 So.2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a].

CONCLUSION

Because the condition precedent to submit to an Examination Under Oath was never met, Progressive was within its right to deny Nicole Cannon's claim. Shazam, stepping into the shoes of Nicole Cannon, cannot maintain a lawsuit against Progressive for breach of contract when the condition precedents of the policy were not complied with. This precludes Shazam from filing suit where the insured failed to attend the Examination Under Oath.

Therefore, considering the aforementioned facts and analysis, it is hereupon **ORDERED AND ADJUDGED** that:

1) The Court finds that it is not in a position to determine if notice was properly given to Progressive.

2) The Court finds that there are no triable issues left as Nicole Cannon failed to sit for an Examination Under Oath, which is a condition precedent to bringing suit.

3) Defendant's Motion for Summary Disposition is Granted for Nicole Cannon's failure to submit to an Examination Under Oath.

4) The Court retains jurisdiction to enter a final judgment and to determine Defendant's entitlement to attorney fees and costs.

* * *

Insurance—Personal injury protection—Coverage—Denial of coverage based on alleged failure to appear at multiple examinations under oath—Insurer was in breach of contract because insurer violated PIP statute by failing to pay or deny claim within 30 days and did not invoke the additional time limitation under section 627.736(4)(i)

IRMA BEAUFILS, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. JEAN BEAUFILS, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. WILLIAM CHARLES, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-015833. July 28, 2020. Frances M. Perrone, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on July 23, 2020 on Plaintiff's Amended Motion for Final Summary Judgment. The court having listened to argument by counsel, having reviewed the Motion, file, applicable law, and being otherwise fully advised, finds,

1. These are three (3) consolidated Declaratory actions under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's denial of PIP coverage based upon an alleged failure to appear at multiple EUO's by the respective

2. Plaintiff's motion for summary judgment seeks entry of summary judgment arguing that Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract and Defendant's denial of coverage was improper.

3. The date of loss was 10/13/16. Defendant received notice of the loss on 10/14/16. The first medical bills were received on 11/1/16. On 11/16/16, Defendant timely noticed an EUO to occur on 11/21/16. Plaintiff's failed to appear at said EUO's. On 12/20/16, Defendant noticed EUO's to occur on 12/28/16. Plaintiff's failed to appear at said EUO's. Defendant issued a denial of coverage on 1/19/17.

4. Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), and as such, Defendant was in breach of contract. As such, Plaintiff's Amended Motion for Final Summary Judgment is **HEREBY GRANTED**.

5. Defendant's Motion for Summary Judgment primarily argued that Plaintiff did not have standing inasmuch as Plaintiff's had executed assignments of benefits to the respective medical providers. Defendant's Motion for Summary Judgment is **HEREBY DENIED.**

6. Defendant's Second Motion for Summary Judgment argues that Plaintiff's pleadings seek to avoid res judicata, collateral estoppel, and the strictures of Rule 1.420(a)(1) Florida Rules of Civil Procedure by having different Plaintiffs and different types of actions which will all rely upon the same accident, policy and defense. Further, the Declaratory action in this case and the other cases amounts to what is called "procedural fencing" and that this action has implications on the other cases in the State. This demonstrates that there is not a bona fide dispute before the Court to make a declaration. Defendant's Second Motion for Summary Judgment is **HEREBY DENIED.**

7. The Court reserves jurisdiction over attorney's fees and costs.

* * *

Insurance—Automobile—Windshield replacement—Appraisal—Clear and unambiguous policy provision that provides simple and informal appraisal process for windshield replacement is enforceable against assignee of insured—Prohibitive cost doctrine does not preclude appraisal where it has not been shown that cost of appraisal is prohibitively expensive as compared to cost of litigation—Motion to dismiss is granted

LLOYD'S OF SHELTON AUTO GLASS, LLC, a/a/o Albert Quinones, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit of Hillsborough County, County Civil Division. Case No. 19-CC-007071, Division S. June 12, 2019. Lisa Allen, Judge. Counsel: Anthony Thomas Prieto, Morgan & Morgan, Tampa, for Plaintiff. Michael Orta, Cole Scott & Kissane, P.A., Jacksonville, for Defendant.

Order Granting Motion to Dismiss and Demand for Appraisal

This matter comes before the Court *sua sponte* and after entry of an Order of Notification Regarding Court's Intent to Rule on Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal. Upon review of the pleadings, argument of counsel and being otherwise fully advised in the premises, the Court finds that Defendant's Motion to Dismiss should be granted.

Plaintiff, Lloyd's of Shelton Auto Glass, LLC ("Llyod"), as an assignee of Albert Quinones ("Quinones") (together referred to as "Plaintiff"), brings a complaint for breach of contract against Defendant, Progressive Select Insurance Company ("Progressive" or "Defendant"). Defendant argues, in pertinent part, that the complaint should be dismissed because Plaintiff failed to satisfy a condition precedent to bringing this lawsuit by failing to participate in an appraisal process as expressly required pursuant to the Progressive Florida Automobile Insurance Policy executed by and between Progressive and Quinones ("Policy").

Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal argues, in pertinent part, as follows: (1) the appraisal provision violates the Plaintiff's fundamental rights of access to the courts, due process and jury trial under the Florida Constitution; (2) the appraisal provision violates public policy; (3) Progressive selected a biased appraiser; (4) the appraisal provision violates the "Prohibitive Cost Doctrine"; (5) appraisal is not applicable to legal issues of policy interpretation; (6) Plaintiff was not required to invoke appraisal;[1] and (7) a failure to satisfy a condition precedent must be raised by affirmative defense[2].

I. Jurisdiction, Applicable Rules and Statutes

This is a small claims lawsuit involving a dispute between an insurance company and an auto glass vendor regarding the reasonable cost of replacing the insured's windshield. Accordingly, the Florida Small Claims Rules apply to these proceedings. The Court has not invoked the Florida Rules of Civil Procedure in this case; nevertheless, the Court's analysis and opinion would be the same even if the Florida Rules of Civil Procedure were invoked.

Under Florida law, "[t]he deductible provisions of any policy of motor vehicle insurance, delivered or issued in this state by an authorized insurer, providing comprehensive coverage or combined additional coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy." *Fla. Stat.* § 627.7288. Simply said, the insured gets a new windshield without having to pay a deductible.

Upon replacement of the windshield, the auto glass vendor requires the insured to sign a work order that includes an assignment of benefits from the insured to the auto glass vendor. While the assignment language may vary depending on the vendor, an assignment of benefits relating to an auto glass claim typically allows the auto glass company to "step into the shoes" of the insured for the purposes of negotiating and collecting the reasonable replacement cost of the windshield after the date of loss; however, the auto glass vendor must "wear the shoes" as assigned.[3] Coverage of the windshield is not disputed, rather the instant claim concerns the replacement cost of the windshield.

II. Background

Progressive insured Quinones's vehicle, and the Policy included comprehensive coverage for damage to the vehicle. The vehicle sustained damage to the windshield on January 2, 2019, and Quinones contacted Lloyd for replacement on or about January 4, 2019. Neither Quinones nor Lloyd contacted Progressive before the windshield was replaced. Instead, Lloyd replaced the windshield on January 8, 2019, and then sent an invoice to Progressive ("Invoice"). Quinones signed the Invoice authorizing the glass repairs and assigning to Lloyd any and all benefits from the insurer providing coverage for the repaired vehicle. When Progressive received the Invoice, Progressive promptly sent a letter dated January 16, 2019 to Lloyd and Quinones disputing the amount to repair the loss and demanding an appraisal of the loss pursuant to the Policy. Neither Lloyd nor Quinones responded to Progressive's demand for an appraisal. Instead, Lloyd filed the instant complaint on January 29, 2019.

III. Policy Language at Issue

Progressive's policy of insurance provides, in pertinent part, as follows:

> **Appraisal**
>
> If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraiser will determine the amount of loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. We will pay our appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

IV. Opinion

A. Enforceability of Contractual Appraisal Provisions.

In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America*, 704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Progressive Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977). In this case, Plaintiff does not point to any statute or public policy considerations that are violated by this "retained rights" provision. "Moreover, controlling Florida law permits 'retained rights' provisions, and these provisions do not render the appraisal clause unenforceable." *Cincinnati Ins.*, 162 So.3d at 143 ("Hence, the trial court erred to the extent it found that Cincinnati Insurance could not demand an appraisal due to the language of the appraisal clause being unenforceable as inconsistent or violative of public policy.").

1. Vagueness, Conflicting Language and Public Policy Arguments

Plaintiff makes several arguments that Progressive's appraisal clause is vague, contains conflicting language and/or violates public policy as follows: (1) the appraisal provision violates the Plaintiff's fundamental rights of access to the courts, due process and jury trial under the Florida Constitution; (2) the appraisal provision violates public policy; (3) Progressive selected a biased appraiser; (4) Plaintiff was not required to invoke appraisal; and (5) appraisal is not applicable to legal issues of policy interpretation.

Progressive and Quinones freely contracted for the right of appraisal. In Florida, parties may negotiate to contractually waive certain constitutional rights. Therefore, within reason, parties are free to contract even though either side may get what turns out to be a "bad bargain." *Quinerly v. Dundee Corp.*, 31 So.2d 533, 534 (1947) ("[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute [the Court's] judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain.").[4] "We have long held that under contract law principles, contract language that is unambiguous on its face must be given its plain meaning." *Green v. Life & Health of America*, 704 So.2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a] ; *Carefree Villages, Inc. v. Keating Properties, Inc.*, 489 So.2d 99 (Fla. 2d DCA 1986).

Upon a review of the appraisal language at issue, this Court finds that such language is clear, unambiguous and provides a simple and informal appraisal process, which if followed, would provide both parties an easy, fair, efficient and inexpensive means of determining the reasonable cost of replacing a windshield. Not only is an informal appraisal an appropriate alternative to litigation in determining the reasonable cost of replacing a windshield, in the instant case an informal appraisal is the *best* course of action. *See e.g., Johnson v. Nationwide Mut. Ins., Co*., 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] and *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a].

To the extent the Plaintiff seeks to attack or requests the Court to rewrite any contractual provisions in the Policy, this Court is powerless to rewrite the contract or interfere with the freedom of contract. If the insured had not assigned this claim to the auto glass vendor, then the insured would have been bound by the appraisal provision contained within the Policy. As an assignee of the insured, the auto glass vendor is subject to all equities and defenses that could have been asserted against the assignor (i.e. the right to appraisal).

For these reasons, the Court finds that any arguments made by Plaintiff based on an attempt to attack the terms of the Policy as unconstitutional, unconscionable, vague, or against public policy are unpersuasive. Likewise, the Court finds that any arguments made by Plaintiff requesting the Court to renegotiate the terms of the Policy, or otherwise requesting the Court to re-write the terms of the Policy are not properly brought before this Court.

2. Prohibitive Cost

The Prohibitive Cost Doctrine is derived from the U.S. Supreme Court's ruling in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, the Supreme Court acknowledged that an arbitration clause could be rendered unenforceable where the existence of substantial arbitration costs would otherwise prohibit a litigant from effectively vindicating his or her federal statutory rights.[5] Federal arbitration is far more expensive and time consuming than the simple informal appraisal process provided in the Policy.

Since the insurance company is not attempting to invoke a formal and potentially expensive arbitration process, an evidentiary hearing is not necessary to determine whether the small cost of retaining an appraiser would be a prohibitive cost. Ironically, the attorneys' fees that would be incurred by the parties as a result of one evidentiary hearing to determine whether the cost of an informal appraisal would be cost prohibitive would far exceed the entire appraisal process. Moreover, this Court could not find any binding legal precedent in Florida supporting the application of the Prohibitive Cost Doctrine to an informal appraisal provision contained in a contract. For these reasons, the Court declines to apply the Prohibitive Cost Doctrine to this small claims case.

B. Right to Appraisal Process Is A Condition Precedent

Plaintiff argues that it is not required to invoke appraisal. In response, Progressive argues that Lloyd failed to fulfill a condition precedent to bringing the instant lawsuit by failing to participate in an appraisal as expressly required by the Policy.

In Florida, a challenge of coverage is exclusively a judicial question. *See Cincinnati Ins.* at 143; *see also Midwest Mut. Ins. Co. v. Santiesteban*, 287 So.2d 665, 667 (Fla. 1973). "However, 'when the insurer admits that there *is* a covered loss,' any dispute on the amount of loss suffered is appropriate for appraisal." *Id*., citing *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a]. In *Cincinnati Ins.*, the Second DCA explains:

> Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the *extent* of covered damage and the *amount* to be paid for repairs. *Id*. Thus, the question of what repairs are needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those repairs would depend on the repair methods to be utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any *coverage* question. Because there is no dispute between the parties that the cause of the damage to Cannon Ranch's property is covered under the insurance policy, the remaining dispute concerning the scope of the necessary repairs is not exclusively a judicial decision. Instead, this dispute falls squarely within the scope of the appraisal process—a function of the insurance policy and not the judicial system. Therefore, Cincinnati Insurance acted within its rights when it demanded an appraisal, and the trial court erred in denying the motion on this basis.

Cincinnati Ins. at 143.

Likewise, in this case, it is clear that the issue in dispute is one of the amount of loss and not one of coverage. Progressive admits that there is a covered loss, thus any dispute on the amount of loss suffered is appropriate for appraisal. Progressive made timely demand for appraisal and has not acted inconsistently with that right at any point relevant hereto. Plaintiff ignored all demands for appraisal; instead, Plaintiff filed this lawsuit. Pursuant to the Policy, upon demand by either party, the other party must participate in the appraisal process prior to filing a lawsuit. Since Plaintiff has refused to participate in the appraisal process, Plaintiff has knowingly and willfully failed to fulfill a condition precedent to filing this action. The Policy provides express language dictating the appropriate appraisal process that should occur in the event one of the parties demands an appraisal. Plaintiff must fully comply with all the terms of the Policy before Plaintiff may sue Defendant for any matter related to the Policy. Thus, the amount of loss suffered should be determined by appraisal. Accordingly, this matter is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy; therefore, this case should be dismissed without prejudice.[6]

For the reasons stated above, it is ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal is GRANTED IN PART AND DENIED IN PART. Defendant's Motion to Dismiss and Demand for Appraisal is granted. Defendant's Motion to Stay is denied as moot.

2. This case is DISMISSED without prejudice.

3. The Clerk is directed to CLOSE this case.

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[1]Pursuant to the Policy, neither party is required to invoke appraisal, but both parties are required to participate if the other party decides to invoke.

[2]Pursuant to Small Claims Rule 7.090(c), unless required by order of court, written pretrial motions and defensive pleadings are not necessary in small claims cases. Furthermore, even if the Rules of Civil Procedure were invoked, the failure to satisfy a condition precedent may be pled at the motion to dismiss phase pursuant to *Fla.R.Civ.P.* 1.140(b) or upon filing an answer and affirmative defenses pursuant to *Fla.R.Civ.P.* 1.140(a). If a defendant fails to plead a failure to fulfill a condition precedent in its answer and affirmative defenses, then such defense will be waived pursuant to *Fla.R.Civ.P.* 1.140(h).

[3]"The law is well established that an unqualified assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned. The assignee steps into the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made." *FL-7, Inc. v. SWF Premium Real Estate, LLC*, 259 So.3d 285, 287 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2557d], quoting *State v. Family Bank of Hallandale*, 667 So.2d 257, 259 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1992a].

[4]*See also Lee R. Russ, Couch on Insurance 3d,* § *17:2* (1997) ("[i]t is axiomatic that parties are free to create the insurance contract they deem appropriate to their needs, provided its form and content do not conflict with any provision of law or public policy; and such is the case even though the resulting contract is improvident as to the insured. Assuming compliance with a standard form and the absence of conflict with statute, the parties to a contract of insurance are free to incorporate such provisions and conditions as they desire.")

[5]Even in federal court, such a finding would be a rare exception, not the rule. Typically, federal courts compel arbitration when the parties have agreed to the same pursuant to a contract.

[6]Several trial courts have been reversed for denying motions to dismiss and/or motions to compel appraisals premised on an insured's failure to comply with the appraisal clause of an insurance policy; their respective appellate courts found that participation in the appraisal process was a condition precedent to bringing a lawsuit. *See e.g. Progressive American Insurance Company v. SHL Enterprises, LLC, et al.,* 264 So.3d 1013 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2434a]; *Progressive Select Insurance Company v. Lloyd's of Shelton Auto Glass, LLC, a/a/o Jedidiah Thomas,* 264 So.3d 1018 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2430a]; *United Community Insurance Company v. Lewis*, 642 So.2d 59 (Fla. 3d DCA 1994), *Utah Home Fire Insurance Co. v. Perez*, 644 So.2d 1040 (Fla. 3d DCA 1994), *State Farm Florida Insurance Company v. Unlimited Restoration Specialists, Inc.*, 84 So.3d 390 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D712b].

* * *

Insurance—Automobile—Coverage—Application—Motion for reconsideration of order finding that insured's failure to disclose brother with whom she lives was material misrepresentation that entitled insurer to rescind insurance contract is denied—Application was not ambiguous, and deposition of insurer's corporate representative was admissible evidence of materiality of misrepresentation

SUNITA ROBERTS, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 18-CC-042484. July 1, 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 PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR REHEARING

[Original Opinion at 28 Fla. L. Weekly Supp. 346a]

THIS CAUSE having come before the Court on June 23, 2020, upon Plaintiff, Sunita Roberts, Motion for Reconsideration and/or Rehearing of the Court's grant of Summary Judgment for Defendant, Direct General Insurance Company, and the Court having reviewed the motion, 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:

Plaintiff's Motion is Denied.

FACTUAL BACKGROUND

The Court previously granted Defendant's Motion for Summary Judgement on the issue of the rescission of a contract of automobile insurance for Plaintiff's failure to disclose her brother, which caused a material misrepresentation. The Court found that Plaintiff failed to disclose her brother in the section of the application of insurance titled "DRIVER INFORMATION" as a person aged 14 and older residing with the Applicant, and that this failure to disclose was material, as established in the deposition testimony of Defendant's Corporate Representative. The Court also found that Insurer's request for such information on the application was unambiguous, and that the Corporate Representative satisfied the business records exception, and so properly testified as to the materiality of said failure. Consequently, the Court granted Defendant's Motion for Summary Judgment on the issue of whether Defendant properly rescinded the contract of insurance. The Court also denied Plaintiff's Motion for Summary Judgment that alleged Defendant improperly rescinded the contract of insurance.

PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR REHEARING

Plaintiff's Claims of Ambiguity in the Application

Plaintiff, in part, argued as grounds for rehearing that the application section titled "DRIVER INFORMATION" is ambiguous. Plaintiff's counsel claimed that the term household is ambiguous. Counsel claimed that Plaintiff believes as she lives in her brother's home, then her brother is not a member of her household. Additionally, Plaintiff claimed that as the section of the Application requesting "DRIVER INFORMATION" is capitalized, then the attached definition requiring disclosure of all persons age 14 or older residing with Applicant is invalid. Further, Counsel claimed that as Plaintiff believed her brother would never drive the vehicle, then Defendant cannot expect Plaintiff to disclose her brother in a section titled "DRIVER INFORMATION. Rather, Defendant should have provided an additional section for non-drivers. Plaintiff provided no testimony in support of said claims.

The Court again reviewed the application, and found the section titled "DRIVER INFORMATION" unambiguously required disclosure of her brother. The Court found that as the section at issue did not use the word household, then this could not support an allegation of ambiguity. The Court also was not persuaded that titling the section "DRIVER INFORMATION" invalidated the attached definition, nor that the insurer needed an additional section, as Plaintiff's brother fell within the provided definition, as a person aged 14 or older residing with Applicant.

Plaintiff's Claims that Defendant lacked Admissible Evidence to Support the Claim that the Alleged Misrepresentation was Material

Additionally, Plaintiff claimed that Defendant failed to provide admissible evidence of the materiality of the alleged misrepresentation. Plaintiff claimed that Defendant was required to provide an affidavit in support of Defendant's claims, therefore, Defendant failed to provide the requisite admissible evidence when Defendant relied upon Plaintiff's deposition of Defendant's Corporate Representative that Plaintiff filed, to establish the materiality of the misrepresentation. Furthermore, that the Corporate Representative lacked the requisite personal knowledge to testify on the issue, because the Corporate Representative could not explain the programming of the computer system that provided the quotation, that established the materiality of the misrepresentation. Additionally, the Deponent lacked the requisite personal knowledge because the Deponent did not write the underwriter's guidelines, was not an underwriter, and was not the person who entered the information into the system to establish the premium increase.

The Court found that deposition testimony is admissible evidence sufficient to support a motion for summary judgment. The Court also found that the Deponent, Ms. Lisa Robison, satisfied the requirements of the business records exception, as head of the department that provided the rate increases, therefore generating quotations fell within her job duties, and she demonstrated sufficient familiarity with the practices of the department, namely how the quote is generated, and the AS400 system that provided same. The Court reasoned that as an officer who testifies at a DWI case is not required to explain the internal workings of a breathalyzer, similarly, Deponent is not required to demonstrate knowledge of how the computer program and actuarial calculations that provide the quote. Therefore, the Court found that the deposition was admissible evidence in support of the materiality of the misrepresentation, and Deponent satisfied the requirements of the business records exception.

CONCLUSION

Therefore, Plaintiff failed to satisfy its burden to show any error, omission or oversight committed in the first consideration. Consequently:

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

Plaintiff's Motion for Reconsideration and/or Rehearing is hereby **DENIED**.

* * *

Insurance—Declaratory judgments—Duty to attend examination under oath—Motion to dismiss action seeking declaration regarding insured's duty to attend examination under oath during pandemic is denied

TYLER HILCHEY, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-023122. June 25, 2020. Michael C. Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS

THIS MATTER having come before the court on June 23, 2020 on Defendant's Amended Motion to Dismiss. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action seeking a declaration regarding the Plaintiff's doubt about his duty to attend an EUO on April 28, 2020 during the Covid-19 pandemic. Defendant's argument is that it subsequently canceled the April 28, 2020 EUO, thereby rendering the EUO issue of the Declaratory action moot.

2. The Court's analysis is confined to the four (4) corners of the complaint. Further, all allegations made by Plaintiff must be accepted as true and accurate.

3. Based on *Tindall v. Allstate Ins. Co.*, 472 So.2d 1291 (Fla. 2d DCA 1985) and *Higgins v. State Farm Fire & Cas. Co.*, 894 So.2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a], Defendant's Amended Motion to Dismiss is **HEREBY DENIED**.

4. Defendant shall file its answer within twenty (20) days of June 23, 2020.

* * *

Insurance—Automobile—Windshield replacement—Appraisal—Clear and unambiguous policy provision that provides simple and informal appraisal process for windshield replacement and was not waived by insurer is enforceable against assignee of insured—Prohibitive cost doctrine is inapplicable to breach of contract action—Motion to compel appraisal is granted

SHAZAM AUTO GLASS, LLC; a/a/o Musselet St. Fleur, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; PROGRESSIVE DIRECT INSURANCE COMPANY; PROGRESSIVE EXPRESS INSURANCE COMPANY; PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-034516, Division J. December 24, 2019. Daryl M. Manning, Judge. Counsel: Ronald S. Haynes, Christopher Ligori & Associates, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL APPRAISAL AND STAY DISCOVERY

THIS CAUSE having come before the Court on Defendant's Motion to Compel Appraisal and Stay Discovery and the Court having heard argument of counsel, and being otherwise advised in the Premises, finds that Defendant's Motion should be GRANTED.

Plaintiff has submitted Complaint for breach of contract against Defendant. Defendant argues, in pertinent part, that the appraisal process should be compelled and discovery stayed, pending completion of the appraisal process, as is required pursuant to the automobile insurance policy executed between Progressive and Musselet St. Fleur.

I. Jurisdiction, Applicable Rules and Statutes

This is a small claims lawsuit involving a dispute between an insurance company and an auto glass vendor regarding the reasonable cost of replacing the insured's windshield. Accordingly, the Florida Small Claims Rules apply to these proceedings.

Under Florida law, "[t]he deductible provisions of any policy of motor vehicle insurance, delivered or issued in this state by an authorized insurer, providing comprehensive coverage or combined additional coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy." *Fla. Stat.* §627.7288. Simply said, the insured gets a new windshield without having to pay a deductible given the applicable coverage.

Upon replacement of the windshield, the auto glass vendor requires the insured to sign a work order that includes an assignment of benefits from the insured to the auto glass vendor. While the assignment language may vary depending on the vendor, an assignment of benefits relating to an auto glass claim typically allows the auto glass company to "step into the shoes" of the insured for the purposes of negotiating and collecting the reasonable replacement cost of the windshield after the date of loss;however, the auto glass vendor must "wear the shoes" as assigned. Coverage of the windshield is not disputed, rather the instant claim concerns the replacement cost of the windshield or the amount of the loss.

II. Background

Progressive insured St. Fleur's vehicle, and the Policy included comprehensive coverage for damage to the vehicle. The vehicle sustained damage to the windshield and St. Fleur contacted Plaintiff to replace the windshield. Neither St. Fleur nor Plaintiff contacted Progressive before the windshield was replaced. Instead, Plaintiff replaced the windshield and then sent an invoice to Progressive. St. Fleur signed the Invoice authorizing the glass repairs and assigning to Plaintiff any and all benefits from the insurer providing coverage for the repaired vehicle. When Progressive received the Invoice, Progressive promptly sent a letter to Plaintiff and St. Fleur disputing the amount to repair the loss and demanding an appraisal of the loss pursuant to the Policy. Neither St. Fleur nor Plaintiff responded to Progressive's demand for an appraisal. Instead, Plaintiff filed the instant Complaint.

III. Policy Language at Issue

Progressive's policy of insurance provides, in pertinent part, as follows:

Appraisal

If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. However, mediation, if desired, must be requested prior to demanding appraisal. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraiser will determine the amount of loss. If they fail to agree, the disagreement will be submitted to an impartial umpire chosen by the appraisers, who is both competent and a qualified expert in the subject matter. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal. [Policy p.30]

Legal Action Against Us

We may not be sued unless there is full compliance with all the terms of this policy. . . [Policy p. 42]

This Court has considered the three necessary factors when ruling on a motion to compel appraisal: (1) whether a valid written agreement to appraisal exists; (2) whether an appraisal issue exists; and (3) whether the right to appraisal was waived. *Heller v. Blue Aerospace, LLC*, 112 So.3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. This court finds that a valid written agreement to appraisal exists, an appraisal issue exists, and the right to appraisal was not waived by Defendant.

IV. Opinion

A. Enforceability of Contractual Appraisal Provisions.

In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America*,704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Progressive Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977). In this case, Plaintiff does not point to any statute or public policy considerations that are violated by this "retained rights" provision. "Moreover, controlling Florida law permits 'retained rights' provisions, and these provisions do not render the appraisal clause unenforceable." *Cincinnati Ins.*, 162 So.3d at 143 ("Hence, the trial court erred to the extent it found that Cincinnati Insurance could not demand an appraisal due to the language of the appraisal clause being unenforceable as inconsistent or violative of public policy.").

1. Vagueness, Conflicting Language and Public Policy Arguments

Plaintiff makes several arguments that Progressive's appraisal clause is vague, contains conflicting language and/or violates public policy as follows: (1) Progressive's appraisal provision provides an undefined standard of reimbursement; (2) Progressive's appraisal provision is an attempt to strike the insured's rights and block access to courts; and (3) Progressive's appraisal provision is ambiguous and subject to different interpretations in that the appraisal clause conflicts with the Limits of Liability Clause found within the Policy. Progressive and St. Fleur freely contracted for the right of appraisal. In Florida, parties may negotiate to contractually waive certain constitutional rights. Therefore, within reason, parties are free to contract even though either side may get what turns out to be a "bad bargain." *Quinerly v. Dundee Corp.*, 31 So.2d 533, 534 (1947) ("[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute [the Court's] judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain."). "We have long held that under contract law principles, contract language that is unambiguous on its face must be given its plain meaning." *Green v. Life & Health of America*, 704 So.2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a]; *Carefree Villages, Inc. v. Keating Properties, Inc.*, 489 So.2d 99 (Fla. 2d DCA 1986).

Upon a review of the appraisal language at issue, this Court finds that such language is clear, unambiguous and provides a simple and informal appraisal process, which if followed, would provide both parties an easy, fair, efficient and inexpensive means of determining the reasonable cost of replacing a windshield. Not only is an informal appraisal an appropriate alternative to litigation in determining the reasonable cost of replacing a windshield, in the instant case an informal appraisal is the *best* course of action. *See e.g., Johnson v. Nationwide Mut. Ins., Co.*, 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] and *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a].

To the extent the Plaintiff seeks to attack or requests the Court to rewrite any contractual provisions in the Policy, this Court is powerless to rewrite the contract or interfere with the freedom of contract. If the insured had not assigned this claim to the auto glass vendor, then the insured would have been bound by the appraisal provision contained within the Policy. As an assignee of the insured, the auto glass vendor is subject to all equities and defenses that could have been asserted against the assignor (i.e. the right to appraisal).

2. Waiver

Plaintiff argues that Progressive waived its rights to an informal appraisal process because it "should have informed its insured/the glass shop of which services were being reimbursed and how rates were determined" or by not providing proper notice to the insured and/or the Plaintiff as the insured's assignee.

A waiver of the right to appraisal only occurs when a party engages in conduct inconsistent with that right. *See Travelers of Florida v. Stormont*, 43 So.3d 941, 945 (Fla. 2010) [35 Fla. L. Weekly D2059a]. Pursuant to the prompt written communications from Progressive to Plaintiff, it is clear that Progressive did not engage in conduct inconsistent with its rights of appraisal; rather, Progressive retained its rights to invoke the appraisal process pursuant to the Policy at all times relevant hereto. In addition, Progressive attempted to unilaterally participate in the appraisal process by sending payment in the amount determined by Progressive's appraiser to Plaintiff, along with a letter of explanation of payment and retaining rights to invoke Plaintiff's participation in the appraisal process.

For these reasons, the Court finds that any arguments made by Plaintiff based on an attempt to attack the terms of the Policy as unconstitutional, unconscionable, vague, or against public policy are unpersuasive. Likewise, the Court finds that any arguments made by Plaintiff requesting the Court to renegotiate the terms of the Policy, or otherwise requesting the Court to re-write the terms of the Policy are not properly brought before this Court.

3. Appraisal Provision as Prohibitively Costly

This Court rejects Plaintiff's argument in this matter that the subject appraisal provision is invalid as prohibitively costly and in violation of the Prohibitive Cost Doctrine. The Prohibitive Cost

Doctrine is applicable where a party is seeking to vindicate a statutory right and not in breach of contract claims. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), *McKenzie Check Advance of Fla., LLC v. Betts*, 122 So.3d 1176 (Fla. 2013) [38 Fla. L. Weekly S223a] *and Citibank v. Desmond*, 114 So.3d 401 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1175a].

For the reasons stated above, it is ORDERED AND ADJUDGED as follows:

1. Defendant's Motion is hereby GRANTED.

2. Within ten (10) days of this Order, the parties must provide each other with the name, address, email address, and phone number of their selected appraisers;

3. The appraisal process shall occur within sixty (60) days of this Order;

4. This matter is hereby stayed/abated until the parties comply with the appraisal provision set forth in the subject policy;

5. . If the appraisal award is in excess of the benefits already paid; Progressive shall send payment for the additional amounts within fifteen (15) days of the appraisal award;

6. Upon payment of the additional amount, if any, or once the appraisal is completed, whichever comes first, the Defendant shall have twenty (20) days to file its response to the Complaint.

7. This court retains jurisdiction of the matter for further proceedings as necessary.

* * *

Insurance—Claim form—MRI provider not required to place professional license number in Box 31 of HCFA form

ALLIANCE SPINE & JOINT II INC., Plaintiff, v. GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO18011520, Division 61. June 30, 2020. Jackie Powell, Judge. Counsel: Vincent J Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. John H. Dougherty, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S SEVENTH AFFIRMATIVE DEFENSE

THIS CAUSE came on to be heard on Plaintiff's Motion For Partial Summary Judgment As to Defendant's Seventh Affirmative Defense on June 24, 2020 at the Court having heard argument of Counsel, having reviewed the Court file, and being otherwise advised in the premises hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Seventh affirmative defense alleges no notice of covered loss because Plaintif failed to list the professional license number of the provider on the HCFA's signature line.

2. Plaintiff alleges that they are entitled to summary judgment as the notice was substantially completed and that the Defendant sustained no prejudice.

3. In ***USAA Casualty Insurance Company v. Pembroke Pines MRI, Inc.***, 31 So.3d 234 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D613b], the appellate court concluded that an MRI provider is not required to place a professional licensure number in Box 31 of the HCFA form.

The Court therefore **GRANTS** Plaintiff Motion for Partial Summary Judgment as to Defendant's Seventh Affirmative Defense.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Where valid written agreement for appraisal exists and has not been waived, and issue in matter is amount of loss, compliance with appraisal provision is mandatory condition precedent to suit—If appraiser is found to be partial, correct course of action is to permit appointment of another appraiser, not to invalidate appraisal provision—Prohibitive cost doctrine is not applicable—Motion to dismiss is granted

BROWARD INSURANCE RECOVERY CENTER, LLC, a/a/o Lynn Rudolph, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-17-003761, Division 55. August 15, 2019. Daniel J. Kanner, Judge. Counsel: Emilio Stillo, Emilio Stillo P.A., Davie, and Joseph Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Plaintiff. Daniel Montgomery, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE having come before the Court on **Defendant's Motion to Dismiss Amended Complaint** and the Court having heard argument of counsel on July 16, 2019, and being otherwise advised in the Premises, it is hereupon:

Background

Plaintiff, Broward Insurance Recovery Center, is the assignee of Clear Vision Windshield Repair, LLC, the assignee of Lynn Rudolph ("Insured"). Plaintiff brings a Complaint for declaratory relief against Defendant, Progressive American Insurance Company. This event stems for services performed by Clear Vision Windshield Repair, LLC for windshield repair services performed to the Insured's vehicle.

Clear Vision Windshield Repair, LLC submitted an invoice to Defendant who subsequently paid less than the invoiced amount. Defendant invoked appraisal by mailing their notice of invocation of appraisal to Clear Vision Windshield Repair, LLC prior to the filing of suit.

Plaintiff's Complaint asserts the following requests for relief: (1) the interpretation of the terms "prevailing competitive labor rate rates charged" and "cost of repair and replacement" are unclear and ambiguous as the exact method used to define those terms has not been disclosed; (2) Plaintiff needs to know the method used to be able to ascertain whether there is an actual dispute; (3) that Defendant has failed to select an impartial appraiser; (4) that the appraisal provision has been invalidly applied; and (5) the appraisal provision violates the Prohibitive Cost Doctrine.

Defendant argues that the issue is the value of the loss and that action should be dismissed because Plaintiff failed to complete a condition precedent to bringing this lawsuit by failing to participate in an appraisal process expressly required pursuant to the Progressive Automobile Insurance Policy executed by and between Progressive and Rudolph.

Legal Findings

In this instance, a valid written agreement for appraisal exists and the defendant has not waived its right to appraisal. The issue in this matter is the amount of the loss. Appraisal is the appropriate mechanism to determine the amount of the loss. Compliance with the subject policy's appraisal provision is a mandatory condition precedent to the filing and maintaining of the subject lawsuit. *See U.S. Fire Ins. Co. v. Franko,* 443 So.2d 170, 172 (Fla. 1st DCA 1983); *United Community Insurance Company v. Lewis,* 642 So. 2d 59 (Fla. 3d DCA 1994).

The 17th Circuit Appellate Court decided similar, if not identical, issues in *Cornerstone Network, Inc. a/a/o Dakota Sowell v. Progressive Select Insurance Company,* Case No: CACE 16-021830 [25 Fla. L. Weekly Supp. 229b], *Progressive American Insurance Company v. Broward Insurance Recovery Center, LLC a/a/o Isabella Cardona,* Case No.: CACE 16-021757 et al.[1] While this Court is not bound by these decisions, their findings are instructional.

Counts I, II, and IV of Plaintiff's Complaint all challenge the method Defendant used to calculate the value of the initial payment. Count II seeks discovery as to the method used by Defendant to come its value of loss. This request is premature in that Plaintiff has failed to complete appraisal, an action required to actually determine if there is a disputed amount and to challenge the method used by Defendant.[2]

Count III seeks to invalidate the appraisal provision by allegations

that Defendant has not complied with the policy requirement that the appraisal be impartial. In a situation where an appraiser is found to be partial, the correct course of action is to permit the party to appoint another appraiser, not invalidate the appraisal provision. *Travelers of Fla. v. Stormont,* 43 So. 3d 941, 945 (3d DCA 2010) [35 Fla. L. Weekly D2059a].

Count IV seeks to invalidate the appraisal provision through the Prohibitive Cost Doctrine. Plaintiff asserts that it is entitled to an evidentiary hearing to establish that the appraisal provision is prohibitively costly. The Prohibitive Cost Doctrine is derived from the U.S. Supreme Court's ruling in *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79 (2000). In *Green Tree,* the Supreme Court acknowledged that an arbitration clause could be rendered unenforceable where the existence of substantial arbitration costs would otherwise prohibit a litigant from effectively vindicating his or her federal statutory right.

In this instance, the Plaintiff has not demonstrated a statutory right that would not be vindicated by going through appraisal, but has argued that they would not be entitled to an ancillary right to attorney's fees pursuant to 627.428.[3]

Progressive admitted coverage for the loss making the only dispute in this matter the amount of the loss. Appraisal is a relatively informal and inexpensive method to determine the amount of a loss.[4] Pursuant to the policy, if either party demands appraisal it must be performed prior to filing lawsuit.

Wherefore it is **Ordered and Adjudged**:

Defendant's Motion to Dismiss is ***granted***. The case is dismissed without prejudice.

---

[1]While this case was certiorari review, the 17th Circuit found that it was outside the essential requirements of law to deny appraisal on the same policy addressed in the instant case where Plaintiff presented the Prohibitive Cost doctrine to the trial court, and within its appellate briefs. The 17th Circuit held that "contrary to Respondent's arguments and the trial court's order, the dispute is purely a question about the amount of loss which falls within the scope of appraisal."

[2]*Linda Enger v. Allstate Property and Casualty Company*, Case No. 09-17785 (9th Ct., U.S. Ct. App. December 9, 2010) (dismissing the declaratory relief action holding that a claim for declaratory relief in instances regarding the allegations of undervalue of paid claim by utilization of an improper valuation method is purely a value question that must go through appraisal and claims that appraisal provision should be disregarded or waiver were unpersuasive).

[3]While attorney's fees are a substantive right this Court finds that it is not a right to a cause of action, but a right that is derived upon judgment in favor of the Plaintiff.

[4]*Richard Bettor v. Esurance Property and Casualty Insurance Company* (So. Dist. Fla., U.S. Dist. Ct. Case No. 18-61860-CIV-MORENO/SELTZER) (holding that appraisal provision in policy applies to claims for declaratory judgment and breach of contract as a condition precedent; that appraisal provision which allowed either party to invoke, pay their own cost of their chosen appraiser, spilt umpire fee, and agree to be bound by results of appraisal is not unconscionable; recommending Motion to Compel Appraisal and Motion to Dismiss be GRANTED; and Plaintiff's Amended Complaint be DISMISSED and Plaintiff is compelled to submit claim to appraisal);

* * *

Criminal law—Scientific evidence—Drug influence examination protocol satisfies *Daubert* standard—State's witness is qualified as expert in drug recognition

STATE OF FLORIDA, Plaintiff, v. CHRISTOPHER MONTPEIROUS, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 13020753MM10A. October 26, 2015. Kenneth A. Gottlieb, Judge. Counsel: John A. Tolley, II, Assistant State Attorney, State Attorney's Office, for Plaintiff. Tobechuku T. Nwahiri, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION IN LIMINE AND DAUBERT OBJECTION TO DRUG RECOGNITION EXPERT TESTIMONY

THIS CAUSE having come before the Court on Defendant's Amended Motion In Limine, and the Court having received evidence, argument and authorities on the same, and being otherwise fully advised in the premises hereby

ORDERS AND ADJUDGES that the Defendant's motion is **DENIED** for the reasons stated below.

This cause came before the court for hearing on October 2, 2015. The court was called upon to determine the admissibility of the testimony of the State's proposed expert, Pembroke Pines Police Sergeant Jennifer Martin, and the reliability of her opinion of the Defendant's impairment using the protocols and procedures of the Drug Recognition Expert (hereinafter D.R.E.) Drug Influence Evaluation. At the hearing, the State presented testimony of both Sergeant Jennifer Martin and Kyle Clark. The Defendant stipulated to Mr. Clark being an expert as to both the D.R.E. program as well as a D.R.E. Expert.

A. THE METHODOLGOY USED IN DRUG RECOGNITION IS RELIABLE UNDER *DAUBERT.*

In 2013, Section 90.702, Florida statute was amended to adopt the *Daubert* standard for expert testimony. The trial judge serves as an evidentiary gatekeeper and determines whether the expert's testimony meets the *Daubert* standard. The Court's duty is to ensure that the testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993). Although the Court did not set out a definitive checklist or single test for reliability, it did list several factors that should be considered by the trial court when making such a determination. These factors include: 1) whether the theory or technique can be (and has been) tested, 2) whether the theory or technique has been subjected to peer review and publication, 3) the known or potential rate of error for the theory or technique, 4) the existence and maintenance of standards controlling the operation of the technique or test, 5) whether the theory or technique has been generally accepted in the relevant scientific community.

The Defendant stipulated that Mr. Clark is an expert in the areas of the Drug Influence Evaluation protocol and procedures as well as a D.R.E. . He currently holds certification as a Drug Recognition Expert as well as a D.R.E. Instructor. Mr. Clark serves as the D.R.E. Program Coordinator for the State of Florida and is responsible for overseeing and approving the certification and re-certification of D.R.E. officers. Mr. Clark testified to the reliability of the D.R.E program through studies, endorsements and his own personal training, education, knowledge and experience.

Mr. Clark testified to a number of studies that established that the procedures and protocols of the D.R.E. Drug Influence Evaluation has been tested, subjected to peer review and publication, the potential error rates of the administration of Drug Influence Evaluation, and the standards controlling the administration of the Drug Influence Evaluation. Among the studies referenced by Mr. Clark, were "*Identifying Types of Drug Intoxication: A Laboratory Evaluation of Subject-Examination Procedures*" conducted by The Johns Hopkins University School of Medicine, the "*Field Evaluation of the Los Angeles Police Department Drug Detection Procedure*" conducted in association with the National Highway Traffic Safety Administration, and "*Drug Recognition Expert Evaluations Made Using Limited Data.*" These studies each examined the validity and reliability of the procedures and protocols utilized by D.R.E.s in the administration of the Drug Influence Evaluation.

Mr. Clark also testified that the D.R.E. program is endorsed by several local and national organizations. These organizations include the American Bar Association, the American Optometric Association, the Broward County Medical Association, the Broward County Psychiatric Society, the Dade County Medical Association, and the Commonwealth of Pennsylvania Department of Transportation. Mr. Clark testified that all of these organizations have endorsed the D.R.E. program for its reliability and acceptance in the communities the associations represents.

The court finds the testimony of Mr. Clark, the studies regarding the validity and reliability, and the endorsements of the local and national scientific and medical organizations, regarding the D.R.E.

Program and the Drug Influence Evaluation to satisfy all of the factors set forth in *Daubert.*

In support of its position, the State provided case law from other jurisdictions finding the D.R.E. program to satisfy the *Daubert* standard. The D.R.E. protocol is a sufficiently valid methodology for identifying drug intoxication to support expert's opinion testimony under the *Daubert* standard. *Nebraska v. Daly,* 278 Neb. 903, (Sup. Ct. Neb. 2009). In *U.S. v. Everett,* 972 F.Supp. 1313 (D. Nev. 1997), while the U.S. District Court did not declare that D.R.E. testimony was admissible by way of scientific opinion, the Court did provide a *Daubert* analysis and found the D.R.E. protocols would satisfy the *Daubert* standard had they applied it. In *Everett,* the Court found that besides a known potential rate of error D.R.E. protocols satisfy all of the factors to establish the D.R.E. program is scientifically reliable under *Daubert*, if they extended that analysis. *Id.*

The Court finds that the D.R.E. program's methodology is acceptable and admissible under the Daubert standard as reliable, relevant and generally accepted through the evidence and case law provided.

B. SERGEANT MARTIN IS QUALIFIED TO BE AN EXPERT IN DRUG RECOGNITION.

The Court finds that through the testimony of Sergeant Jennifer Martin and Kyle Clark that Sergeant Martin is qualified to be an expert in Drug Recognition.

Sergeant Martin testified that she has been a D.R.E officer since 2010. She has complied with all requirements and education in order to become and maintain her D.R.E status, and testified that she has never had a lapse in her certification as a D.R.E. . Mr. Clark also testified that Officer Martin has maintained her certification as a D.R.E and has met all requirements both in becoming certified as well as remaining certified. The court found the witnesses to be credible, and at no time was either witness impeached.

Thus, the court finds that Sergeant Martin is qualified as a certified Drug Recognition Expert.

ORDERED AND ADJUDGED that the Drug Recognition Expert program and protocol is reliable and relevant under the *Daubert* standard and Sergeant Jennifer Martin of the Pembroke Pines Police Department is qualified as an Expert in Drug Recognition.

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment—Dilatoriness—Sanctions—Where insurer failed to notify medical provider of pre-suit exhaustion of policy limits until it filed motion to amend affirmative defenses to raise that issue over a year after suit was filed, insurer is granted leave to amend its affirmative defenses but is ordered to pay attorney's fees and costs that provider incurred as result of insurer's dilatory conduct

GADY ABRAMSON, DC, P.A., Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, a/a/o Sviatlana Altarifi, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE18007405, Division 82. June 29, 2020. Natasha DePrimo, Judge. Counsel: Abdul-Sumi Dalal, Johnson | Dalal, Plantation, for Plaintiff. Jacob Berger, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER AND AFFIRMATIVE DEFENSES

THIS CAUSE came to be considered on: *DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND AFFIRMATIVE DEFENSES AND PLAINTIFF'S ORE-TENUS MOTION FOR SANCTIONS, and for ENTITLEMENT AS TO ATTORNEY'S FEES AND COSTS.* IT IS HEREBY ORDERED AND ADJUDGED:

1. Defendant's Motion for Leave to Amend is GRANTED.

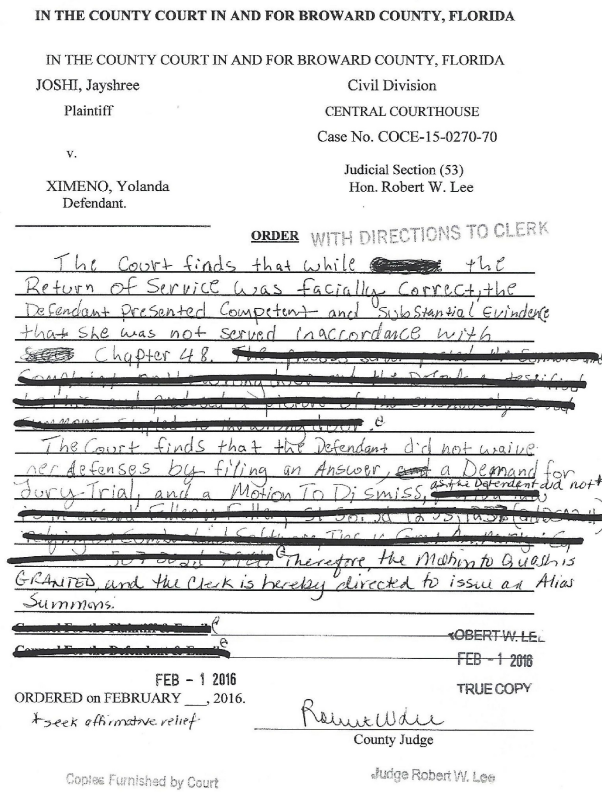
2. Plaintiff's Ore-Tenus Motion for Sanctions is hereby GRANTED. On July 25, 2018 suit was filed in the case at bar. Service was effectuated on the Defendant on August 01, 2018. On September 18, 2018 the Defendant served its Answer and Affirmative Defenses, listing proper payment and a defective demand letter as its sole affirmative defenses. At the time of Defendant's Answer and Affirmative Defense, benefits of $10,000.00 had been exhausted, more specifically benefits were exhausted pre-suit. This Court finds that exhaustion should have been pled as an affirmative defense. On April 10, 2020 for the first time, Defendant notified Plaintiff of the exhaustion of benefits. The Defendant's conduct in failing to promptly notify the Plaintiff of the exhaustion caused Plaintiff to spend attorney time and costs for which it would otherwise not have incurred had the issue of exhaustion been conveyed. The Court has inherent authority to award reasonable attorney's fees when the dilatory conduct of a party caused precipitates the adverse party from prosecuting a claim that it otherwise would have dismissed. *See Barnes v. Pro Imaging,* 15 Fla. L. Weekly Supp. 981b (Fla. 17th Cir. Court 2008). The Court is aware that sanctions should be imposed sparingly. *See Koch v. Koch,* 47 So. 3d 320 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2091a]. However, the Court finds the unreasonable conduct of the Defendant caused an unnecessary waste of time.

Accordingly, Plaintiff is awarded and entitled to attorney time and costs through April 10, 2020, the date Defendant filed its Motion for Leave to Amend its Affirmative Defenses. The Court will hold a separate hearing as to the reasonableness of Plaintiff's time and hourly rate sought.

* * *

JAYSHREE JOSHI, Plaintiff, v. YOLANDA XIMENO, Defendant. County Court, 17th Judicial Circuit in and for Broward County, Civil Division. Case No. COCE-15-0270-70, Judicial Section (53). February 1, 2016. Robert W. Lee, Judge. Counsel: Alexander P. Johnson, Fort Lauderdale, for Plaintiff. Hegel Laurent, Laurent Law Office, P.L., Miami, for Defendant.

ORDER



IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

JOSHI, Jayshree — Civil Division
Plaintiff — CENTRAL COURTHOUSE
Case No. COCE-15-0270-70
v.
Judicial Section (53)
XIMENO, Yolanda — Hon. Robert W. Lee
Defendant.

ORDER WITH DIRECTIONS TO CLERK

The Court finds that while [redacted] the Return of Service was facially correct, the Defendant presented Competent and Substantial Evidence that she was not served in accordance with Chapter 48. [redacted]

The Court finds that the Defendant did not waive her defenses by filing an Answer, a Demand for Jury Trial, and a Motion To Dismiss, [redacted] Therefore, the Motion to Quash is GRANTED, and the Clerk is hereby directed to issue an Alias Summons.

ROBERT W. LEE
FEB - 1 2016
TRUE COPY

FEB - 1 2016
ORDERED on FEBRUARY ___, 2016.
*seek affirmative relief

County Judge

Copies Furnished by Court

Judge Robert W. Lee

* * *

Volume 28, Number 5
September 30, 2020
Cite as 28 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Campaign tactics—A judge or group of judges may sign a proposed resolution urging that all judges remain vigilant in their continued efforts to keep racial bias out of the justice system—Resolution may be submitted to chief justice of judges' circuit and to the supreme court for consideration

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-18. Date of Issue: July 13, 2020.

ISSUE

May a judge or group of judges sign a proposed resolution urging that all judges remain vigilant in their continued efforts to keep racial bias out of the justice system? May the group of judges submit the resolution to the chief judge of their circuit and to the Florida Supreme Court for consideration?

ANSWER: Yes, to both questions.

FACTS

A group of judges has been meeting together recently and participating in a "dialogue on race." As a result of their dialogue, the members have prepared and would like to sign a document referred to as a resolution on race and equal justice.

The judges intend to present the resolution to the chief judge of their circuit and ask him or her consider it, and are also contemplating submitting it to the Florida Supreme Court for consideration.

DISCUSSION

At least three of the canons of the Code of Judicial Conduct appear to be implicated, at least indirectly, in the consideration of the judge's question. Canon 2A requires that:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Judges are encouraged by Canon 4 of the Code of Judicial Conduct to participate in activities concerning the administration of justice, subject to the requirements of the Code. The reason for such activities is based on the reasoning for the adoption of the Code, as stated in the Commentary to Canon 1:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.

While some questions previously submitted to the committee address the propriety of becoming involved in activities sponsored or endorsed by outside groups or organizations, over which the judge might not have control, and which might seek to use the judge's position or prestige to further their goals, the current inquiry indicates that the activity proposed is to occur entirely within the judiciary, avoiding the concerns common to activities involving other parties.

The language of the proposed resolution urges that all judges remain vigilant in their efforts to ensure that our justice system operates without racial bias within our justice system expresses a valid concern of both judges and litigants and seeks to remind each of us to be aware of the need to conduct ourselves in a manner that would encourage confidence on the part of all persons in the fairness of the judicial system. The Committee finds that it is acceptable to voice a commitment or sign a resolution that says all judges should treat all litigants fairly and equally without regard to race, creed, color, national origin, sexual preference, gender, etc. etc. and take steps to ensure that this goal of equality is achieved. However, judges should not voice a commitment or sign a resolution that may lead to any litigants having any justification for questioning a judge's impartiality.

REFERENCES

Fla. Code Jud. Conduct, Canons 1, 2A, 4

* * *

Judges—Judicial Ethics Advisory Committee—Fundraising—Charitable fundraising and volunteering—A judge may purchase raffle tickets at a charity auction

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-19. Date of Issue: July 17, 2020.

ISSUE

Whether a judge may purchase raffle tickets at a charity auction.

ANSWER: Yes.

FACTS

The inquiring judge has asked whether the judge may purchase raffle tickets at a charity auction.

DISCUSSION

The inquiry does not indicate that the judge's title or judicial office will be mentioned or used in any way during the event, and so we assume it will not. There being no law or canon that prohibits this activity (and, arguably, one that encourages it, *see* Canon 5B and Commentary to Canon 5A), the answer to the judge's question is yes.

REFERENCES

Fla. Code Jud. Conduct, Canon 5B, Commentary to Canon 5A

* * *